

STATE OF SOUTH CAROLINA  
 COUNTY OF CHARLESTON  
 FLORIDA CITIZENS BANK,  
 Plaintiff,  
 versus  
 SUSTAINABLE BUILDING SOLUTIONS,  
 INC., JOHN PORRETTO, SR., SUE A.  
 PORRETTO, THE COUNTY OF  
 CHARLESTON, AND ISLAND  
 PRESERVATION PARTNERSHIP  
 Defendants.

) IN THE COURT OF COMMON PLEAS  
 ) IN THE NINTH JUDICIAL CIRCUIT  
 ) CIVIL ACTION NO. 2010-SP-103586

**RECEIVED**

MAY 09 2016

**SC Court of Appeals**

ORDER GRANTING MOTION  
 FOR RELIEF FROM JUDGMENT

BY JUDITH A. ARISTRONG  
 JUDGE OF COURT  
 2016 MAR 30 PM 4:00

**FILED**

**THIS MATTER** came before the Court on January 19, 2016, pursuant to Defendants' Notice of Motion for Relief From Judgment.

Defendants John Porretto, Sr., and Sue A. Porretto filed a motion dated October 30, 2015, seeking clarification of the Court's prior order dated April 11, 2011 and relief from judgment pursuant to Rule 60(b)(5) of the South Carolina Rules of Civil Procedure. The need for this motion is that the Plaintiff has domesticated this Court's prior order in the State of Texas and seeks to collect an alleged balance on the loan from Defendants, the guarantors of the loan. The legal question raised by the motion is whether Plaintiff has waived its right to a deficiency judgment against the guarantors, Defendants John and Sue Porretto.

This Court issued an order dated April 11, 2011, finding that Sustainable Building Solutions Inc., John Porretto and Sue Porretto were all liable for the debt to Florida

Citizens Bank. Legal title to the real estate collateral belonged to the corporate entity. Mr. and Mrs. Porretto were liable as guarantors. The order found that the Plaintiff may waive rights including demand for deficiency. The order found at paragraph 28 "Defendants reserve any rights they have pursuant to 29-3-680 through 780 (1976)." These sections refer to the rights of appraisal.

On April 26, 2011, Plaintiff filed a waiver of deficiency judgment. It reads simply: "Plaintiff hereby waives its right to *any* deficiency judgment in this action." [emphasis added]. Subsequently the notice of Master's Sale filed in June 2011 referred to the fact that the Complaint contained no waiver of deficiency judgment and accordingly scheduled the sale to be reopened in August 2011. However, on June 21, 2011, Attorney Catherine Bryan, representing Plaintiff, wrote to the Clerk of Court informing the clerk: "While the Master's Sale notice correctly notes that the Plaintiff did not waive its right in the deficiency judgment in the Complaint, Plaintiff expressly waived its right to any deficiency in the Waiver of Deficiency judgment filed April 26, 2011. *Accordingly, I would ask that the sale not be reopened on August 4.*" [emphasis added].

The Master's Sale took place on July 8, 2011. One improved parcel was purchased by Duncan and Brooks for consideration of \$1,075,000.00. The undeveloped lot was acquired by the Plaintiff Florida Citizens bank for \$90,000. The bank has since transferred title to that property on October 11, 2012 for \$70,000.

Perhaps because of the confusion created by the notice of Master's Sale, Attorney Bill Bundy, representing the Porrettos, filed a petition for appraisal rights on July 27, 2011. Attorney Catherine Bryan, representing Plaintiff, subsequently wrote to Mr. Bundy on August 3, 2011, requesting that he withdraw the petition for appraisal. Mr. Bundy replied

to Ms. Bryan on the same date informing her that he would not withdraw the petition for appraisal unless the Plaintiff waived the deficiency judgment against the Porrettos. The parties both designated appraisers. However, the Court did not designate a third appraiser. Also, the bidding was not reopened in accordance with section 15-39-730 governing circumstances where deficiency judgment is sought. The appraisal process did not proceed. Thus Defendants effectively withdrew their petition as requested by Plaintiff. The Court did not issue a specific deficiency judgment, as is done in cases where a deficiency judgment is sought. On August 15, 2011, Plaintiff issued a 1099-C to Sustainable Building Solutions, Inc. The 1099-C referred to a cancellation of debt in the amount of \$412,320.00.

Under all the circumstances of this case, it must be concluded that the Plaintiff waived its deficiency judgment against not only Sustainable Building Solutions, Inc., but also against John and Sue Porretto, as guarantors. Otherwise, the Plaintiff would have clarified in its filed waiver that it was waiving a deficiency judgment only as to Sustainable Building Solutions, Inc, instead of waiving *any* deficiency judgment. Otherwise, the sale would have been reopened on August 4, 2011. Plaintiff's memorandum argues that a creditor may sue on a foreclosure and independently make a claim against the guarantor. There is no doubt that this is correct. However, in this case the Plaintiff sued both on the foreclosure and the guarantors in one suit. The Court issued one order in which it held that Defendants had appraisal rights. That order was not appealed. When Plaintiff expressly waived its right to deficiency judgment and the appraisal rights were not ultimately pursued to conclusion, this effectively discharged the deficiency judgment as to the guarantors as well as the mortgagor.

The statute governing deficiency judgments is 29-3-660, which provides:



In actions to foreclose mortgages the court may adjudge and direct the payment by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage and *if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor the plaintiff may make such person a party to the action and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person and may enforce such judgment as in other cases.*

[emphasis added]. The statute gives the creditor the option of adding the guarantors as parties to the foreclosure proceeding. When the creditor does so, the guarantors have the same rights of appraisal that the mortgagor has. And the mortgagee may waive the right to seek a deficiency. Here the Plaintiff elected to join John and Sue Porretto as parties rather than bring a separate lawsuit to collect the debt in Texas, where the Porrettos reside. The Plaintiff expressly waived *any* deficiency judgment twice: in its April 26, 2011 filing and in its counsel's letter to the Clerk of Court on June 21, 2011.

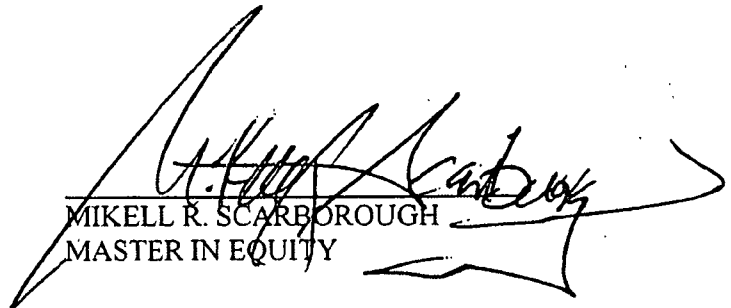
Rule 60 (b)(5) permits the court to relieve a party from a judgment if "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." Plaintiff's memorandum in opposition to the motion argues that the "equitable leg" of Rule 60(b)(5) does not apply to money judgments. However, Defendants are not relying on the last clause or "equitable leg" of Rule 60(b)(5). Instead they are asking for an order under Rule 60(b)(5) clarifying that the judgment against Defendants has been *released or discharged* by virtue of Plaintiff's express waiver.

The case of *American General Financial Services, Inc., v. Brown*, 376 S.C. 580, 658 S.E.2d 99 (2008), deals with a deficiency judgment in a foreclosure action. There the Supreme Court held that the Master-in-Equity did not have the discretion to deny a

deficiency judgment *unless it was expressly waived*. In this case, since the Plaintiff expressly waived the deficiency judgment, there is no legal mechanism to reinstate it. Accordingly, Defendants are entitled to an order pursuant to Rule 60(b)(5) clarifying that the judgment against them has been released or discharged. It is therefore

**ORDERED** that the judgment dated April 11, 2011, against Defendants John Porretto, Sr. and Sue A. Porretto is hereby released and/or discharged.

**IT IS SO ORDERED!**

  
MIKELL R. SCARBOROUGH  
MASTER IN EQUITY

At Charleston, South Carolina

This 29 day of March 2016



# LAW OFFICES OF PAUL E. TINKLER

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MAY 09 2016

April 11, 2016

**SC Court of Appeals**

Robert T. Lyles, Jr., Esquire  
Lyles & Lyles, LLC  
P.O. Box 773  
Charleston, SC 29402

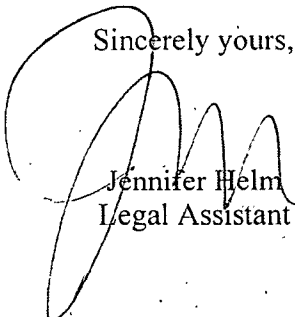
Re: Florida Citizens Bank v. Sustainable Building Solutions, Inc., etl  
Case: 2010-DR-10-3586

Dear Mr. Lyles:

Please find enclosed a filed copy of the Order Granting Motion for Relief from Judgment in the above-referenced matter.

With kind regards, I am

Sincerely yours,

  
Jennifer Helm  
Legal Assistant

/jh

Enclosures

cc: John & Sue Porretto