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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

**RECEIVED**

NOV 04 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.

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**APPELLANT'S FINAL BRIEF**

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### STATEMENT OF THE ISSUES

Did the trial court err in concluding that the Bank released its rights against the guarantors because the facts did not reasonably support such a conclusion?

Did the trial court err in holding that a waiver of a deficiency judgment from a mortgage foreclosure released the Bank's rights to pursue a guaranty judgment against a guarantor?

Did the trial court err in granting the Poretos' Motion for Relief from Judgment pursuant to Rule 60(b) because the motion was not filed in a reasonable time?

### STATEMENT OF THE CASE

This Appeal rises from the Master in Equity's order granting relief from a judgment pursuant to Rule 60(b)(5) of the South Carolina Rules of Civil Procedure. On April 28, 2010, the Appellant Florida Citizens Bank (the "Bank") filed an action for foreclosure of two lots on Dewees Island in Charleston County, against Sustainable Building Solutions, Inc., which owned the lots and, through its President John Porretto, signed the notes and mortgages encumbering them. In the same case, the Bank pled an action for breach of guaranty as to Defendants John P. Porretto, Sr. and Sue A. Porretto. (R. pp. 000074-000119). A hearing was held on March 22, 2011, and no appearance was made on behalf of Defendants Sustainable Building Solutions, Inc., John P. Porretto, Sr., and Sue A. Porretto. The Court issued an Order of Judgment and Foreclosure and Order of Judgment for Suit on Guaranty on April 13, 2011. (R. pp. 000003-000016).

Pursuant to the Foreclosure Judgment, the property was sold at a foreclosure sale. The Plaintiff filed a Waiver of Deficiency Judgment on April 26, 2011 (R. pp. 000120-000121).

On July 27, 2011, the Porrettos filed a Petition for Order of Appraisal and an Order of Appraisal was issued on July 28, 2011 (R. pp. 000123-000126)(R. pp. 000030). In response, on

August 11, 2011, Plaintiff filed Plaintiff's Designation of Appraiser and Motion for Attorneys' Fees and Costs (R. pp. 000127-000137). The appraisal process was never completed.

In October 2014 the Bank enrolled a certified copy of the South Carolina judgment in Texas. A year later, on October 30, 2015, John Porretto, Sr. and Sue Porretto (the "Porrettos") filed a Motion for Relief from Judgment seeking an order cancelling the Judgment against them. The court held a hearing on the motion on January 19, 2016. At the hearing Judge Scarborough requested additional briefing from the parties. The Porrettos and the Bank each filed an additional memorandum (R. pp. 000199-000373). On March 30, 2016, Judge Scarborough issued an issued a formal order granting Defendants John and Sue Porretto's Motion for Relief from Judgment. (R. pp. 000066-000072). The Bank received written entry notice of the Order on April 11, 2016.

This Appeal follows. The Bank filed a Notice of Appeal on May 4, 2016, and requested a copy of the transcript from the January 19, 2016 hearing, which was received on June 9, 2016.

#### **STATEMENT OF FACTS**

Sustainable Building Solutions, Inc., purchased two lots on Dewees Island in Charleston County. In 2005, Florida Citizens made a commercial loan to Sustainable Building Solutions evidenced by a promissory note and a mortgage covering the property described in the Complaint and known as Lot 95 and Lot 124. The parties modified the promissory note multiple times. On April 15, 2009, John P. Porretto, Sr., individually, and Sue Porretto, individually, each executed and delivered to the Bank a Guaranty (the "Guaranties" dated April 15, 2009) guaranteeing Sustainable Building Solutions, Inc.'s debt to the Bank, which at the time included a principal balance of over \$1.5 million. (R. pp. 000112-000118). After Sustainable Building Solutions defaulted on the Note, the Bank filed a foreclosure action and in the same lawsuit filed

an action for breach of the guaranty. The trial court held a hearing, which the Porretos did not attend, and issued an Order of Judgment and Foreclosure and Order of Judgment for Suit on Guaranty on April 13, 2011 (R. pp. 000003-000029), which included the following language regarding what we will be referring to as the "Foreclosure Judgment":

IT IS FURTHER ORDERED, ADJUGED AND DECREED that Plaintiff have deficiency judgment against the Defendants Sustainable Building Solutions, Inc., John P. Porretto, Sr., individually, and Sue A. Porretto, individually, jointly and severally, pursuant to S.C. Code Ann. Section 29-3-660 (1976), should the proceeds of sale fail to pay the total debt owed to the Plaintiff, together with the costs and expenses of this action and the costs of sale, which judgment shall be entered without further notice or hearing.

(R. pp. 000012).

Importantly, the Order contained a second, separate order of judgment against the Porretos for what will be referred to as the "Guaranty Judgment":

As a direct and proximate result of the breach of the Guaranties, the Defendants: John P. Porretto, Sr., individually, and Sue A. Porretto, individually, have an unlimited liability to the Plaintiff in the amount of \$1,676,793.78 and for which sums they are truly indebted to Plaintiff, and therefore,

IT IS ORDERED that the Plaintiff Florida Citizens Bank be awarded a judgment against the individual Defendants John P. Porretto, Sr., and Sue A. Porretto, jointly and severally, the sum of One Million Six Hundred Seventy-Six Thousand Seven Hundred Ninety-Three and 78/100's Dollars (\$1,676,793.78).

(R. pp. 000015).

Pursuant to the Foreclosure Judgment, the property was sold at a foreclosure sale on April 13, 2011. Thane Duncan and Maria Brooks purchased the improved Lot 124 for \$1,075,000.00 and the Bank purchased the undeveloped lot, Lot 95 for \$90,000. The Bank filed a Waiver of Deficiency Judgment on April 26, 2011. (R. pp. 000120-000121). Despite the waiver of deficiency, in June, 2011, the Court notified the parties that it was going to re-open the sale. Upon receipt of that notification, on June 21, 2011, Catherine Bryan (counsel for the Bank)

sent a letter advising or reminding the Court that the right to a deficiency judgment had been previously waived. Counsel for the Porrettos was copied on that letter. The second sale did not occur.

Subsequently, clearly recognizing a guarantors' right to an appraisal pursuant to § 29-3-680, on July 27, 2011, the Porrettos filed a Petition for Order of Appraisal and an Order of Appraisal was issued on July 28, 2011. (R. pp. 000123-000126). In response, the Bank filed Plaintiff's Designation of Appraiser and Motion for Attorneys' Fees and Costs indicating it intended to defend its interests and pursue the recovery of all costs and fees associated with the appraisal pursuant to its rights under the Guaranties. (R. pp. 000127-000137).

There was an exchange of correspondence between counsel as part of the appraisal process, including a letter from Ms. Bryan, as counsel for the Bank to Mr. Bundy, counsel for the Porrettos dated August 3, 2011. (R. pp. 000405). In this letter, Ms. Bryan clearly conveyed her understanding that the Bank had a judgment against the Porrettos and suggested that because the Porrettos represented that they were judgment proof, the appraisal should be abandoned. Mr. Bundy, on behalf of the Porrettos, electronically mailed a response, also indicating his understanding that the Bank had a judgment (although he incorrectly refers to it as a deficiency judgment) against the Porrettos individually. (R. pp. 000406). However, nothing further occurred with respect to the original appraisal process that the Porrettos began.

In October 2014, the Bank secured a certified copy of the judgment and enrolled it in Texas. (R. pp. 000032-000065). The Notice was mailed to the Porrettos at 2640 Arbuckle Street, Houston Texas. In October 2015, the Porrettos, through separate counsel, sought relief from the South Carolina Judgment pursuant to Rule 60(b)(5). (R. pp. 000138-000140)

## STANDARD OF REVIEW

A party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the requested relief. *Perry v. Heirs at Law of Gadsden*, 357 S.C. 42, 46-47, 590 S.E.2d 502, 504 (Ct. App. 2003). On review, this Court is limited to determining whether the trial court abused its discretion in granting or denying such a motion. *Id.* "An abuse of discretion occurs when a court's order is controlled by an error of law or there is no evidentiary support for the court's factual conclusions." *Wilson v. Dallas*, 403 S.C. 411, 425, 743 S.E.2d 746, 754 (2013); *see also State v. Corey D.*, 339 S.C. 107, 118, 529 S.E.2d 20, 26 (2000) (stating an abuse of discretion may be found if the conclusions reached by the lower court are without reasonable factual support).

## ARGUMENT

The Order Granting Motion for Relief from Judgment is in error because it contains errors of law and factual conclusions that the evidence does not support. As an initial matter, the Order misstates the issue before the court. The issue is not whether or not the Bank waived a deficiency judgment against the guarantors John and Sue Porretto because there was no "deficiency judgment" against the Porrettos as guarantors. The issue is whether or not the Porrettos have presented evidence that the Bank released the Guaranty Judgment. They did not. Waiver of a deficiency judgment from the Foreclosure Judgment does not constitute a release of the Bank's right to pursue a judgment against the Guarantors.

### **I. In Error, the Court Confused the Foreclosure Judgment and the Guarantee Judgment and Concluded Through Speculation that the Bank Deceived the Guarantors and the Court -- A Conclusion the Evidence Does Not Support.**

The Guaranty Judgment was separate and distinct from the deficiency judgment, which resulted from the sale as part of the Foreclosure Judgment. The Guaranty Judgment was the

result of a cause of action separate from the foreclosure action. The fact that both actions were successfully litigated in one lawsuit does not change the nature of the actions. The essential fact that the action on the guaranties, which resulted in the Guaranty Judgment, was separate and distinct from the foreclosure action, which resulted in the deficiency judgment, is fundamentally critical to the matter before this Court.

We know that the Foreclosure Judgment and the Guaranty Judgment were separate and distinct — and that all of the parties understood that the obligations and judgments were distinct — for several reasons. First, the Guaranties themselves contemplate that the obligations imposed would survive the foreclosure of the property or the release of the borrower:

I am unconditionally liable under this Guaranty, regardless of whether or not you pursue any of your remedies against the Borrower, against any other maker, surety, guarantor or endorser of the debt or against any Property... **I will remain obligated to pay on this Guaranty even if any other person who is obligated to pay the Debt, including the Borrower, has such obligation discharged in bankruptcy, foreclosure, or otherwise discharged by law.** [Emphasis added.]

(R. pp. 000112). Therefore, the Guaranties themselves informed the Porrettos that the obligation was intended to be separate from the obligation of the corporate borrower.

Second, the pleadings contemplate two separate causes of action resulting in two separate judgments. The Complaint states two causes of action: (1) Foreclosure of the Mortgage as to Defendant Sustainable Building Solutions and (2) Breach of Guaranty as to Defendants John P. Porretto and Sue A. Porretto. (R. pp. 000074-000081). The Order of Judgment and Foreclosure and Order of Judgment for Suit on Guaranty filed on April 13, 2011 includes two separate judgments. At Page 7 the April 13, 2011 Order begins the heading “AS TO THE FORECLOSURE” which includes the following at Page 10, Paragraph 10:

IT IS FURTHER ORDERED, ADJUGED AND DECREED that Plaintiff have deficiency judgment against the Defendants Sustainable Building Solutions, Inc., John P. Porretto, Sr., individually, and Sue A. Porretto, individually, jointly and severally, pursuant to S.C. Code Ann. Section 29-3-660 (1976), should the proceeds of sale fail to pay the total debt owed to the Plaintiff, together with the costs and expenses of this action and the costs of sale, which judgment shall be entered without further notice or hearing.

(R. pp. 00012).

Importantly, the April 13, 2011 Order contained a second, separate order of judgment against the Porrettos, under the heading "AS TO THE SUIT ON THE GUARANTY" for what will be referred to as the "Guaranty Judgment":

As a direct and proximate result of the breach of the Guaranties, the Defendants John P. Porretto, Sr., individually, and Sue A. Porretto, individually, have an unlimited liability to the Plaintiff in the amount of \$1,676,793.78 and for which sums they are truly indebted to Plaintiff, and therefore,

IT IS ORDERED that the Plaintiff Florida Citizens Bank be awarded a judgment against the individual Defendants John P. Porretto, Sr., and Sue A. Porretto, jointly and severally, the sum of One Million Six Hundred Seventy-Six Thousand Seven Hundred Ninety-Three and 78/100's Dollars (\$1,676,793.78).

(R. pp. 000015).

Finally, the evidence before the Court supports the conclusion that all parties including the Porrettos were well-aware that the Bank intended to pursue the Guaranty Judgment against the Porrettos as Guarantors. In fact, there is clear and convincing evidence before the Court that the Porrettos knew and understood that the Guaranty Judgment was in effect long after the Bank waived its right to a deficiency judgment. As noted, the deficiency was waived in April, 2011, a fact that was reiterated in the letter from Catherine Bryan to the Court in June, 2011<sup>1</sup>. A month later, on July 27, 2011, the Porrettos filed the Petition for Appraisal, recognizing their right as

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<sup>1</sup> Contrary to the Order, the letter was not a second waiver of anything, but merely Ms. Bryan's effort to point out to the Court that the deficiency had been waived in April. The Waiver of Deficiency is plain on its face and does not refer to the Guaranty Judgment.

debtors on the Guaranty Judgment. The Porrettos did not make a request that the Guaranty Judgment be marked satisfied or indicate that it had been release or waived. They did not seek clarification from the Court via a Rule 59 or 60 motion. Instead, they merely attempted to reduce the amount of the existing Guaranty Judgment through the appraisal process provided in §29-3-680, to which they had a right.

The only evidence in the case suggests that the reason the Porrettos abandoned their appraisal rights is reflected in Catherine Bryan's letter to Bill Bundy dated August 3, 2011. (R. pp. 000405). The Porrettos were insolvent and unable to satisfy the Guaranty Judgment (or defend the foreclosure case, for that matter). Rather than pay for the appraisal process, which they began, and expose themselves to even greater liability in the form of the Bank's attorneys' fees, the Porrettos never completed the appraisal process, abandoning it instead. Though we do not know the Porrettos' state of mind, they must have assumed that the matter would not be of further consequence to them. After the Bank filed an action to pursue judgment in Texas, and the Porrettos appear to have the funds to satisfy the debt, they attempted to re-write history and say that the Guaranty Judgment, for which they exercised their appraisal rights, had, in actuality, been "released" or "waived" months before. However, Mr. Bundy's response (as the Porrettos' counsel) to Ms. Bryan's letter confirms again that the Porrettos knew, several months after what the trial court determined was a complete and total waiver, that the Bank did not intend to and had not waived any judgment against the Poretos as guarantors. (R. pp. 000406). Specifically, as the Order Granting Relief from Judgment notes, in response to Ms. Bryan's August 3, 2011 letter in which she demanded that the Poretos abandon their appraisal rights or risk attorneys' fees added to the judgment, counsel for the Porrettos refused "unless the Plaintiff waived the deficiency against the Porrettos." (R. pp. 000069).

In its Order the trial court merely speculates, in the absence of any evidence, that the Porrettos' exercise of appraisal rights was simply a mistake.<sup>2</sup> (R. pp. 000069-000070). It defies all logic to conclude that the Bank had waived all rights to pursue judgment against the Porrettos as of April 2011, yet acknowledge that after this date, the Porrettos pursued appraisal rights and demanded that they be released from judgment. Although counsel for the Porrettos and the Court conflate the terminology, the parties were well-aware, until the Porrettos' most recent motion, that the Bank intended to waive its rights to a "deficiency judgment," yet retain its rights to pursue the Porrettos as guarantors pursuant to the Guaranty Judgment.

**II. The Court Erred in Concluding That the Waiver of Deficiency Judgment Released the Judgment on the Guaranties.**

The waiver of the deficiency judgment, and the fact that the sale did not remain open as a result does not release the Bank's valid Guaranty Judgment and right to pursue it. Rule 60(b)(5), SCRPC, provides that judgments may be set aside if "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it has been based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." The rule is based on the historical power of an equity court to modify its decree "in light of subsequent conditions." *Perry v. Heirs at Law of Gadsden*, 357 S.C. 42, 48, 590 S.E.2d 502, 505 (Ct. App. 2003).

The waiver of deficiency judgment did not also release or satisfy the Guaranty Judgment. The Order cites the case of *American General Financial Services, Inc. v. Brown*, 376 S.C. 580, 658 S.E.2d 99 (2008), which does not support such a finding. In *American General Financial Services*, the Master-in-Equity found that it was within the court's equitable powers in a

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<sup>2</sup> The Poretos did not submit any evidence at all on this point in support of their motion. The "mistake" notion was simply suggested by the Poretos' new counsel, Mr. Tinkler, who was not a witness to any of this.

mortgage foreclosure action to deny the Mortgagee's request for a deficiency judgment when Mortgagee specifically demanded the deficiency judgment and the sale was insufficient to satisfy the debt. *American General Financial Services, Inc. v. Brown*, 376 S.C. at 582. The Supreme Court reversed and held that the Master did not have the discretion to deny the Mortgagee's request for a deficiency. *Id* at 583.

The Bank referred the Master to the Supreme Court of Wisconsin's decision in *Bank Mut. V. S.J. Boyer Construction Company*, 785 N.W.2d 462 (Wis. 2010). South Carolina law, like Wisconsin law, treats the liability of a guarantor as separate and distinct from the liability of the borrower, arising not from the debt itself but from the terms of the guaranty contract. See *Citizens and Southern Nat. Bank of South Carolina v. Lanford*, 443 S.E.2d 549, 544 (S.C. 1994).

### **III. The Rule 60(b)(5) Motion Was Not Filed In a Reasonable Time.**

Rule 60(b)(5), SCRCF, provides that judgments may be set aside if "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it has been based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." The rule is based on the historical power of an equity court to modify its decree "in light of subsequent conditions." *Perry v. Heirs at Law of Gadsden*, 357 S.C. 42, 48, 590 S.E.2d 502, 505 (Ct. App. 2003).

Although rule 60(b)(5) motions are not required to be filed within one year of the judgment, they still must be filed within a reasonable time. The Order of Judgment and Foreclosure and Order of Judgment for Suit on Guaranty was filed on April 13, 2011. As outlined above, the Porrettos were well-aware that the Bank intended to pursue judgment against them individually when the Poretos pursued appraisal rights. When the judgment against the Porrettos was enrolled in Texas, the Porrettos received notice of it, on October 28, 2014. This

motion was not filed until October 30, 2015, thus it was not filed within a reasonable time period. *See id.*

### CONCLUSION

For the reasons set forth above, the Bank respectfully requests that this Court reverse the trial court's Order Granting Motion for Relief from Judgment.

Respectfully submitted,

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November 1, 2016

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APPEAL FROM CHARLESTON COUNTY  
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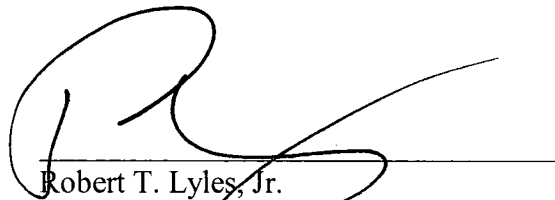
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Of Whom John Porretto, Sr. and Sue Porretto are the Respondents.

Certificate of Counsel

The undersigned hereby certifies that the Appellant's Final Brief complies with Rule 211(b), SCACR.

November 1, 2016



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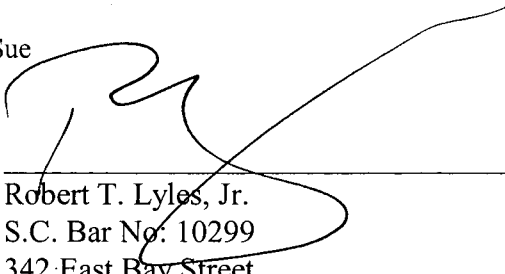
Of Whom John Porretto, Sr. and Sue Porretto are the Respondents.

PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant on counsel for the Respondent by depositing a copy in the United States Mail, First Class postage prepaid, this 1st day of November, 2016, addressed to the following:

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