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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM MARION COUNTY
Court of Common Pleas

W. Haigh Porter, Special Referee

Case No. 2011-CP-33-00016

RECEIVED

DEC 31 2012

SOUTH CAROLINA COURT OF APPEALS

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

Plaintiff

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.

RESPONDENT'S MOTION TO DISMISS APPEAL

The Respondent 4 Prophets, LLC moves the Court, pursuant to Rule 240 SCAR,
for an Order dismissing the appeal of Appellants.

GROUNDS FOR MOTION

This Motion is based upon Rule 240 SCAR and is made on the following
grounds:

pp. 9-12). and submitted same to the Special Referee, together with an Affidavit of Mark Bauman (Exhibits pp.13-16) in support thereof. A second hearing was conducted by the Special Referee on August 25, 2011 for the purpose of hearing two Motions to Alter or Amend, one relating to the foreclosure decree and one relating to the Special Referee's order denying a motion to set aside the defaults of Appellant Guarco and Marion Amphitheater, LLC. At this hearing, the Special Referee signed the proposed Order for Judgment, but directed Respondent's counsel not to file the Order until after the following Monday to give Appellants' counsel an opportunity "to raise an objection to the wording".

On August 29, 2011 Appellant Guarco filed and served his Objection To Proposed Order For Judgment (hereinafter referred to as the August 29 Objections). (Exhibits, pp 17-21). The Special Referee conducted a hearing on September 12, 2011 to hear the objections. After hearing from counsel for both parties, the Special Referee took the matter under advisement. On November 7, 2011 the Special Referee signed the Order for Judgment (the copy of the order signed on August 25, 2011 had been misplaced). (Exhibits, pp 9-12). Counsel for Appellant Guarco filed and served a motion on November 21, 2011 (hereinafter referred to as the November 21 Motion) seeking relief from the Order of November 7, 2011. (Exhibits, pp. 22-25). This motion was heard by telephonic hearing on December 8, 2011 and the Special Referee issued his order denying the November 21 motion on March 14, 2012. (Exhibits, pp. 26-27).

ARGUMENT

I. Notice of Appeal Not Timely filed

Respondent first contends that this appeal should be dismissed for the reason that the Notice of Appeal was not filed and served in a timely manner. Rule 203 (b)(1) SCACR requires that the Notice of Appeal be filed and served within 30 days after receipt of written notice of entry of the order or judgment being appealed from. This requirement is jurisdictional. Mears v. Mears, 287 S.C. 168, 337 S.E.2d 206 (1985).

The motion of Appellant Guarco dated November 21, 2011 (hereinafter the November 21 Motion) is entitled "MOTION TO AMEND ORDER AND JUDGMENT". The body of the motion, however, says that it is made "pursuant to Rule 60 and/or 55 (c), SCRCF" and the relief requested is that "the Order and Judgment be set aside pursuant to Rules 60 and/or 55 (c), SCRCF".

If the November 21 Motion is considered to be made pursuant to Rule 60, it does not have the effect of tolling the time to file a Notice of Appeal, under Rule 203 SCACR. Additionally, while Rule 60 relates to relief from a judgment or order due either to clerical error or mistake, inadvertence, excusable neglect, newly discovered evidence, etc., no arguments relating to any of the provisions of Rule 60 were put forth either in the November 21 Motion or at the hearing on said motion held on September 12, 2011. (Exhibits pp. 27-39). Furthermore, the November 21 Motion was made by Appellant Guarco only. Appellant Gannon cannot appeal from an order denying a motion made by another party.

It appears from their Initial Brief that the Appellants consider the November 21 Motion as a Rule 59, SCRCP motion. While a timely filed motion to alter or amend a judgment made pursuant to Rule 59, SCRCP tolls the time for filing a notice of appeal, respondent contends that Appellants' Notice of Appeal was not timely filed because the November 21 Motion did not toll the time for filing. All of the issues raised in the November 21 Motion had been raised in the August 29 Objections. Specifically, the November 21 Motion raised questions regarding service of process in Paragraphs 1, 2, 3 and 4. The issue of service of process was raised in the August 29 Objections under Section I. The issue of damages was raised in Paragraphs 5 and 6 of the November 21 Motion and in Section VII of the August 29 Objections. Finally, Paragraph 7 of the November 21 Motion raises the questions of Connecticut law and venue which were raised in Sections II, III, and IV of the August 29 Objections. Admittedly, the language of the objections is not repeated verbatim. However, Elam v. South Carolina Department of Transportation, 361 S.C. 9, 602 S.E. 2d 772 (2004) confirmed earlier cases holding that a Rule 59(e) Motion, made after a motion for new trial or judgment N.O.V. made on the same grounds, would not toll the time for filing the Notice of Appeal. The Notice of appeal filed herein was filed and served on April 12, 2012, more than 4 months after the November 7, 2011 Order for Judgment.

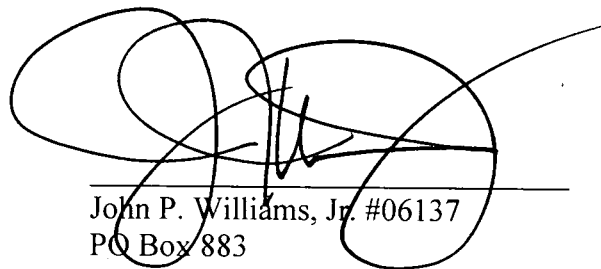
II. No Appeal Taken From Order For Judgment

The Notice of Appeal states that the Appellants appeal the order dated March 14, 2012, which denied the November 21 Motion. While a copy of the March 14, 2012 order is attached to the Notice of Appeal, no copy of the November 7, 2011 Order for Judgment is attached. If the November 21 Motion is considered to be a timely filed motion under

CONCLUSION

The Trial Court properly granted Respondent a judgment by default. The Appellants have not timely filed a Notice of Appeal, for the reasons set forth above. Even if a Notice of Appeal has been timely filed and served, Appellants can not now appeal the order of the Trial Court on an issue not only not objected to but specifically consented to.

RESPECTFULLY SUBMITTED,



John P. Williams, Jr. #06137
PO Box 883
Marion, SC 29571
(843) 423-7630 - Tel.
(843) 407-3672 - Fax
Email: jpwlawoffice@att.net
Attorney for Respondent

December 19, 2012

Other Counsel of Record:
E. Lloyd Willcox, II
PO Box 1909
Florence, SC 29503-1909
Attorney for Appellants

EXHIBITS TO RESPONDENT'S MOTION TO DISMISS APPEAL

1	Answer and Cross-Claims	1-8
2.	Order for Judgment	9-12
3.	Affadavit of Mark Bauman	13-16
4.	Objection to Propose Order	17-21
5.	Motion To Amend Order and Judgment	22-24
6.	Order Denying Motion	25-26
7.	Transcript of Hearing September 12, 2011	27-39
8.	Transcript of Hearing July 21, 2011 (Portions)	40-49

13. Answering the allegations contained in paragraphs 21, 22, 23, 24, 25, and 26 of the Complaint, this Defendant specifically denies so much thereof as alleges that the Plaintiff is entitled to foreclosure of this Defendant's interest in the subject property. This Defendant lacks sufficient information so as to form a belief as to the remaining allegations of said paragraphs and therefore denies the same.

SECOND DEFENSE AND COUNTER-CLAIM

14. Each and every allegation contained in the foregoing First Defense is realleged as though set forth herein verbatim.
15. Plaintiff knew or should have known that this Defendant was the owner of an undivided one half interest in the Subject Property, and that the Defendant Marion Amphitheater, LLC had neither the capacity ignored the authority to mortgage or otherwise encumber this Defendant's interest in the Subject Property.
16. This Defendant is entitled to an order compelling the Plaintiff to release this Defendant's undivided one half interest in the Subject Property from the liens of its mortgages.

FIRST CROSS COMPLAINT

The Defendant-4 Prophets, LLC, complaining of the Defendants Marion Amphitheater, LLC, Michael Guarco, and David P. Gannon, alleges:

17. The Defendant-4 Prophets, LLC, hereinafter 4 Prophets, is a limited liability company organized and existing under the laws of the State of Florida duly authorized to own property and conduct business in the State of South Carolina.
18. The Defendant Marion Amphitheater, LLC, hereinafter referred to as Marion, is upon information and belief a limited liability company organized and existing

FIFTH CROSS COMPLAINT

36. Each and every allegation contained in the foregoing Cross Complaints is realleged herein as though set forth herein verbatim.
37. Under the terms and conditions of the July 6 Agreement, 4 Prophets is entitled to one half of all rental and other income arising out of the use of the Subject Property.
38. Marion, Guarco in Gannon have received various sums unknown to 4 Prophets.
39. 4 Prophets is entitled to an order requiring the said Marion, Guarco and Gannon to prepare and produce an accurate accounting setting forth all income and reasonable and necessary expenses, and to judgment against the said Marion, Guarco and Gannon for the amounts due to 4 Prophets according to said accounting.

WHEREFORE, having fully answered the complaint herein, Defendant 4 Prophets prays of this Honorable Court as follows:

- A. That the Complaint be dismissed as to this Defendant;
- B. That Plaintiff be ordered to release the interest of this Defendant in the real property described in the Complaint and in the real estate mortgages referred to therein from the lien of said mortgages;
- C. That this defendant have judgment against the Defendants Michael Guarco, David Gannon and Marion Amphitheater, LLC on its First, Second, Third and Forth Cross Complaints in an amount not less than \$12,500,000.00, plus punitive damages in such amount as may be determined by the trier of fact;

appraisals performed at the request of one or more of the Cross-Defendants, copies of which are attached to the aforementioned affidavit of Mark Bauman.

CONCLUSIONS

Based upon the foregoing findings of fact, I conclude that the Cross-Complainant 4 Prophets LLC is entitled to judgment against the Cross-Defendants Michael Guarco and David P. Gannon in an amount equal to one half of the value of the subject property, being the sum of \$12,500,000.00, plus costs. It is, therefore

#4
ORDERED that the Cross-Complainant 4 Prophets LLC have judgment against the said Michael Guarco and David P. Gannon in the sum of \$12,500,000.00, plus costs as allowed by law.

AND IT IS SO ORDERED.



Haigh Porter, Special Referee

November 7, 2011

Florence, South Carolina

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF MARION

) CIVIL ACTION NO.: 2011-CP-33-00016

WELLS FARGO BANK, N.A., successor-in-
interest to WACHOVIA BANK, NATIONAL
ASSOCIATION,

Plaintiff,

vs.

AFFIDAVIT

MARION AMPHITHEATRE, LLC, DAVID P.
GANNON, MICHAEL GUARCO, CAROLINA
ENTERTAINMENT COMPLEX, LLC AND 4
PROPHETS, LLC a/k/a 4 PROFITS, LLC,

Defendants.

PERSONALLY appeared before me Mark Bauman, who being first duly sworn,
deposes and says:

1. I am a citizen and resident of Marion County South Carolina and I am the managing member of 4 Prophets, LLC, one of the defendants in this action.
2. As alleged in the First Cross Complaint, 4 Prophets, LLC entered into a written agreement with Michael Guarco on July 17, 2006. This agreement specifically provided that in consideration of the work and efforts of 4 Prophets, LLC and its members related to the Amphitheater Property 4 Prophets, LLC would own an undivided one half interest in the Amphitheater Property if it was acquired by Mr. Guarco. A copy of this agreement is attached hereto and identified as Exhibit A.
3. The Amphitheater Property was purchased by Mr. Guarco with the closing taking place in January of 2007. The contract of sale for the purchase of the Amphitheater

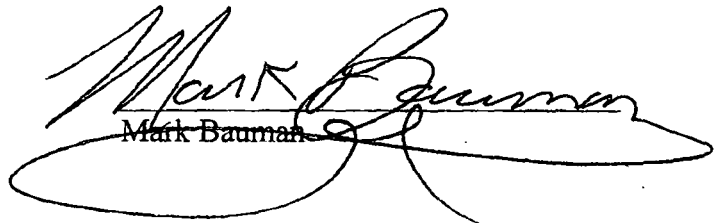
Property referred to Mr. Guarco as the buyer but at the closing the property was conveyed to Marion Amphitheater, LLC. As part of the purchase price, a promissory note and real estate mortgage were executed in favor of the Sellers of the Amphitheater Property. Michael Guarco executed the promissory note and real estate mortgage as "Sole Member". A copy of the first page and signature page of the contract of sale of the purchase of the Amphitheater Property is attached hereto and identified as Exhibit B. A copy of the first page and signature page of the real estate mortgage is attached hereto and identified as Exhibit C.

4. After the Amphitheater Property was acquired, three separate applications for zoning changes were made to the City of Marion. In each of these applications, the then current members of 4 Prophets, LLC were listed as additional owners. Copies of these zoning applications are attached hereto and collectively identified as Exhibit D.
5. As a result of statements made by Michael Guarco to the effect that he would sell the property in order to defeat the ownership interest of 4 Prophets LLC, 4 Prophets LLC filed suit seeking an injunction restraining Marion Amphitheater LLC and Michael Guarco from selling or hypothecating the property during the pendency of a suit pending in the State of Connecticut between these parties. The suit was filed against Marion Amphitheater LLC and Michael Guarco in the Court of Common Pleas for Marion County on May 19, 2010 and the Summons and Complaint were served on Michael Guarco on June 2, 2010. The result of this suit was a Consent Order restraining the sale or hypothecation of the Amphitheater Property until

defendants had the property appraised a second time in January of 2010. The "as is" given by the appraiser, effective January 29, 2010 was again \$25 million. Copies of the valuation sections of these appraisals are attached hereto and collectively identified as Exhibit H. I am unaware of any information which would lead me to believe that the value of this property has declined in any amount since these two appraisals were made and therefore I believe the present fair market value of the subject property to be the sum of \$25 million, the value reached by the appraiser in both appraisals.

10. As a result of the actions of the said Michael Guarco and David P. Gannon in breaching the agreement with 4 Prophets LLC's and taking actions designed and intended to defeat the valid interests of 4 Prophets LLC, there is due and payable to 4 Prophets LLC by the said Michael Guarco and David P. Gannon the sum of \$12,500,000.00, being the value of the equitable interest of 4 Prophets LLC in the property.

AND FURTHER AFFIANT SAYETH NOT


Mark Bauman

SWORN to before me this
25th day of August 2011.


(L.S.)
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 4/18/2013

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF MARION)

CIVIL ACTION NO.: 2011-CP-33-00016

WELLS FARGO BANK, N.A.,)
successor-in-interest to)
WACHOVIA BANK, NATIONAL)
ASSOCIATION,)
Plaintiffs)

vs.)

OBJECTION TO PROPOSED
ORDER FOR JUDGMENT

MARION AMPHITHEATRE, LLC,)
DAVID P. GANNON, MICHAEL)
GUARCO, CAROLINA)
ENTERTAINMENT COMPLEX, LLC)
AND 4 PROPHETS, LLC a/k/a)
4 PROFITS, LLC,)
Defendants)

The defendants/cross complaint defendants, Marion Amphitheatre, LLC, and Michael Guarco object to the Proposed Order for Judgment submitted by the Cross Complaint Plaintiff, 4 Prophets, LLC for the following reasons.

I. LACK OF PERSONAL JURISDICTION FOR MICHAEL GUARCO AND DAVID P. GANNON.

1. The Cross-Complaint Defendants Michael Guarco and David Gannon were not properly served in the underlying foreclosure action. Nor were they properly served and with copies of the Cross Complaint Plaintiff's Answer, Counterclaim and Cross Complaint. The failure to properly serve Michael Guarco and David P. Gannon deprives this Court of jurisdiction over said parties in this matter. Therefore, this Court is without jurisdiction to hear this matter and to issue the proposed Order for Judgment.

II. THE COURT LACKS SUBJECT MATTER JURISDICTION BY THE AGREEMENT OF THE PARTIES.

1. This Court does not have subject matter jurisdiction over the present dispute by the express terms of the July 17th letter. (Exhibit A attached).

2. Paragraph 4 of the July 17th letter provides in relevant part that any action, suit or proceeding arising out of or relating to the letter must be brought in the State of Connecticut, a restriction agreed upon by all of the parties to such letter.

3. Due to the agreement of the parties, this Court does not have subject matter jurisdiction over this dispute.

III. THE PARTIES AGREED THAT CONNECTICUT LAW WOULD GOVERN THE JULY 17th LETTER AGREEMENT

1. The July 17th letter provides in paragraph 4 that the letter would be governed and construed in accordance with the laws of the State of Connecticut applicable to agreements made to be wholly performed in such state.

2. This Court has not reviewed whether the July 17th letter constitutes a valid agreement under Connecticut law.

3. Under Connecticut law the July 17th letter does not confer any interest in the Marion Amphitheatre property to 4 Prophets, LLC for one or more of the following reasons:

a. The July 17th letter does not meet the requirements for a valid conveyance under Connecticut law. See Conn.Gen.Stat. § 47-5(e).

b. The July 17 letter fails for lack of consideration.

c. The July 17 letter violates the Statute of Fraud in that it fails to

sufficiently describe their subject property.

IV. A PRIOR PENDING ACTION IN THE CONNECTICUT SUPERIOR COURT PRECLUDES LITIGATION OF THIS DISPUTE.

1. By complaint dated February 20, 2010, Marion Amphitheatre, LLC commenced a declaratory judgment action in the Superior Court for the Judicial District of Hartford (Docket No. HHD-CV10-6008478) (the "Connecticut Action") so that a Connecticut Court would determine whether or not 4 Prophets, LLC has any interest in the Marion Amphitheater Property and whether the July 17th letter was a valid contract.

2. Marion Amphitheatre, LLC has incurred in excess of \$50,000 in costs and attorney's fees to prosecute the Connecticut Action.

3. The Connecticut Action is scheduled for trial on November 2, 2011.

V. THE MEMBERS OF 4 PROPHETS KNEW THAT MARION AMPHITHEATRE, LLC WAS MORTGAGING THE PROPERTY FOR THE ACQUISITION

1. The Marion Amphitheater property was mortgaged by its owner, Marion Amphitheater, LLC with the knowledge and without objection by the managing members of 4 Prophets, LLC.

2. Michael Guarco and David P. Gannon did not, individually, mortgage the Marion Amphitheater property as alleged in the Cross Complaint.

VI. DAVID GANNON IS NOT A PARTY TO THE JULY 17th AGREEMENT.

1. David Gannon was not a party to the July 17th letter and there are no allegations in the Cross-Complaint that he is personally liable to the Cross-Complaint Plaintiffs.

VII. THE FINDING OF FACT THAT 4 PROPHETS IS ENTITLED TO 12.5 MILLION IS FLAWED.

1. The Court's valuation of the sums that may be due 4 Prophets under the July 17th letter is flawed in that it adopts the fair market value determined in an appraisal of the Marion Amphitheatre Property but does not subtract therefrom the acquisition cost, the carrying costs, the remodeling expenses, and the mortgage and interest expenses.

Rule 55 (b)(1) S.C.R.C.P. that permits this court to assess damages is inapplicable in this matter because the sums that may be due 4 Prophets is not (a) a liquidated amount, nor is it (b) a sum certain, nor is it (c) a sum which can be determined by computation since this Court has not determined the proper deductions.

CONCLUSION

1. 4 Prophets is not entitled to judgment because of the improper service of the Cross Defendants.

2. 4 Prophets is not entitled to judgment because this Court has not applied the Law of the State of Connecticut to this matter as required under the July 17th letter.

3. 4 Prophets is not entitled to judgment because the proper venue for any action arising out of the July 17th letter is in the Connecticut State Court system as required under the July 17th letter.

4. 4 Prophets is not entitled to judgment because of the prior pending action in the Superior Court within the State of Connecticut.

5. 4 Prophets is not entitled to judgment against David P. Gannon because David P. Gannon was not a party to the July 17 letter and there is no factual support to

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF MARION) CASE NUMBER 11-CP-33-00016

WELLS FARGO BANK, N.A., successor-)
in-interest to WACHOVIA BANK,)
NATIONAL ASSOCIATION,)
)
Plaintiff,)

vs.)

MOTION TO AMEND ORDER AND
JUDGMENT

MARION AMPHITHEATRE, LLC,)
DAVID P. GANNON, MICHAEL)
GUARCO, CAROLINA)
ENTERTAINMENT COMPLEX, LLC,)
AND 4 PROPERTIES LLC a/k/a 4)
PROFITS, LLC,)
Defendant.

Pursuant to Rule 60 and/or 55(c), SCRCPP, the Defendant Michael Guarco moves for relief from the attached Order and Judgment dated November 7, 2011 (*Exhibits 1 and 2*) in this matter on the following grounds:

1. Defendant Guarco was never served with the Cross-Claim pursuant to the rules nor was he advised of the amount of time he would have to answer the Cross-Claim. Co-Defendant 4 Prophets, LLC filed with the court a proof of service wherein this Defendant was served with the Cross-Claim via personal service. *See Ex. 3.*

2. The Proof of Service does not contain evidence of actual service on the targeted Defendant. Specifically, service of Co-Defendant 4 Prophets, LLC's Cross- Claim was attempted on Michael Guarco by service of the Cross-Claim on his son Alan Guarco according to the affidavit of service of Wilson filed June 14, 2011. As can be seen by the affidavit of Alan

Guarco (*Ex. 4*), the Defendant Michael Guarco was not personally served nor were the pleadings left at his dwelling house with some person of suitable age then residing therein. Alan Guarco did not live at 7 Bayberry Drive, East Granby, Ct. 06026. Therefore Defendant Michael Guarco has not been served with the Cross-Claim pursuant to Rule 4, SCRPC.

3. Rule 4, SCRPC governs service of process in South Carolina. Service by personal delivery is at issue in this case therefore Rule 4 (d)(1) governs. That subsection requires service by personal service:

...by delivering a copy of the summons and complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein,...

Rule 4(d)(1), SCRPC.

4. The record contains proof no such service. Michael Guarco was not personally served and Alan Guarco, who was served, did not reside at the place of attempted service.


5. The Order for Judgment ignores certain terms of the agreement dated July 17, 2006, most importantly that the Defendant Michael Guarco would be entitled to recoup all initial investment costs prior to any disbursement under the agreement.

6. The court's valuation does not subtract or credit this Defendant with the acquisition cost, carrying costs, remodeling expenses, and mortgage and interest expenses.

7. The court failed to apply law of the State of Connecticut as required by the July 17, 2006 agreement. Venue is also improper in that this matter under the terms of the agreement should be tried in Connecticut.

Wherefore Defendant moves that the Order and Judgment be set aside pursuant to Rules 55(c) and 60 (b), SCRPC.

WILLCOX, BUYCK & WILLIAMS, P.A.

By: 
E. LLOYD WILLCOX, II
I.D. No. 015093
PO Box 1909
Florence, SC 29503-1909
(843) 662-3258 - Tel
(843) 662-1342 - Fax
ATTORNEY FOR DEFENDANTS

November 21, 2011

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF MARION

) CIVIL ACTION NO.: 2011-CP-33-00016

WELLS FARGO BANK, N.A., successor-in-
interest to WACHOVIA BANK, NATIONAL
ASSOCIATION,

Plaintiff,

vs.

MARION AMPHITHEATRE, LLC, DAVID P.
GANNON, MICHAEL GUARCO,
CAROLINA ENTERTAINMENT COMPLEX,
LLC AND 4 PROPHETS, LLC a/k/a 4
PROFITS, LLC,

Defendants.

ORDER

MARION COUNTY SC
CLERK R. RHODES
FOR THE COURT

2012 MAR 15 P 1:23

BOOK _____ PAGE _____

FILED

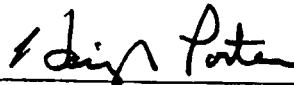
This is an action to foreclose a real estate mortgage. The Defendant 4 Prophets, LLC filed responsive pleadings alleging various Cross-Claims against the Defendants Marion Amphitheater, LLC, Michael Guarco and David P. Gannon. An Order granting judgment in favor of 4 Prophets, LLC and against Michael Guarco and David P. Gannon was issued on November 7, 2011. The matter is now before the court on a Motion to Reconsider by Defendant Michael Guarco. The Motion was heard by me by telephonic hearing on December 8, 2011. Participating were E. Lloyd Wilcox, attorney for the said defendant, and John P. Williams, Jr., attorney for 4 Prophets, LLC

Having reviewed Defendant's Motion to Reconsider, and after hearing from counsel for the respective parties, it is the opinion of the Court that the Motion should be denied and the previous Order of the Court confirmed. It is, therefore

ORDERED that the Motion to Reconsider is denied.

AND IT IS SO ORDERED.

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Haigh Porter, Special Referee

March 14, 2012

Florence, South Carolina

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STATE OF SOUTH CAROLINA
COUNTY OF MARION
Wells Fargo Bank, N.A.
Successor-In-Interest
To Wachovia Bank,
National Association

IN THE COURT OF COMMON PLEAS
CASE NO. 2011-CP-33-00016

TRANSCRIPT OF HEARING

Plaintiff,

-vs

Marion Amphitheater
David P. Gannon, Michael
Guarco, Carolina
Entertainment Complex, LLC,
And 4 Prophets, LLC
a/k/a 4 Profits, LLC
Defendant(s),

 **COPY**

Given before Courtney Young, Court Reporter and
Notary Public, at the office of Haigh Porter, 152 South
McQueen Street, Florence, South Carolina on Monday,
September 12, 2011 at 11:00 a.m.

A-P-P-E-A-R-A-N-C-E-S

1
2 Special Referee:
3 Haigh Porter, Esquire
4 152 South McQueen Street
5 Florence, SC 29501

6 For the Defendants,
7 Marion Amphitheatre, LLC and Michael Guarco

8 Wilcox, Buyck, & Williams
9 By: E. Loyd Wilcox, II
10 P.O. Box 1909
11 Florence, SC 29503

12 For the Defendants,
13 4 Prophets, LLC a/k/a 4 Profits, LLC:

14 John P. Williams, LLC
15 By: John P. Williams
16 300 North Main Street
17 Marion, SC 29571

18 On the phone: Dave Wheeler

19 Also present: Mark Bauman

INDEX TO EXHIBITS

(None were marked.)

1
2 THE REFEREE: For the sake of the court
3 reporter, this is a matter of Wells Fargo Bank,
4 N.A. vs. Marion Amphitheatre, LLC, et al, file
5 number 2011-CP-33-16. The matter has been before me
6 pursuant to an order of reference. An order for
7 foreclosure has been entered, but today we're here
8 due to the motions of Mr. Wilcox on behalf of
9 Mr. Guarco, I believe.

10 MR. WILCOX: That's correct and Marion
11 Amphitheatre.

12 THE REFEREE: And Marion Amphitheatre, but not
13 as to the defendant, David Gannon.

14 MR. WILCOX: That's correct.

15 THE REFEREE: No one is here on his behalf.
16 All right. Gentlemen. . .

17 MR. WILCOX: You're ready?

18 THE REFEREE: We're ready.

19 MR. WILCOX: Thank you. I won't take up most
20 of y'all's time. We did file some objections, Your
21 Honor. Just a brief background, we're dealing with
22 the cross-claim of 4 Profits against Guarco and
23 Gannon. The cross-claims are for fraud, breach of
24 contract, and breach of contract with fraudulent
25 intent. The contract at issue is part of the courts

1 filed. It clearly says that any disagreement about
2 this contract will be governed my Connecticut law
3 and governed in the Courts of Connecticut. We are
4 -- we have done neither in this case. It also says
5 on the signature page that profits are defined as
6 only the funds after Guarco, my client, recoups his
7 initial investment which includes the cost of the
8 mortgage, borrowing the principal of the mortgage
9 and the interest on the mortgage.

10 We list in our objections, Your Honor, to the
11 order that has been signed. I don't know whether
12 it's been filed, but it has been signed by Your
13 Honor. I -- same old complaint that we've made
14 since I've made an appearance in this action,
15 failure to serve, that the letter/contract is
16 governed by Connecticut law and should be governed
17 by Connecticut cause of action and -- in a
18 Connecticut court which is ongoing, a current
19 Connecticut action is on going; that 4 Profits also
20 knew about the mortgage about which they are
21 complaining and that David Gannon is not a party to
22 the contract that is the basis of the cross-claim
23 against him.

24 Finally, Your Honor, the -- Your Honor
25 granted a judgment against Guarco and Gannon and

1 Marion Amphitheater based on some affidavits
2 submitted by 4 Profits based on the fair market
3 value of the property which are in turn based on
4 some appraisals. We assert that those -- that the
5 figure that the court came up with does not take
6 into consideration the cost that Guarco has
7 expended to purchase this property, including the
8 mortgage, including improvements, and including
9 money he's put in himself. The damages that -- in
10 our opinion are not liquidated or not a sum
11 certain. We submit as part of our objections Mr.
12 Guarco's affidavit to that effect as well as Mr.
13 Rouson. And I apologize for the pronunciation,
14 R-o-u-s-o-n, affidavit who tells me he is a member
15 of 4 Profits and that Guarco gets paid first, gets
16 paid back before 4 Profits should get anything. He
17 says that in his affidavit and he says that under
18 oath.

19 Thank you, Your Honor. Those are the basis of
20 our objections.

21 THE REFEREE: Do you have a copy of that order
22 for judgment? I don't appear to have --

23 MR. WILLIAMS: I have the original as a matter
24 of fact, if I can put my fingers on it. I'm
25 supposed to have the original, because it has not

1 been filed.

2 THE REFEREE: Y'all bear with me a minute.
3 Let me refresh my memory just a second. I've only
4 had one foreclosure that's probably more convoluted
5 than this one, and Mr. Wheeler, you were the
6 plaintiff's attorney in that one.

7 MR. WHEELER: I do what I can, Your Honor.

8 THE REFEREE: I will say this; in this
9 previous case with Mr. Wheeler, of about five six
10 years ago, a lot of money was involved like this
11 case, and it was one of those rare cases where
12 everybody got paid. It was competitive bidding for
13 the property and everybody got paid in full.

14 MR. WHEELER: Maybe that will happen in this
15 case.

16 MR. WILCOX: From your lips to God's ears,
17 Dave.

18 THE REFEREE: All right, Mr. Williams.
19 What's your response?

20 MR. WILLIAMS: Your Honor, if it please the
21 Court, the first -- and I'll speak of first as in
22 roman numeral I, the lack of personal jurisdiction.
23 Your Honor has ruled on that issue several times
24 already as to the efficacy of the service of
25 process. The roman numeral II and III relate to

1 the July 17th agreement which is the -- the
2 referred to in the -- in our cross-claims and
3 elsewhere is a letter agreement as Exhibit A
4 attached to the -- our affidavit. And to the part,
5 thereof, which says that any action arise out of it
6 will be brought in the State of Connecticut and all
7 facts where that's correct certainly. The problem
8 is that our allegations are that we had a contract,
9 and that they -- by failure to make the payments to
10 the plaintiff bank, the purpose thereof was to you
11 -- extinguished by foreclosure sale, the rights of
12 4 Profits and that was a fraudulent and it was
13 wrongful that they conspired to -- conspiracy
14 cross-complaint, breach of contract by fraudulent
15 act and so forth.

16 Now, it was our view and still is my view and
17 these -- these cross-claims were alleged and set
18 forth on the basis that they are proceeded in the
19 Court of Equity in Connecticut. There's a
20 proceeding here in a Court of Equity, and that if
21 they wish to avail themselves of the terms of the
22 contract, that is, the restriction of jurisdiction
23 to the State of Connecticut in a Court of Equity,
24 then they need to be doing equity. And therefore,
25 by argument had they not been in default would had

1 been just that. They have waived the right to set
2 fourth that as a defense.

3 Now, beyond that, Your Honor, all of these --
4 all of these objections, roman numerals I through
5 VI are matters that they would have been entitled
6 to a raise had it not been in default, but all of
7 these things have been admitted by virtue of the
8 default as found in your order for judgment, Your
9 Honor, is that -- and under South Carolina law,
10 they have admitted conceited liability, admitted
11 liability and have admitted the truth of every
12 well plead fact of the complaint. And so I think
13 that that's positive -- their default that it's
14 just positive of roman numerals I through VI.

15 Roman numeral VII, Mr. Wilcox takes position
16 that the rules of civil procedure provide that on a
17 default matter if the damages are liquidated or a
18 sum certain or a sum which can be determined by
19 computation, then there's no need of an evidentiary
20 or damages hearing. I will say this, You're Honor,
21 is it my belief and my opinion that we did not have
22 liquidated damages, but we do have a sum which can
23 be determined by computation, because if alleged,
24 one, the value of the property which they've
25 admitted to, and two, we've alleged that we own

1 half interest in it which they have admitted to.
2 And that's leads to a fairly simple computation.

3 However, the belief in that, that I do,
4 that's the reason we proceeded to way we have. If
5 Your Honor feels differently or upon reflection
6 feels like it's appropriate, then we don't have any
7 problem conducting an evidentiary hearing, a
8 damages hearing that is to say. I say that in
9 response to roman numeral VII, and I think I've
10 already respond roman numerals I through VI
11 already.

12 THE REFEREE: That's it Mr. Wilcox?

13 MR. WILCOX: Yeah. The only thing I'd like
14 to add after Mr. William's positions are that the
15 contract at issue, in our opinion, does not
16 describe the property appropriately. Their copies
17 have a legal description attached to it; our don't.
18 Our copies don't have any legal descriptions.

19 Number two, in addition to asserting that the
20 sum certain can not be ascertained -- and Mr.
21 Williams says he'd be glad to have a damages
22 hearing -- we'd also would like to point out that
23 we don't think we've been given credit for the cost
24 that we've expended. In other words, we haven't
25 been given a credit to the tune of the mortgage

1 that he clearly owe, as well as Mr. Guarco says
2 he's spent seven million dollars of his own money
3 in here. And therefore their judgment, if it
4 stands, should be reduced by those amounts or at
5 least half of those amounts. Thank you, Your
6 Honor.

7 THE REFEREE: As to the description, even if
8 there's not a descriptive page attached to your
9 copy, the copy that was furnished to me does have a
10 schedule A. But I notice in the first paragraph,
11 and I presume y'all are referring to the letter
12 form agreement dated July 17th of 2006 on a
13 letterhead of Michael Guarco, Sr. And the first
14 paragraph refers to the "that certain property
15 known as the Carolina Amphitheater property located
16 in Marion, South Carolina." I think that
17 adequately describe the property, what the property
18 is. It's well known in the community and the
19 county of where the amphitheater property is.

20 MR. WILCOX: I think you're probably right in
21 South Carolina, Your Honor, but I would point out
22 that we're asserting in Connecticut, it wouldn't be
23 and it should be in Connecticut.

24 THE REFEREE: Well --

25 Mr. WILCOX: And also it says it's in Marion;

1 it's not in Marion. It's in Marion County. I
2 don't believe it's in the city limits.

3 THE REFEREE: I take that Marion County --
4 it's out in the country. The Court is aware of
5 where the property is located out on the highway
6 east of -- southwest of the town of Marion.

7 MR. WILCOX: We all know where it is.

8 THE REFEREE: I think that adequately
9 describes it. Someone from some unknown county up
10 in Connecticut will probably not know, because he
11 might not know where South Carolina is unless he's
12 been down Highway 95, I-95. So I think that -- I
13 don't think that's an issue.

14 I will review all of the documents further.
15 I'll take into consideration what you all have
16 said. Mr. Williams, if you'll hold up on the
17 filing this proposed letter I recently signed, I
18 will take that into further consideration, and
19 we'll let you fellows know something hopefully by
20 the end of the week. I will say that starting
21 tomorrow, I am loaded up either with sales or
22 hearings almost every day this week until Friday.
23 But I will -- I have a couple of things scheduled
24 this afternoon. I'll try and spend some time on
25 this this afternoon. A quit taking things home to

1 work on at night anymore. I'm old enough to that I
2 don't do that anymore, but I will try to let you
3 all know something.

4 Mr. Wilcox, one of the things that's
5 bothering me is there's litigation right here in
6 South Carolina involving all of these people, and
7 not withstanding any argument that can be made
8 about the terms of the July 17th, 2006 letter
9 agreement as to jurisdiction and venue. I think
10 once this action was brought down here with the
11 parties all identified, with the properties all
12 identified, the only way to resolve the whole issue
13 is for it to be tried here in South Carolina.

14 Now, on the other hand, if there was no
15 foreclosure action -- and we'll just for sake of
16 argument say, well, the payments were all current
17 and all, there was no problem, the bank was happy,
18 and then they have -- the parties had the falling
19 out. Yes, I would agree with you; it would have to
20 be tried probably up in Connecticut even though the
21 property is situated here in South Carolina. But I
22 think -- and this is something I will take into
23 consideration, but with the venue and jurisdiction
24 established through the foreclosure, I am not sure
25 that that precludes Mr. Williams and his clients

1 from proceeding as part of this action, because
2 they are part of the action along with your
3 clients. So I think Mr. Wheeler's client in affect
4 has opened the door, but I will certainly take all
5 of that into consideration and try and let you all
6 know something no later than the first of next
7 week.

8 MR. WILCOX: Thank you.

9 MR. WILLIAMS: Thank you, Your Honor.

10 THE REFEREE: That will conclude it.

11 MR. WHEELER: Thank you, Your Honor. I
12 appreciate you letting me participate via phone.

13 THE REFEREE: Unless Mr. Wheeler you want to
14 add anything to it.

15 MR. WHEELER: No, sir.

16 THE REFEREE: Okay. Well, that will do it
17 now.

18 (Whereupon the proceedings concluded.)
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1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
2 COUNTY OF MARION) Case No. 11-CP-33-00016

3 WELLS FARGO BANK, NA,)
4 SUCCESSOR and INTEREST OF)
5 WACHOVIA BANK, NATIONAL)
6 ASSOCIATION,)

Plaintiff(s),)

-vs-)

8 MARION AMPHITHEATER, LLC,)
9 DAVID P. GANNON, MICHAEL)
10 GUARCO, CAROLINA ENTERTAINMENT)
11 COMPLEX, LLC, and 4 PROFETS,)
12 LLC a/k/a 4 PROFITS, LLC,)

Defendant(s).)

COPY

14 Given before Molly C. Newton, Court
15 Reporter and Notary Public, at the office of Haigh
16 Porter, 152 South McQueen Street, Florence, South
17 Carolina, on Thursday, July 21st, 2011, commencing at
18 10:42 o'clock, a.m.

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For the Plaintiff(s): Moore & VanAllen, PLLC
By: David B. Wheeler, Esquire
Post Office Box 22828
Charleston, SC 29413

For the Defendant(s): Willcox, Buyck, Williams
(Guarco) By: E. Lloyd Willcox, II, Esquire
Post Office Box 1909
Florence, SC 29503

For the Defendant(s):
(4 Profets) By: John P. Williams, Esquire
Post Office Box 883
Marion, SC 29571

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1 **THE COURT:** This is Marion County case 2011-
2 CP-33-00016; it's the matter of Wells Fargo
3 Bank, NA, Successor and Interest of Wachovia
4 Bank, National Association, Plaintiff, versus
5 Marion AMPHITHEATER, LLC, David P. Gannon,
6 Michael Guarco, Carolina Entertainment Complex,
7 LLC, and 4 Profets, LLC also known as 4 Profits,
8 spelled differently, LLC. The matter before me
9 presents a reference filed on June 2nd of this
10 year referring the matter to me with finality.
11 I think in reading the pleadings, Mr. Wheeler,
12 you are here representing Wells Fargo?

13 **MR. WHEELER:** That's correct, Your Honor.

14 **THE COURT:** Mr. Williams, you are here
15 representing 4 Profets?

16 **MR. WILLIAMS:** That's correct.

17 **THE COURT:** Mr. Willcox, you are here based
18 on a motion filed this week, I believe,
19 representing Mr. Guarco?

20 **MR. WILLCOX:** And Marion AMPHITHEATER.

21 **THE COURT:** And Marion AMPHITHEATER.

22 **MR. WILLCOX:** That's correct, Your Honor.

23 **THE COURT:** Mr. Gannon, you're here
24 representing yourself?

25 **MR. GANNON:** That's correct.

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1 **MR. WILLIAMS:** But my answer counter claim
2 and cross were served on Mr. Alan Guarco.

3 **THE COURT:** So my earlier assumption was
4 correct, that there was a young fellow.

5 **MR. WILLCOX:** Yes, with the same name.

6 **MR. BAUMAN:** He is an attorney.

7 **THE COURT:** Pardon?

8 **MR. BAUMAN:** Michael Guarco, III is an
9 attorney.

10 **MR. GUARCO:** He hasn't taken the bar exam
11 yet. He works for Mr. Lauditi.

12 **THE COURT:** I believe the services are good
13 on everything. I believe I have the proper
14 jurisdiction to hear this case. With that said,
15 we'll take a break.

16 (The hearing went off the record for a brief period of
17 time.)

18 **THE COURT:** We had an opportunity for the
19 parties outside of The Court to have some
20 discussions. Gentlemen, did you reach any
21 understanding or agreements or do we need to
22 proceed.

23 **MR. WHEELER:** Your Honor, David Wheeler, on
24 behalf of the Plaintiff. We discussed the
25 presentation of prepared testimony and we're

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1 prepared to go forward in that fashion.

2 MR. WILLIAMS: Your Honor, Mr. Willcox
3 raised the question whether we considered being
4 that the Defendant's are in default simply
5 getting our judgement by default and we pay a
6 liquidated damage. However, Rule 55 says that I
7 can proceed on the complaint if it's liquidated
8 damages if it's verified; if it's not verified I
9 can satisfy that with an affidavit. My question
10 to The Court is -- and I would have had an
11 affidavit and had an order of judgment by
12 default before today, in fact that is what I was
13 going to tell you day before yesterday. My
14 question is, I can submit an affidavit and order
15 of judgement by default, I can have Mr. Bauman
16 testify that he is familiar with all the
17 allegations and the answer and counter and cross
18 complaint, the simple language of verification,
19 or I can have him testify fully as to damages
20 but I don't think I need to do that being they
21 are in default but I'll do as I'm instructed.

22 MR. WILLCOX: I agree with Mr. Williams'
23 outline of the rule which is that liquidated
24 damages can be verified, which I don't think
25 they are in this case, or in lieu thereof an

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1 affidavit can be submitted if that is what the
2 rule says. I wish I could fight it but I can't.

3 **THE COURT:** As I understand it your
4 discussion really ends up with this: Mr.
5 Wheeler, you have prepared testimony which you'd
6 like to submit; is that your testimony or an
7 officer of the bank?

8 **MR. WHEELER:** An officer of the bank who
9 has authorized me in the affidavit to present
10 the testimony on his behalf.

11 **THE COURT:** Could you summarize that for us?

12 **MR. WHEELER:** Your Honor, it is attached to
13 the reference testimony as Exhibit Two, it's an
14 affidavit of indebtedness and authorization to
15 testify. Presentation of evidence in this
16 fashion is similar to the affidavit requirement
17 to Rule 55. I'll just read the affidavit;
18 Personally appeared before me the undersigned
19 witness who, being duly sworn, deposes and says
20 he is an officer of Wells Fargo Bank, servicer
21 of the loan which is the subject of the above
22 referenced foreclosure action that the amount of
23 the indebtedness is as follows; then we go
24 through the balance due. There is a similar
25 affidavit with respect to the second loan and

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THE COURT: You've shown this to the other gentlemen?

MR. WHEELER: I have not shown the decree to the others; it's consistent with the indebtedness, the facts, exhibited and prepared testimony.

THE COURT: On the proposed order I have changed the time of the sale to 12 noon. I changed the sale time in Marion County. The second sale is 11; deficiency sales are always 11 unless the order provides otherwise and I don't know if that etched in stone with the Supreme Court but that's the way it is around all 46 counties.

Mr. Williams, if you haven't had a chance to look at the decree, he doesn't make any provisions to your case in this decree.

MR. WILLIAMS: That's correct, Your Honor. On page two, it provides that there will be a separate order.

THE COURT: So you will provide a separate order with the affidavit?

MR. WILLIAMS: Yes, sir. Unless you would have me have him testify today.

THE COURT: I think Mr. Willcox indicated
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1 that the affidavit will suffice.

2 MR. WILLCOX: I think it qualifies under the
3 rule.

4 THE COURT: I think it does. We'll just do
5 it that way, then.

6 Mr. Wheeler, I think your decree is
7 prepared appropriately and I will sign that and
8 I'll also sign the notice of sale for the
9 September 13th sale date for the first sale and
10 the follow-up sale is October 13th.

11 Let me make sure you non-lawyers
12 understand, they are seeking a deficiency
13 judgement and in South Carolina where a
14 deficiency judgement is sought, at the first
15 sale, as sort of an unwritten rule nobody but
16 the bank bids and the reason for that is that
17 the high bid at the first sale cannot bid again
18 at the second sale. The first sale the bank
19 will bid and then at the second sale any of you
20 folks can bid or Sammy Unknown can bid. The
21 sale will not be final until October 13th.

22 In the meantime that does not prevent you
23 folks from reaching other agreements as may be
24 appropriate or not. There is nothing in the
25 meantime that prevents the debtors to come in

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1 and pay the bank.

2 **MR. GANNON:** Then what happens?

3 **THE COURT:** If you pay the bank off I would
4 file an order vacating or dismissing this order.

5 **MR. WHEELER:** Your Honor, if I may, there is
6 some indication in reference testimony and in
7 the decree as to stipulation of dismissal as to
8 the counter claim between 4 Profets and the
9 bank. I have an original signed by Mr. Williams
10 and myself as the counsel.

11 **THE COURT:** That will need to be filed.

12 **MR. WHEELER:** We will file that separately.

13 **THE COURT:** Unless there is something else
14 that will conclude the hearing and I will expect
15 to hear from Mr. Williams in a few days, and
16 when you send it to me if you'll just send it to
17 the other parties. Okay. Thank you.

18 (Hearing concluded at 12:05 o'clock, p.m.)
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM MARION COUNTY
Court of Common Pleas

W. Haigh Porter, -Special Referee

RECEIVED

DEC 31 2012

Case No. 2011-CP-33-00016

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

SC Court of Appeals
Plaintiff

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,

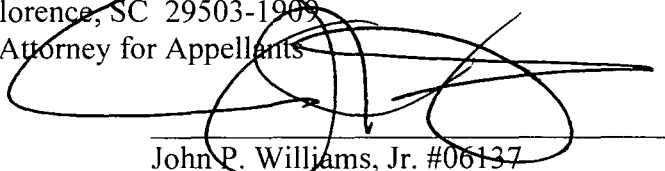
And
4 Prophets, LLC, a/k/a 4 Profits, LLC is the,

Respondent.

PROOF OF SERVICE

I certify that I have served the Respondent's Motion to Dismiss Appeal on the Appellants, through their attorney of record, by depositing a copy of same in the United States Mail, postage prepaid, to

E. Lloyd Willcox, II
PO Box 1909
Florence, SC 29503-1909
Attorney for Appellants



December 19, 2012

John P. Williams, Jr. #06137
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MARION, SOUTH CAROLINA 29571

TELEPHONE (843) 423-7630
FACSIMILE (843) 407-3672

December 19, 2012

HONORABLE JENNY ABBOTT KITCHINGS
CLERK OF COURT
SC COURT OF APPEALS
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SC COURT OF APPEALS

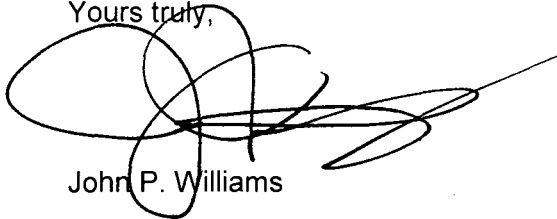
RE: Wells Fargo v Marion Amphitheatre, LLC Guarco. et al
Civil Case No. : 2011-CP-33-00016
Case Tracking No. 2012-211806

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of Respondent's Motion to Dismiss. I am also enclosing a Proof of Service and my check in the amount of \$25.00 for the filing fee.

With kind regards, I remain

Yours truly,



John P. Williams

cc: w/enclosure E. Lloyd Wilcox