THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM MARION COUNTY
Court Of Common Pleas

The Honorable W. Haigh Porter, Special Referee

Case No: 2015-CP-33-280
Appellate Case No.: 2016-000956

PARTNERS 95, LLC and HSGCHG Investments, LLC ..... Respondents,

v.

Riverdale Funding, LLC and Woodbridge
Mortgage Investment Fund 3, LLC ..... Appellants.

FINAL REPLY BRIEF OF APPELLANTS

Amy L.B. Hill, SC Bar # 68541
Laura W. Jordan, SC Bar # 100374
GALLIVAN, WHITE & BOYD, P.A.
PO Box 7368
Columbia, SC 29202
ahill@gwblawfirm.com
ljordan@gwblawfirm.com
(803) 779-1833 Office
(803) 779-1767 Fax

ATTORNEYS FOR APPELLANTS

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM MARION COUNTY
Court Of Common Pleas

The Honorable W. Haigh Porter, Special Referee

Case No: 2015-CP-33-280
Appellate Case No.: 2016-000956

PARTNERS 95, LLC and HSGCHG Investments, LLC ..... Respondents,

v.

Riverdale Funding, LLC and Woodbridge
Mortgage Investment Fund 3, LLC ..... Appellants.

FINAL REPLY BRIEF OF APPELLANTS

Amy L.B. Hill, SC Bar # 68541
Laura W. Jordan, SC Bar # 100374
GALLIVAN, WHITE & BOYD, P.A.
PO Box 7368
Columbia, SC 29202
ahill@gwblawfirm.com
ljordan@gwblawfirm.com
(803) 779-1833 Office
(803) 779-1767 Fax

ATTORNEYS FOR APPELLANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Respondents PARTNERS 95, LLC and HSGCHG Investments, LLC (collectively "Partners 95") filed their response to Appellants Riverdale Funding, LLC and Woodgridge Mortgage Investment Fund 3, LLC's (collectively "Lenders" and individually "Riverdale" and "Woodbridge") opening appellate brief. The gravamen of Partners 95's arguments is that they have adequately plead their causes of action, that the punitive damages award is proper and that Lenders had not preserved some of their arguments such that they can now be appealed. Lenders address each of Partners 95's points in the brief below. Partners 95 cannot overcome their pleadings, an issue that Lenders raised from their first appearance in the case. Partners 95 control this litigation as the plaintiffs, and they chose to continue on the path of a default action, which makes this situation atypical. While Lenders are bound to the pleadings, Partners 95 are likewise bound. A punitive award is not proper based on the pleadings alone, but more so in this case where the punitive damages were awarded in an incorrect manner. For the reasons set forth in this brief and Partners 95's opening brief, the order of the lower court should be reversed.

ARGUMENT

I. All Issues On Appeal Were Preserved For Review By This Court.

There is no merit to either of Partners 95's preservation arguments.[1] First, they incredibly claim: "It was not ***until their post-trial briefing*** that Appellants, ***for the first***

[1] The preservation concerns raised by Partners 95 relate only to a portion of Lenders' arguments on appeal – specifically, pleading insufficiencies and constitutional arguments regarding punitive damages. Partners 95 apparently do not dispute that Lenders preserved their sufficiency of proof arguments related to the actual and punitive damages awards. Nevertheless, Lenders sequentially address preservation first to clear

time and in an attempt to boot-strap arguments not previously presented, ***made any sort of argument as to the adequacy of Respondents' pleading***." (Resp. Brief, p. 9)(emphasis added). The Record on Appeal overwhelmingly demonstrates otherwise. From Lenders' very first appearance in this action, they have argued that Partners 95's Complaint allegations were insufficient:

- In Lenders' October 29, 2015 Motion to Set Aside Entry of Default, they argued: "Defendants have a meritorious defense. First and foremost, Defendants generally deny Plaintiffs' allegations. Second, Plaintiffs' complaint centers on a commitment letter, ***but they do not allege that it was ever executed***. Plaintiffs curiously do not attach it as an exhibit to the Complaint. Defendants maintain that they had every right not to consummate the transaction pursuant to the pertinent documents. Moreover, Plaintiffs, themselves, allege that they found another source of funding, questioning their alleged damages. Defendants have not breached any contract, nor committed any tortious act." (R. p. 58, ¶ 4) (emphasis added).

- Lenders reiterated this argument at the November 4, 2015 hearing on their Motion to Set Aside Default: "[T]he Plaintiffs in their own complaint admit the commitment letter was not executed. They're saying that that is the agreement between the parties, that is the agreement to fund the loan. ***And they admit in their own complaint that it was not executed. So looking at their own facts, they have issues right there that provide[] us with a meritorious defense***." (R. p. 135, lines 3-13)(emphasis added). Partners 95 even responded to this sufficiency of pleading argument: "You know, they have said that we didn't attach to the complaint the commitment letter. ***But how we plead is at our discretion***." (R. p. 136, lines 20-22) (emphasis added).

- After the Special Referee received Partners 95's evidence at the February 8, 2016 damages hearing, he requested additional briefing on the legal issues before making a determination on the default damages: "I'm going to take it under advisement. You can prepare a list of -- I made notes on most of it, the actual -- what you consider the actual damages. ***And y'all both can address any questions you want to on that and on anything about punitive damages***." (R. p. 225, lines 17-22)(emphasis added).

---

the path for the substantive matters truly at issue and which Partners 95 seek to avoid by arguing non-preservation.

- As requested by the Special Referee, and ***prior to any ruling on damages or entry of default judgment***, Lenders submitted not one – but two – substantive briefs. Both of Lenders' memoranda raised the insufficiency of Partners 95's pleading ***as a primary argument***:

    - ***Over half*** of Lenders' February 29, 2016 "Response in Opposition to Plaintiffs' Damages" was devoted to the following argument: "Plaintiffs Have Failed to Properly Plead the Following Causes of Action: Fraud, Breach of Contract with a Fraudulent Intent, Failure to Honor a Promise, and Violation of the South Carolina Unfair Trade Practices Act." (R. pp. 83-88).

    - Five days later, Lenders filed a responsive memorandum to Partners 95's submission, ***more than half of which*** was devoted to arguments concerning pleading insufficiencies, starting with page one: "Plaintiffs are not Entitled to Damages Where They Have Failed to Properly Plead the Necessary Elements of a Cause of Action." (R. pp. 93-99).

Only then did the Special Referee issue his ruling on damages.

It is misleading for Partners 95 to suggest that Lenders first raised the issue of pleading deficiencies in "post-trial briefing." First, Lenders raised this argument from the moment they appeared after the entry of default. Second, there is no traditional "trial" in a default judgment context – liability is presumed, the only item on the agenda is the one-sided presentation of damages by the plaintiff, and the defaulting party's hands are tied.[2] Third, it is not accurate to characterize briefing as "post-trial" before judgment is entered

[2] The unique posture of a default proceeding also defeats Partners 95's bald assertion, which was made without any supporting case law, that Lenders were required to move for dismissal under Rule 12(b)(6) in order to raise this argument. (Resp. Brief, p. 13). There is no opportunity for standard motion practice in a default proceeding; the available motions are those outlined in Rule 55, SCRCP, and Lenders raised Partners 95's pleading deficiencies at every available opportunity. However, simply because Lenders did not have the ability to file a Rule 12(b)(6) motion does not mean that Partners 95 are not bound by their pleadings and required to properly plead causes of action as a prerequisite for receiving any damages award. *Mutual Sav. & Loan Asso. v. McKenzie*, 274 S.C. 630, 632-33, 266 S.E.2d 423, 424-425 (1980).

in a default proceeding – particularly when the Special Referee has asked for additional briefing on legal issues. The memoranda submitted by Lenders after the damages hearing were not post-trial motions that sought reconsideration of the Special Referee's ruling; they were memoranda the Special Referee requested ***to inform*** his ruling.

The principal case cited by Partners 95 that addressed preservation issues in the default judgment context – *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 723 S.E.2d 597, 602 (Ct. App. 2012) – raised concerns that are not present in this case.[3] In *Solley,* the defendant bank ***did not*** move to set aside the Rule 55(a) *entry* of default and ***did not*** raise pleading insufficiency at the earliest possible time. 397 S.C. at 203, 723 S.E.2d at 602. Lenders did both in this case. In *Solley,* the defendant bank raised pleading insufficiency for the first time in a motion to reconsider filed "***after*** damages were awarded and the default judgment had been entered." 397 S.C. at 203, 723 S.E.2d at 602 (emphasis added)(noting this scenario was "much like *Bardoon* [*Properties, NV v. Eidolon Corp.*, 326 S.C. 166, 168, 485 S.E.2d 371, 372 (1997)]"). Lenders raised pleading concerns four (4) times before judgment was entered in this case. Even after the

---

[3] Excepting *Solley,* the bulk of preservation cases cited by Partners 95 lack application in the default judgment context and/or address objections to the introduction of evidence – not legal arguments regarding the sufficiency of Complaint allegations. (Resp. Brief, pp. 7-10). A default judgment damages hearing is a unique proceeding that severely limits the defendant's ability to participate or defend. Even in the context of a traditional trial, the case law carves out a different set of preservation rules when the case is tried ***by a judge without a jury***. *See e.g., Norell Forest Prods. v. H & S Lumber Co.*, 308 S.C. 95, 98-99, 417 S.E.2d 96, 99 (Ct. App. 1992), *aff'd in part, rev'd in part*, 310 S.C. 368, 426 S.E.2d 800 (1993)("When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised ***whether or not the party raising the question has made in the trial court an objection to such findings*** or has made a motion to amend them or a motion for judgment. Under this rule, we hold that it was unnecessary in this trial before a judge without a jury for Norell to make a motion for judgment (directed verdict).") (emphasis added).

Special Referee entered his Judgment Order (which was received by Lenders on April 11), Lenders renewed their pleading sufficiency arguments in their April 20, 2016 post-judgment motion filed pursuant to Rules 52, 59 and 60, SCRCP. The concerns raised in *Solley* have no application here where Lenders raised challenges to the sufficiency of Partners 95's allegations at every opportunity ***both before and after*** judgment was entered. Partners 95's failure to plead an entitlement to damages is properly before this Court.

Partners 95's second preservation argument – that Lenders failed to preserve arguments that the punitive damages award was excessive and un-apportioned – is equally erroneous. The primary purpose of imposing preservation requirements on the appellant is "to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments" while "prevent[ing] a party from keeping an ace card up his sleeve - intentionally or by chance - in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724-25 (2000). That purpose was fulfilled in this case, and Lenders have kept no ace up their sleeves.

Indeed, Partners 95 do not dispute that the punitive damages arguments at issue ***were presented to, and ruled on by***, the Special Referee via Lenders' post-judgment memorandum filed pursuant to Rules 52, 59, and 60. (Resp. Brief, p. 11). Rather, Partners 95 complain that Lenders should have made these arguments ***before the Special Referee even issued his Judgment Order***. It is difficult to imagine how Lenders could have raised arguments that did not exist until the Special Referee awarded excessive punitive damages and failed to apportion them as to each defendant, but that appears to

be Partners 95's position. It is axiomatic that a party can only preserve arguments at the time they become available, because "our preservation rules . . . do not require clairvoyance." *State v. Tapp*, 398 S.C. 376, 385-86, 728 S.E.2d 468, 473 (2012). For these reasons, and the reasons outlined in Section IV, *infra*, this Court should reject Partners 95's invitation to pretermit Lenders' constitutional arguments because Lenders failed to divine by crystal ball that the Special Referee would issue an excessive, un-apportioned punitive damages award.

II. The Special Referee Abused His Discretion By Awarding Actual Damages in the Absence of Supporting Pleading or Proof.

A default is not an admission that the facts pled are sufficient to constitute a cause of action, nor is it a license for relief beyond what the complaint allegations support. *Mutual Sav. & Loan Asso. v. McKenzie*, 274 S.C. 630, 632-33, 266 S.E.2d 423, 424-425 (1980); *Blakely v. Wright*, 269 S.C. 6, 11-12, 235 S.E.2d 803, 806 (1977). Although Partners 95 failed to plead the existence of an enforceable contract in the first instance, they attempt on appeal to repair this pleading deficiency by regurgitating elements of their claims and selectively endorsing parts of their Complaint to the exclusion of others. (*See* Resp. Brief, pp. 13-14). This approach holds no water, and the Special Referee's award must be reversed because it exceeds both the pleading and the proof offered by Partners 95 in the proceedings below.

a. Because Partners 95 Failed To Plead The Existence Of An Enforceable Contract, No Award Of Actual Damages Was Appropriate.

No amount of rhetoric can correct the fact that the Special Referee awarded damages to Partners 95 for the purported breach of a "contract" that, according to the Complaint, never was binding. It is axiomatic that a claim for breach of a promise to

make a loan must allege the existence of an enforceable promise, and the law requires that a promise to make a loan must be signed in writing. *See* S.C. Code Ann. § 37-10-107(1)(a)-(c); *see also Sea Cove Dev., LLC v. Harbourside Cmty. Bank*, 387 S.C. 95, 105, 691 S.E.2d 158, 163 (2010) (discussing the writing requirement of 37-10-107, which "is essentially a statute of frauds"). As Lenders have repeatedly pointed out beginning with their first appearance in this case, Partners 95's Complaint alleged that the Commitment was not executed. This is fatal to their claims for breach of contract and breach of contract accompanied by a fraudulent act.

Partners 95 cannot escape this failure to plead a critical element of their claims by reframing it as an "affirmative defense" Lenders waived by default, as they have tried to do in this appeal. (Resp. Brief, pp. 15-16). First, this argument runs contrary to the admitted pleading deficiency which prompted Partners 95's request at the damages hearing to "amend the [C]omplaint to confirm to the evidence, that the [C]ommitment was signed on December 9, 2014." (R. p. 213, lines 5-24; p. 219, lines 1-4; pp. 264-273). Second, the law is clear that a promise to make a loan is not enforceable as a contract without ***Lenders'*** signature, and there is no allegation in the Complaint that Lenders signed the Commitment. Generic allegations that Lenders "issued" the Commitment, and "[u]nder the terms of said Commitment . . . agreed to lend" Partners 95 a sum of money, (R. pp. 34-35, ¶¶ 7, 8) are not the same as an allegation that ***Lenders signed the Commitment***.[4] "It is elemental, and requires no citation of authority for the proposition

[4] Partners 95 incredibly suggest that when Lenders recited the above-referenced allegations in their Statement of Facts under the heading "Facts Pled in the Complaint," they "admit[ted]" they "provided a signed commitment to [Partners 95]." (Resp. Brief, p. 16 and n.6). The Complaint allegations do not reference a signed Commitment, and Lenders have not admitted this occurred.

that before a party can recover for the breach of a contract, that he must ***allege*** . . . each one of the material elements of the contract sued on." *Rabon v. State Fin. Corp.*, 203 S.C. 183, 185, 26 S.E.2d 501, 502 (1943)(emphasis added). Failure to allege that Lenders signed a promise to loan money to Partners 95 is a fundamental pleading flaw – not an affirmative defense, and it pretermits any recovery against Lenders.[5]

Third, even if the Complaint could be construed to allege that Lenders signed the Commitment (which Lenders deny), the Complaint still fails to establish the existence of an enforceable contract because it affirmatively alleges ***Partners 95*** did not execute the Commitment. (R. p. 35, ¶ 12). By its terms, acceptance of the Commitment occurred "by [Partners 95] signing and returning the enclosed copy of this letter to Lender with the applicable fees." (R. p. 272, ¶ 19(e)).[6] The Commitment provides in no uncertain terms

---

[5] This is not to say that the Statute of Frauds cannot ***also*** serve as a meritorious defense, as Lenders argued at the November 4, 2015 hearing. (R. p. 137, lines 4-20; p. 138, line 20 - p. 139, line 3). In this case, however, it also reveals the failure to state a claim upon which relief could be granted in the first instance.

[6] Contingencies like failure to execute the Commitment gave Lenders the right to unilaterally terminate the contract. For this reason, Partners 95's assertion that Lenders represented "that there were not outstanding contingencies for the Commitment," (Resp. Brief, p. 6), also finds no support in the record. The Complaint alleges only that Partners 95 were "informed and believe" there were no outstanding contingencies for the Commitment. (R. pp. 37-39, ¶¶ 32, 41, and 43). This is not the same as Lenders representing there were no contingencies. As noted in Lenders' opening brief, there appeared to be no consideration of the possibility that Lenders may have declined to close because other contingencies as set forth in the Commitment had not been satisfied by Partners 95. And as outlined above, Partners 95's Complaint acknowledges that they had not satisfied at least one contingency, the one requiring that the Commitment be executed by Partners 95 and Lenders. (*Compare* R. p. 35, ¶ 12 *with* R. pp. 264-273 ("Borrower accept [] this Commitment on or before December 12, 2014 by signing and returning the enclosed copy of this letter to Lender with the applicable fees."). The Commitment details numerous contingencies that Lenders, ***in their sole discretion at any time***, could determine had not been satisfied. (R. pp. 264-273; *see also* R. p. 204, lines 19-23, p. 206, lines 3-7).

that "Lender's obligations to close and make any advance under the Loan discussed in this commitment are subject to" Partners 95's execution of the Commitment – an event which did not occur prior to Closing, at least according to the Complaint allegations. (R. p. 35, ¶ 12). As masters of their Complaint, Partners 95 chose not to make the Commitment itself an exhibit to their pleading. And Partners 95 alone drafted the admission in Paragraph 12 that the Commitment was not executed – an allegation that cannot be undone by deflecting to an ambiguous phrase in Paragraph 11. (Resp. Brief, p. 14 (failing to cite ¶ 12 and instead claiming that ¶ 11 "clearly asserts that the commitment was executed by Riverdale").

It is Partners 95's failure to plead the existence of an enforceable contract in the first instance that also defeats their purported "additional sustaining ground" that "the Special Referee, as a matter of law, necessarily found an underlying breach of contract." (Resp. Brief, pp. 19-21). Whether the Special Referee could have awarded actual damages on a garden variety breach of contract claim or a breach of contract accompanied by a fraudulent act claim is of no moment, because there was no enforceable contract that could have been breached. Partners 95 were not entitled to damages at all and even at its best, Partners 95's additional sustaining ground requires reversal of the punitive damages award.

b. The Introduction of the Commitment Letter at the Hearing Does not Support a Finding of an Enforceable Contract.

Partners 95 also argue that if their pleadings are faulty, the introduction of the Commitment signed by both Partner 95 and Lenders is evidence of a contract and thus corrects any faulty pleading. However, the Commitment does the opposite. A review of the document shows that numerous contingencies existed that Lenders unilaterally could

determine were not satisfied. (R. pp. 264-273). Due to the contingencies that only Lenders could approve such as the adequacy of Parnters 95's credit, the adequacy of the appraisal and broker's price opinion, and approval of the licenses, permits and approvals, the Commitment does not result in a finding that Lenders were obligated to fund the loan. (R. pp. 264-273). Further, there was no evidence submitted at the hearing that the Commitment was ever delivered to Lenders, which was a requirement pursuant to the terms of the document and may be why Partners 95 included in their Complaint an allegation that it was not executed. (*Id.*).

Finally, the Complaint alleged that the parties continued "negotiating loan documents" throughout the month of December, indicating that negotiations of the loan continued and were not a certain event. (R. p. 35, ¶ 13). If there was no choice but for Lenders to fund the loan, there would have been little to no negotiations of the loan documents. Similarly, quoting from the Complaint, the Special Referee made reference to and in fact relied on a finding that the parties continued negotiations of loan documents through December, lending further proof to the necessary result that there was no binding contract that required Lenders to fund the loan. (R. p. 13, Finding of Fact ¶ 18). If the parties continued to negotiate the loan, which oddly enough is grounds cited by the Special Referee for a punitive award, then there is no contract on which damages could be awarded.

Lenders stand by their position that Partners 95 are bound by the facts plead in their Complaint to prove the sufficiency of their causes of action. However, even if this Court were to accept Partners 95's claim that introduction of the Commitment somehow corrected their pleading whereby they asserted the document was not executed, a review

of the document itself shows that Lenders were not required to fund the loan. Under either approach, there is no contract and thus no breach of contract upon which damages could be awarded.

c. Moreover, Partners 95 Pled No Fraudulent Act That Supports An Award Of Damages.

Partners 95 cannot create fraudulent activity out of whole cloth, and their citation to case law from the early 1900s does nothing to shore up their deficient allegations against Lenders. Indeed, the two cases cited by Partners 95 actually highlight ***the absence*** of any alleged fraudulent act beyond the breach in this case, as both of those cases involved a contractual breach accompanied by theft of the plaintiff's property. In *Sullivan v. Calhoun*, 117 S.C. 137, 108 S.E. 189 (1921), the alleged fraudulent act – the effective theft and "exclusive possession" of the plaintiff's property – existed apart from the alleged contractual breach. *Sullivan*, 117 S.C. at 139, 108 S.E. 189; *see also Holland v. Spartanburg Herald-Journal Co.*, 166 S.C. 454, 466, 165 S.E. 203, 207 (1932) (noting that in *Sullivan,* "[t]he taking of the part of the crop which belonged to the defendant was the fraudulent act, as held by the Court, upon which punitive damages were allowed."). Even more egregious in *Ford v. Ball*, 178 S.C. 111, 116, 182 S.E. 319, 321 (1935), the defendant breached the contract to convey land to the plaintiff and also "dispossessed the plaintiff" of that property by conveying it to a third party "knowing that by making such conveyance it would be impossible for him to comply with the terms of his contract." *Ford*, 178 S.C. at 116, 182 S.E. at 321.

Sullivan and *Ford* emphasize the need to allege the existence of a fraudulent act apart from the contractual terms and alleged breach. No such act existed in this case. There was no theft or fraudulent conveyance of property to which Partners 95 were

entitled – just a mere lack of communication and a failure to close the loan. This is simply not enough to rise to the level of particularity required to state a claim for breach with a fraudulent act.[7]

d. Partners 95 Continue To Claim Damages Of Which There Is No Proof.

As detailed in Lenders' opening brief, the Special Referee's award of actual damages must be reversed because Partners 95 failed to prove by a preponderance of the evidence some – if not all – of the damage categories they claim. (App. Opening Brief, pp. 19-25). To the extent that Partners 95 now ask this Court to bypass a category-by-category evaluation of their damages in favor of a blanket affirmance of the entire award "if there is any evidence" of damages at all (Resp. Brief, pp. 12, 21), that proposal is erroneous. The law requires proof by a preponderance of the evidence, and that applies to each type of damage Partners 95 claim.

For example, Partners 95 never explain how they are entitled to "$10,000 in legal fees for the legal work to prepare for the original closing to be funded by Woodbridge," (Resp. Brief, p. 5), when the attorney they hired admitted: (1) many of the documents prepared were ultimately used in a different loan closing, (R. p. 166, line 4 – p. 168, line 3); (2) there is no itemized documentation of work completed in the amount of $10,000 because it was only an "estimate" of "amount of responsibility, the time generally

[7] Moreover, Partners 95 fail to address that two of the essential elements of their claim – alleged fraudulent intent and the alleged fraudulent breach – were pled with the qualifier "Plaintiffs are informed and believe." (R. pp. 37-38, ¶¶ 31, 32). A non-conclusory statement does not entitle the plaintiff to relief in a dispositive motion, *see Dawkins v. Fields*, 354 S.C. 58, 67-68, 580 S.E.2d 433, 438 (2003), and it does not establish the liability of a defaulting defendant who is bound by those allegations. As a matter of law, these non-conclusory allegations fail to state a claim for relief and warrant reversal of the Special Referee's actual damages award.

required, and the kind of documentation required to produce the transaction," (R. p. 157, lines 19-22; p. 171, lines 5-8); (3) some of the legal documents prepared were for a stock purchase unrelated to the loan from Lenders, (R. p. 166, lines 4-25; p. 167, lines 1-8), and (4) the Commitment provided that all attorney's fees were solely the responsibility of Partners 95 regardless of whether the loan closed or not, (R. pp. 264-273). Partners 95 cannot claim that the Commitment Letter is a contract between the parties that has been breached by Lenders and also ignore the terms of the same document that disallow an award of attorneys' fees. As with the other categories of damages addressed in Lenders' opening brief, Partners 95 still has not shown that the $10,000 in claimed fees were truly legal fees incurred solely in relation to the potential loan with Lenders.

e. The Collateral Source Rule Does Not Apply.

As a final note, Partners 95's reliance ***for the first time*** on the collateral source rule in this breach of contract case is perplexing. (Resp. Brief, pp. 25-26). Partners 95 appear to claim that evidence concerning the more favorable terms of the substitute loan should not be considered in the measure of damages because of the "collateral source rule." (*Id.*). While the collateral source rule was not raised to the lower court, this theory encourages an inappropriate application of the rule under South Carolina law.

"The collateral source rule only applies to tort claims. It has no bearing on the breach of contract claims which form the basis of the present action. When a contract is breached, the non-breaching party is limited to recovering that amount that it would have received if the contract had not been breached." *Crossmann Cmtys. of N.C., Inc v. Harleysville Mut. Ins. Co.*, No. 4:09-CV-1379-RBH, 2013 U.S. Dist. LEXIS 138941, at *82 (D.S.C. Sep. 27, 2013)(citing South Carolina law). This is because "[t]he purpose of

an award of damages for breach of contract is to put the plaintiff in as good a position as he would have been in if the contract had been performed." *Minter v. GOCT, Inc.*, 322 S.C. 525, 528, 473 S.E.2d 67, 70 (Ct. App. 1996). "Applying the collateral source rule to contract law would contravene this principle by awarding the non-breaching party more damages than necessary to compensate it for the breach." *Id.*

Partners 95 cannot hide behind the collateral source rule to obtain more damages than necessary to compensate it for Lenders' alleged breach, and the benefits received by Partners 95 as a result of the substitute financing should have informed the Special Referee's damages calculation.

III. Partners 95 Failed To Plead Or Prove Punitive Damages.

Partners 95 utterly fail to demonstrate they are entitled to a punitive damages award ***in any amount*** from Lenders – as they neither pled with precision how Lenders' alleged conduct was reprehensible, nor proved by clear and convincing evidence the ultimate facts to support a punitive damage award.

With respect to Partners 95's pleading deficiencies, it is telling that their brief on appeal avoids any mention that they failed to plead even the most basic punitive damages allegations in their Complaint (i.e., that Lenders' conduct was "willful, wanton, or reckless" or some synonym thereof). Instead, Partners 95 summarily claim they "pled their entitlement to punitive damages" because the Complaint alleged that Lenders continued to negotiate and exchange emails in the weeks prior to closing and then "fail[ed] to communicate with Plaintiffs' counsel after 12:07 p.m. on the day of closing." (Resp. Brief, pp. 28-29). While Partners 95 may now (incorrectly) characterize these to

be "alleged fact[s] showing [Lenders] willful, wanton, or reckless behavior," ***the fact remains that their Complaint did not.***

Nor can Partners 95 explain how allegations made "upon information and belief" could – or did – satisfy their heavy burden to justify civil penalties against Lenders. Partners 95 are bound both by what they pleaded and, most importantly, what they did not — all the more so in the case of default where Lenders are deemed to have admitted liability. Lenders cannot be deemed to have admitted allegations that Partners 95, in their Complaint, admitted they were not sure of themselves. At most, Lenders admitted that Partners 95 did not have enough knowledge or information to make an absolute allegation. It is appreciated that many times at the pleading stage of a case, allegations are pled "upon information and belief" when there is a belief but not actual knowledge that something occurred. While such a pleading may be sufficient to start the case until the onset of discovery bears out supporting facts, it is not enough to make a non-conclusory allegation and then hold the defendant in default as to a specific fact alleged only upon belief.

Unfortunately for Partners 95, they are bound by their pleadings in a default setting. If they wished to make their pleadings stronger in order to affirmatively support their causes of action, they needed only to have amended their Complaint. They chose not to do so presumably because they were concerned that Lenders would then file a timely answer.

Quite simply, Partners 95 cannot have it both ways. Either Partners 95 can proceed with the default bound by their pleadings, or they can file an amended Complaint and allow Lenders the ability to respond in a timely manner. The law already prevents

Lenders from mounting a substantive defense after default. If it also binds them to allegations that were no more than an educated guess when they were pled, there are serious constitutional concerns – particularly when quasi-criminal damages were awarded based upon those allegations.

From a proof perspective, Partners 95 still have yet to produce even a shred - much less clear and convincing - evidence of willful, wanton, or reckless conduct as required by statute, or reprehensible conduct as required by *Mitchell.* There was no evidence: (1) that Lenders failed to close title to the property "all while knowing the repercussions for Plaintiff if the loan failed to close on December 30, 2014," (R. p. 23, Conclusion of Law ¶ R); (2) that "Defendants targeted Partners 95 who Defendants knew were financially vulnerable" – whatever "targeted" means, (R. p. 24, Conclusion of Law ¶ S); (3) that Partners 95 were financially vulnerable or that Lenders had any knowledge of that alleged vulnerability; or that (4) Lenders were aware when the Commitment was drafted that Partners 95 were operating by an internal closing date earlier than the Commitment provided.

It is not insignificant that Partners 95 offered the Commitment into evidence at the damages hearing, essentially proving that Lenders could refuse to fund the loan because numerous contingencies outlined in the Commitment could be determined by Lenders to not have been fulfilled by Partners 95. The Commitment shows that Lenders had a right to determine that they did not want to extend the loan based solely on their own determination. This is not a punitive damages case, and it was error for the Special Referee to penalize Lenders with punitive damages for exercising a right provided by the Commitment itself.

IV. The Excessive, Un-Apportioned Punitive Damages Award Violated The Two Lenders' Fourteenth Amendment Rights.

In their opening brief, Lenders demonstrated that from the Special Referee's punitive damages award it is *factually* impossible to ascertain against which of them it was made. (App. Opening Brief, pp. 33-38). There is no need to repeat those facts here, except one: At pages 36-7 of Lender's opening brief they set forth a colloquy between the Special Referee and Partners 95's witness. (App. Opening Brief, pp. 36-37). The colloquy proves that even the Special Referee was confused about the identity of the two Lenders – and thus their eventual individual culpability, and liability, for punitive damages.

Further, in their opening brief, Lenders posit that the universal litmus test for determining the constitutionality of a punitive damages award is Due Process of law, requiring a court to assess (1) reprehensibility, (2) harm-disparity, and (3) the difference between the punitive damages and civil penalties in comparable cases. Accordingly, applying that litmus test, Lenders' Fourteenth Amendment rights have been violated.

In response, Partners 95 have offered two arguments. The first is a strawman because it relates to failure to *plead.* Quoting Partners 95: "Appellants failed to preserve their argument that Respondent failed to properly plead." The strawman has nothing to do with the *constitutional* arguments Lenders made in their Points III and IV.[8]

Even a casual reading of Lenders' opening brief makes it apparent that their constitutional arguments are not directed at a failure of Partners 95's *pleading.* Lenders' unambiguous argument is that the Special Referee's *award* of punitive damages violated

[8] The non-constitutional preservation issues are dealt with in Points I and II, *supra.*

their Fourteenth Amendment rights because *the award* failed to differentiate between them.

Oddly, despite Partners 95 having constructed their strawman, in the first sentence of their Point III they make a fatal concession: "Appellants argue on appeal that the *special referee's award* of punitive damages violates the Lenders' 14th Amendment rights because Respondents failed to distinguish between the individual lenders." (emphasis added). Thus, Partners 95 have conceded that Lenders attack not the former's failure of pleading, but rather the Special Referee's *award* of punitive damages.

Partners 95's concession was inescapable because, for preservation purposes, *Lenders had nothing to preserve until the Special Referee made his punitive damages award*, erroneously not apportioning that quasi-criminal liability on anyone in particular. Once that award was made, Lenders preserved the Special Referee's punitive damages award by motions for reconsideration submitted to the Special Referee.

Thus, nothing Partners 95 have said in their appellate response brief about non-preservation prior to the Special Referee making his punitive damages award has any relevance. Again, *once the Special Referee failed to apportion, Lenders objected and thus preserved their arguments.*

The same analysis applies concerning Lenders' argument that the punitive damages award was constitutionally excessive. *There was nothing to preserve about the excessiveness of the punitive damages award until the Special Referee made his excessive punitive damages award.*

Apparently entertaining some doubt about whether Lenders' constitutional apportionment and excessiveness arguments were preserved, Partners 95's fallback

position is that the Special Referee's punitive damages award did not violate Lenders' Fourteenth Amendment rights. In less than a single page of their response brief on page 34, Partners 95 resurrect the same strawman that failed them earlier. Quoting Partners 95: ". . . differentiation between Appellants is not necessary in the *complaint* . . . ." (emphasis added.) Rather than repeat what Lenders have said *supra,* suffice to say that the *Complaint* is irrelevant to the Special Referee's error in not apportioning in his *award* because *nothing violated the two Lenders' Fourteenth Amendment rights until there was a failure to apportion, and that was not until the Special Referee made his punitive damages award.*

As to Lenders' claim that the Special Referee's punitive damages award was excessive, apparently both sides agree that Due Process is the constitutional requirement by which an alleged too-high punitive damages award is to be judged, and that the core element of the analysis is whether either of Lenders' conduct was "reprehensive." In answer to Lenders' argument, all that Partners 95 offer is the naked assertion that Lenders' actions were reprehensible, and various "facts" for which there is no support in the record. *See* argument *supra* Section III (outlining four alleged "facts" for which no supporting evidence was presented to satisfy Mitchell's reprehensibility standard).

In sum, because Lenders' constitutional arguments were preserved for review in this Court, and because the Special Referee's punitive damages award violated their Fourteenth Amendment rights, the punitive damages award should be vacated.

V. The Excessive, Un-Apportioned Punitive Damages Award Also Violated Lenders' Rights Under The South Carolina Constitution.

In response to Lenders' arguments that the Special Referee's award also violates similar constitutional rights under South Carolina law, Partners 95 do not respond with

any defense of the award under South Carolina Due Process law; in fact, they ignore it entirely. Instead, they defend the award by raising an entirely new "amalgamation" claim that: (1) was never pled, much less presented to the Special Referee as justification for the punitive award that fails to differentiate between the Lenders; and regardless, (2) fails to satisfy the statutory mandate that "[i]n an action with multiple defendants, a punitive damages award must be specific to each defendant, and each defendant is liable only for the amount of the award made against that defendant." S.C. Code Ann., § 15-32-520(G).

First, Partners 95 cannot justify the punitive damages award by testing an unpled, never-considered amalgamation claim at the appellate level. There is no cause of action pled by Partners 95 whereby they seek to set aside the corporate structure of the Lenders. To use the amalgamation of corporate interests cause of action for the first time in their appellate response brief is not proper. Such a cause of action was not raised before the lower court and has certainly not been ruled upon by the lower court; thus it is not a proper topic for this appeal.

Further, it is generally recognized that a corporation or limited liability company is an entity separate and apart from its officers and shareholders. *Mid-South Mgmt. Co. v. Sherwood Dev. Corp.*, 374 S.C. 588, 597, 649 S.E.2d 135, 140 (Ct. App. 2007), citing *Hunting v. Elders*, 359 S.C. 217, 223, 597 S.E.2d 803, 806 (Ct. App. 2004). Courts are generally reluctant to disregard the corporate entity and will not do so until sufficient reason to the contrary is proven by the party seeking to set the corporate entity aside. *Sturkie v. Sifly*, 280 S.C. 453, 457, 313 S.E.2d 316, 318 (Ct. App. 1984); *Woodside v. Woodside*, 290 S.C. 366, 370, 350 S.E.2d 407, 410 (Ct. App. 1986).

Thus, Partners 95 bear the burden of proving that Lenders should have their corporate entities set aside because there is an amalgamation of corporate interests, entities, and activities that blur their identities. Despite the fact that Partners 95 did not raise this theory to the lower court or this cause of action in their Complaint, Partners 95 cannot show that the interests, entities and activities of Lenders are such that they blur their identities. *Kincaid Landing Dev. Corp.*, 289 S.C. 89, 96, 344 S.E.2d 869, 874 (Ct. App. 1986). In *Kincaid*, the Court of Appeals found an amalgamation of interest where the sibling companies overlapped such that the marketing company was the contact for the development company and their letterhead noted their shared interests as well as the same officers, shareholders and the same location. *Id.* However, the Court of Appeals rejected the amalgamation of interests claim in the later *Mid-South Mgmt.Co.* where there was no evidence that the party seeking to set aside the corporate entity confused the related entities because they were aware they were dealing with separate companies. *Mid-South Mgmt. Co.*, 374 S.C. at 604, 649 S.E.2d at 145. Similarly, in this instance, there has been no evidence presented that Lenders, separate corporate entities, were confused by Partners 95. In the Complaint, Partners 95 set forth exactly which company it initially worked with regarding the loan. Partners 95 affirmatively plead that Riverdale transferred and assigned the Commitment to Woodbridge prior to closing because Woodbridge was to be the eventual owner and holder of the promissory note, mortgage and other loan documents. (R. p. 35, ¶ 14). Therefore, it is clear that Partners 95 knew there were two separate entities involved in the transaction and the role that each entity played. The amalgamation of corporate interests cause of action does not apply in this

instance and cannot justify the punitive award that does not differentiate between Woodbridge and Riverdale.

Second, no claim of "joint liability" can overcome § 15-32-520(G)'s mandate that all punitive awards "be specific to each defendant." There is no exception for defendants who are "amalgamated companies," related entities, or even jointly liable. If multiple defendants are involved, as they undisputedly are in this case, the award must be specific to each defendant regardless of their relationship to each other. At the very least, the award in this case violates § 15-32-520(G) and must be vacated and reversed.

Even more alarming, however, is the violation of Due Process that resulted from a non-specific punitive award which effectively imposed liability for the whole on each Lender without any delineation of reprehensible conduct. Because no South Carolina decision specifically has addressed whether the Due Process Clause of the South Carolina Constitution embraces the spirit of Section 15-32-520(G), this Court is writing on a clean decisional slate. This case makes clear that at least in the case of default, the constitutional right to notice and opportunity to be heard is violated when defaulting parties (already hamstrung by a limited damages hearing) are not informed which of them may be liable for what, and why, until the case has been concluded and an order issued.

The South Carolina Supreme Court has issued scores if not hundreds of opinions articulating the essence of Due Process under both federal and state law, and this case falls squarely within that analysis. A recent explanation of the interests protected by Due Process is found in *Tant v. South Carolina Dept of Corrections*, 408 S.C. 334 (2014):

> Under both our state and federal due process clauses, no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. "The fundamental requirements of due process include notice, an opportunity to be heard in a

> meaningful way, and judicial review." *State v. Binnarr*, 400 S.C. 156, 165, 733 S.E.2d 890, 894 (2012). Determining whether an individual has been denied due process requires an inquiry into whether the interest involved can be defined as liberty or property within the meaning of the Due Process Clause, and if so, what process is due under those circumstances. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

408 S.C. at 340-41, 759 S.E.2d at 401.

It is not difficult to apply those elements of Due Process – property and process – to this case. An obvious property interest is at stake given that Lenders have been burdened with thousands of dollars of punitive damages — against which, and for what conduct, is still not clear. As to what process is due, one needs only to focus on what happened: Neither during motion practice prior to the damages hearing, nor after the hearing concluded and further motion practice, was even a syllable uttered about which of the Lenders had committed what conduct that could result in the award of punitive damages. Not until the liability horse had left the barn by entry of the Special Referee's order did either Lender learn of the punitive damages assessed against it. And by then it was too late to do anything about it. While in other cases parties may argue about how much process is due, in this case there can be no such discussion because ***there was no process at all.***

Apparently entertaining some doubt about whether Lenders' constitutionally-based apportionment argument is well-founded, Partners 95 offer a fallback position: If the Special Referee's punitive damages award did violate Lenders' constitutional rights, this Court should remand to the Special Referee to make unspecified "findings." (Resp. Brief, p. 37). Such a remand would be similar to unwinding a clock. The pre-hearing proceedings occurred with no differentiation between Lenders. So, too, the damages

hearing. The post-trial motions rested on the same lack of differentiation. Accordingly, it is too late in the game to ameliorate the violation of Lenders' South Carolina constitutional rights that occurred in this case. Nothing less than reversal of the Special Referee's order can re-balance the scales of justice.

CONCLUSION

Lenders respectfully ask this Court to reverse the damages award issued against them for the reasons set forth above. Partners 95 drafted a complaint that does not stand the test of scrutiny necessary in a default action. The Special Referee incorrectly issued a punitive damages award where none was justified in violation of Lenders' Fourteenth Amendment rights. Based upon the arguments submitted to the Court in its briefs, Lenders requests should be granted and the Special Referee's Order should be reversed.

December 12, 2016

By: _____

Amy L.B. Hill, SC Bar # 68541
Laura W. Jordan, SC Bar # 100374
GALLIVAN, WHITE & BOYD, P.A.
PO Box 7368
Columbia, SC 29202
ahill@gwblawfirm.com
ljordan@gwblawfirm.com
(803) 779-1833 Office
(803) 779-1767 Fax

ATTORNEYS FOR APPELLANTS

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM MARION COUNTY
Court Of Common Pleas

The Honorable W. Haigh Porter, Special Referee

Case No: 2015-CP-33-280
Appellate Case No.: 2016-000956

PARTNERS 95, LLC and HSGCHG Investments, LLC ..... Respondents,

v.

Riverdale Funding, LLC and Woodbridge
Mortgage Investment Fund 3, LLC ..... Appellants.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that the Final Reply Brief of Appellants Riverdale Funding, LLC and Woodbridge Mortgage Investment Fund 3, LLC complies with Rule 211(b), SCACR and the August 13, 2007, Order from the South Carolina Supreme Court titled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in the Appellate Court Filings."

Amy L.B. Hill, SC Bar # 68541
Laura W. Jordan, SC Bar # 100374
GALLIVAN, WHITE & BOYD, P.A.
PO Box 7368
Columbia, SC 29202
ahill@gwblawfirm.com
ljordan@gwblawfirm.com
(803) 779-1833 Office
(803) 779-1767 Fax
ATTORNEYS FOR APPELLANTS

December 12, 2016