

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master In Equity

Case No. 2016-000971

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SEP 08 2016

SC Court of Appeals

Florida Citizens Bank, Appellant,

v.

Sustainable Building Solutions, Inc., John Porretto, Sr., Sue A. Porretto, The County of Charleston, and Island Preservation Partnership, Defendants

Of Whom John Porretto, Sr. and Sue Porretto are the Respondents.

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. The Guaranty Judgment is Separate and Distinct from a Deficiency Judgment.

Respondents the Poretos repeatedly confuse the issue before the Court by conflating the Guaranty Judgment (defined in earlier briefing) with the deficiency judgment resulting from the foreclosure sale. As noted previously, the Master's initial Order rendered not one but two separate orders. The first was for the foreclosure and sale of the property, which could have resulted in a deficiency judgment had that not been waived by the Bank. The second order of the Master was the Guaranty Judgment, which was entered immediately, before any sale of the property was to take place. In order for the Respondent's position to be correct, the two judgments must be considered to be only one judgment with the guarantors and foreclosure debtors equally sharing exactly the same rights and the same exposure to liability. Such a finding will require a fundamental change in South Carolina law relative to guarantors and will necessitate the elimination of any distinction between the obligations and rights of a guarantor separate and distinct from the underlying debtor.

Although there is no South Carolina case directly on point, several South Carolina cases reinforce the idea that guarantors do not receive the same protections as debtors. In *AMA Mgmt. Corp. v. Strasburger*, 420 S.E.2d 868, 872 (S.C. Ct. App. 1992), the court noted that if the debtor files a petition for bankruptcy, the guarantor is not discharged and does not receive the benefit of the automatic stay, thereby allowing the creditor to bring a separate state court action against the guarantors, even though a bankruptcy petition had been filed by the debtor. *Id.* In *Branch Banking & Trust Co. v. Brown*, 3:12-CV-1059-JFA, 2013 WL 2099488, at *3 (D.S.C. 2013), the court held that the parties in the federal action on the guaranties were not litigating substantially the same issues that were being litigated by the parties in a concurrent state court foreclosure

action. Finally, in *In re Southco, Inc.*, 168 B.R. 95, 101 (Bankr. D.S.C. 1994), the court stated that “the contract of guaranty is a separate undertaking and if the terms and conditions of the contract so state, a guarantor may assume a greater liability than that of the principal.”

II. The Bank’s Issuance of a 1099 to Sustainable Building Solutions, Inc. is Irrelevant to the Proceedings.

The Bank’s Issuance of form 1099 “cancellation of debt,” which is raised by the Poretos in their brief, is a red herring. First, the Poretos have not cited any authority to suggest that issuing a 1099 to one entity or person discharges a legal obligation — much less the legal obligation of another party. The 1099 was sent to Sustainable Building Solutions, Inc., the corporate debtor. While the 1099 may or may not have affected the tax liability of that company, the Poretos have not offered any evidence that it affected their tax liability or that any taxes were paid or by whom. Even if the Poretos incurred personal tax liability as the result of debt relief to the company, such liability is a matter between the Poretos and the IRS and is entirely unrelated to the valid debt the Poretos owe the Bank. (*See* Plaintiff’s Memo. of Law in Opp. to Defendant’s Motion for Relief from Judgment, p. 7).

III. The Appellant Raised the Issue of the Timeliness of the Poretos’ Motion for Relief from Judgment Before the Master and the Issue Is Preserved.

The Poretos are wrong when they assert that the timeliness of the Motion for Relief from Judgment was raised for the first time on appeal. Rule 60 of the South Carolina Rules of Civil Procedure is entitled “Relief from Judgment or Order.” Rule 60(b) sets forth five reasons for which a court, upon motion, may relieve a party from “a final judgment, order or proceeding.” *See* Rule 60(b) SCRPC. Rule 60(b) further provides that a motion for such relief shall be made within a reasonable time. *Id.* Appellant Florida Citizens Bank (the “Bank”) raised this argument to the Master in Equity in its Supplemental briefing, which was made at the Master’s request.

(See Plaintiff's Supp. Mem. in Opp. to Defendants John and Sue Poretto's Motion for Relief from Judgment, February 18, 2016, p. 8).

The Master's Order Granting Motion for Relief from Judgment holds that the Defendants are entitled to an order "pursuant to Rule 60(b)(5) clarifying that the judgment against them has been released or discharged." (Order filed March 30, 2016, p. 5). Because all motions made pursuant to Rule 60(b) must be made within a reasonable time, the Master's Order finding that the Defendants were entitled to relief is premised on a finding that the Poretos made the motion within a reasonable time. The Bank raised the issue, which was denied by the Master, and it is properly preserved.

The Poretos argue that the Bank has articulated no prejudice. The Bank is not required to argue prejudice and it is entitled to pursue its judgment in Texas for the length of time allowed by law. The Bank's actions in enforcing the judgment are only relevant in that they show, again in 2014, that the Poretos were fully aware that a South Carolina judgment against them had been entered in 2011, and they chose not to seek relief from it until October 2015. The Poretos, who bore the burden of presenting evidence entitling them to relief, have offered no answer as to why their motion was timely. Thus, the Motion for Relief was not made within a reasonable time. See *Perry v. Heirs at Law of Gadsden*, 357 S.C. 42, 48, 590 S.E.2d 502, 505 (Ct. App. 2003)(citations omitted) ("[A]lthough motions under Rule 60(b)(5) are not subject to the requirement that they be filed within one year of the judgment, they still must be filed within a reasonable time. While we are reluctant to proclaim that four years is a per se unreasonable period of time, [defendant], who bore the burden of showing the propriety of his motion, has failed to proffer an argument as to why we should find the four-year delay is reasonable in this case.").

CONCLUSION

The Bank never waived the Guaranty Judgment, which remained in full force and effect. The Bank respectfully requests that this Court reverse the trial court's Order Granting Defendants' Motion for Relief from Judgment.

Respectfully submitted,

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September 1, 2016

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PROOF OF SERVICE

I certify that I have served Appellant's Reply Brief by depositing a copy of it in the
United States Mail, postage prepaid, on September 1, 2016 to the counsel below:

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September 1, 2016



Lee Anne Walters

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September 1, 2016

Via US Mail

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: *Florida Citizens Bank vs. Sustainable Building Solutions, Inc. et al.*
Appellate Case Number: 2016-000971

Dear Ms. Kitchings:

Enclosed for filing with regard to the above-referenced matter, please find two (2) copies of Appellant Florida Citizens Bank's Reply Brief with Proof of Service. Please return a clocked copy to me in the envelope provided.

By copy of this letter, I am providing the enclosure to counsel for the Respondent by mail as set forth in the Proof of Service included with the Brief.

With kindest regards, I remain

Very truly yours,

LYLES & LYLES, LLC

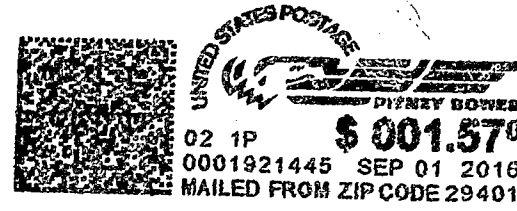
Robert T. Lyles, Jr. / by Phatters

Robert T. Lyles, Jr.

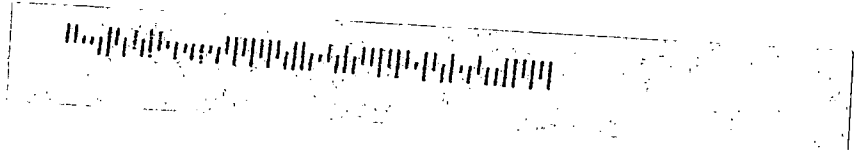
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cc: Paul E. Tinkler, Esq.

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