

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM MARION COUNTY  
Court of Common Pleas

Haigh Porter, Special Referee

Case No. 2011-CP-33-00016

Wells Fargo Bank, N.A. successor-in-interest  
to Wachovia Bank, National Association ..... Respondent,

v.

Marion Amphitheatre, LLC, David P. Gannon,  
Michael Guarco, Carolina Entertainment Complex, LLC  
and 4 Prophets, LLC a/k/a 4 Profits, LLC ..... Defendants,

Of Whom,  
David P. Gannon, and Michael Guarco are the ..... Appellants,

And 4 Prophets, LLC a/k/a 4 Profits, LLC is the ..... Respondent.

FINAL BRIEF OF APPELLANTS

**RECEIVED**

JUN 06 2013

**SC Court of Appeals**

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**STATEMENT OF ISSUES ON APPEAL**

- I. DID THE TRIAL COURT ERR IN HOLDING THAT THE DAMAGES ALLEGED IN THE CROSS-CLAIMS WERE LIQUIDATED.**

## STATEMENT OF THE CASE

Wells Fargo N.A. as Successor in Interest to Wachovia Bank, N.A. (hereinafter referred to as the "Bank") commenced this action on January 12, 2011 seeking to foreclose on real property situate in Marion County. The Bank named the Appellants and 4 Prophets, LLC a/k/a 4 Profits, LLC (hereinafter referred to as "4 Profits") as defendants.

On April 18, 2011, 4 Profits filed an Answer, Counter-Claim, and Cross-Claim. 4 Profits attempted to serve the Answer and Cross-Complaint on the Appellants by personally delivering a copy on Michael's son, Alan Guarco (hereinafter referred to as "Alan") at Michael's home at 7 Bayberry Drive, East Granby, Connecticut. Alan did not reside at the address. The Answer and Cross-Complaint did not include a summons.

On July 20, 2011, the Clerk of Court entered default against Appellants. The case was referred to Special Referee Haigh Porter (hereinafter referred to as the "Trial Court"). On July 20, 2011, the Appellants moved to set aside entry of default. The Trial Court heard the motion on July 21, 2011. On August 10, 2011, the Trial Court issued an order denying the Appellants' motion. The Appellants appealed that order, and the appeal remains pending.

4 Profits submitted a proposed order of judgment for \$12,500,000.00, and on August 29, 2011, the Appellants filed objections. On September 12, 2011, the Trial Court heard the Appellants' objections. On November 7, 2011, the Trial Court held that the damages sought by 4 Profits were liquidated, and it entered an order awarding 4 Profits \$12,500,000.00. On November 21, 2011, the Appellant Guarco filed a motion to amend the Order, and on March 14, 2012, the Trial Court denied the motion. The Appellants subsequently filed this appeal of the judgment.

## STATEMENT OF THE FACTS

On July 17, 2006, Appellant Michael Guarco (hereinafter referred to as "Guarco") and the principals for the Respondent 4 Profits entered into an agreement to share profits generated by the Carolina Amphitheater located in Marion County, South Carolina. (R. 123-126). The Agreement required that the parties litigate disputes in Connecticut and that Connecticut law governs the Agreement. (R. 124, ¶ 4). Moreover, the Agreement allows distributions to partners only after payments were made on the note and mortgage which Guarco secured to purchase the property. (R. 125 and R. 133-134, ¶ 6-8).

Unfortunately, the venture was not a success, and the group was unable to service the debt. (R. 35-47). On January 12, 2011, the Bank filed this action in Marion County seeking to foreclose on the property. (R. 35-47). 4 Profits filed an Answer and Cross-Complaint against the Appellants seeking \$12,500,000.00 in alleged diminution to its share value in the venture. (R. 93-97, ¶ 17-39). 4 Profits does not provide an agreement that either calculates damages or provides a method to calculate the damages that it seeks in its cross complaint. Prior to the foreclosure lawsuit, Guarco filed a declaratory action in a Connecticut State Court against 4 Profits arising out of the same transaction to declare the parties rights in the venture. (R. 137, ¶ 12). This action remains pending. (R. 137, ¶13).

After the Trial Court denied the motion to set aside entry of default, 4 Profits submitted a proposed judgment against the Appellants awarding it \$12,500,000.00. The Trial Court held that 4 Profits alleged damages were liquidated. (R. 3-6).

## ARGUMENT AND CITATION OF AUTHORITY

### STANDARD OF REVIEW

The decision to grant or deny entry of default lies within the sound discretion of the trial court. Williams v. Vanvolkenburg, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994). “An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support.” Stearns Bank National Association v. Glenwood Falls, L.P., 373 S.C. 331, 336, 644 S.E.2d 793, 795 (Ct. App. 2007).

#### **I. THE COURT ERRED IN HOLDING THAT THE DAMAGES ALLEGED IN THE CROSS-CLAIMS WERE LIQUIDATED.**

A defaulting party does not admit allegations concerning damages, and the non-defaulting party has the burden to prove damages. Harbor Island Owners Association v. Preferred Island Properties, Inc., 369 S.C. 540, 546-547, 633 S.E.2d 497, 500 (2006). Merely alleging an amount in an complaint is insufficient to establish damages as liquidated. Beckmann Concrete Contractors v. United Fire and Casualty Co., 360 S.C. 127, 132, 600 S.E.2d 76, 79 (Ct. App. 2004).

Liquidated damages are made certain and fixed either by the act and agreement of the parties or operation of the law. Id. at 132, 78 (citing 22 Am Jur. 2d damages § 489 (2003)). “In general, damages are unliquidated when they are an uncertain quantity, depending on no fixed standard, referred to the wise discretion of a jury, and can never be made certain except by accord or verdict.” Id. A court must conduct a damages hearing after notice to grant a default judgment based on unliquidated damages. Rule 55(b)(2), SCRCP; *see also* Id. at 133,

79.

4 Profits provides no agreed upon method to determine the value of its alleged ownership in the Marion venture. It merely provides appraisals valuing the venture's primary asset which does not take into account the mortgage and costs associated with the property. Moreover, the damages are contested as the July 17, 2006, agreement expressly provides that the Appellants are entitled to a credit for their initial investments. The Trial Court awarded damages based solely on the alleged value of the property as set forth in the appraisals with no consideration for the mortgage and expenses related thereto. The damages alleged in the cross-claims are not liquidated, and the Appellants are entitled to a trial on damages.<sup>1</sup>

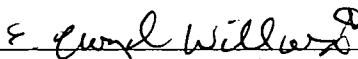
#### CONCLUSION

The Trial Court erred in holding that the damages sought by 4 Profits were liquidated. Consequently, the Appellants request that the Court reverse the Trial Court's November 7, 2011, Order and remand this action.

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In the earlier appeal, the Appellants argue that the Trial Court erred in refusing to set aside entry of default and ask the Court to reverse and remand for a trial on the merits. The Appellants do not waive that argument, but submit this appeal challenging the Trial Court's holding after they filed the first appeal that the damages alleged against them were liquidated.

  
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June 5, 2013

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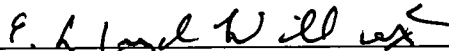
Of Whom,  
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And 4 Prophets, LLC a/k/a 4 Profits, LLC is the . . . . . Respondent.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that this Final Brief complies with Rule 211 (b),

SCACR.

  
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**PROOF OF SERVICE**

I certify that I have served the *Record on Appeal and Final Brief of Appellant* on the Respondent, through their attorney of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

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