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

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 A. Porretto are the.....Respondents.

BRIEF OF RESPONDENTS

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STANDARD OF REVIEW

Whether to grant or deny a motion under Rule 60(b) is within the sound discretion of the trial judge. *Coleman v. Dunlap*, 306 S.C. 491, 413 S.E.2d 15, (1992). On review, the appellate court is limited to determining whether the trial court abused its discretion in granting or denying such a motion. *Saro Invs. v. Ocean Holiday P'ship*, 314 S.C. 116, 441 S.E.2d 835 (Ct.App.1994). Where, as here, a finding of fact is involved (i.e. the Bank's intent to waive a deficiency judgment), an abuse of discretion may be found only if 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).

ARGUMENT

I. THERE IS ABUNDANT EVIDENCE TO SUPPORT THE MASTER'S FACTUAL DETERMINATION THAT THE BANK INTENDED TO WAIVE ITS RIGHT TO SEEK A DEFICIENCY JUDGMENT.

Appellant contends that the Master was confused and that he concluded by speculation that the "Bank had deceived the Guarantors and the Court." It first must be observed that Master did not find that the Bank deceived anybody. Instead, he found simply that the Bank had waived its right to seek a deficiency judgment by filing a document entitled "Waiver of Deficiency Judgment" affirming that "Plaintiff hereby waives its right to any deficiency judgment in this action." (R. pp. 120, 403). That statement is simple and unambiguous. Even if somehow the Bank's express written waiver of any deficiency judgment could be deemed ambiguous, any ambiguity should be construed against the Bank. *See Duncan v. Little*, 384 S.C. 420, 682 S.E.2d 788 (2009).

The Bank argues that the foreclosure judgment and the guarantee judgment are independent of each other and the bank never intended to waive the deficiency judgment as to John and Sue Porretto. The Bank contends: "The essential fact that the action on the guarantees, 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." [Emphasis added] Appellant's Brief p. 6. This assumes that there was a deficiency judgment, but there was not, *because it was waived.* So it is fundamentally critical to understand that the Master never issued a deficiency judgment because *the Bank had waived it* and there is nothing in the record to indicate that the Bank ever went back to the Master to seek a deficiency judgment. In fact, Appellant's brief acknowledges that when the Master indicated he was going to leave the bidding open, the Bank's attorney sent a letter dated June 21, 2011, reiterating that the deficiency judgment was waived and accordingly the bidding should not be left open and a second auction should not be held. (R. pp. 401-403). The record reflects that a sale subsequently took place on July 5, 2011. The Bank acquired one of the properties and the other property was sold to a third party. The Master executed deeds to both properties on July 8, 2011. The bidding did not remain open and the second auction did not take place on August 4, 2011, as would have been required in the absence of a waiver of deficiency judgment.

Appellant's argument ignores the fact that guarantors have the same rights as the debtors in a foreclosure action when a deficiency judgment is sought. South Carolina Code § 29-3-680 applies to "debtors, makers, borrowers, and/or *guarantors*." They have the right to have the property appraised if requested within thirty days after a sale, and to have the bidding remain open and a second auction held thirty days after a sale. The procedure for appraisal rights is spelled out in § 29-

3-680 and for judicial foreclosure sales is set forth in § 15-39-720. The only way the Porrettos could have waived these rights is by signing a written waiver as set forth in § 29-3-680 or by failing to invoke those rights within thirty days of the sale. The only way that the appraisal rights and second auction procedures can be avoided by a foreclosure plaintiff is by a waiver of a deficiency judgment. This is, of course, because if the bank is not seeking any money other than that returned by the sale of the collateral, the "debtors, makers, borrowers, and/or guarantors" are in no position to assert that the property did not return what it was worth.

Apparently, given the confusion over the waiver of the deficiency judgment, the Porrettos' attorney initially asked for their appraisal rights to be invoked. But the Master (clearly understanding that a waiver of deficiency had taken place and that he had in fact executed deeds to both properties on July 8, 2011) did not subsequently reopen the bidding or hold a second auction as is required by § 15-39-720. Nor did he complete the appraisal panel by appointing a third appraiser as is required by § 29-3-710. Nor did he issue an order quantifying the deficiency judgment, as is the normal practice. These steps would have had to be taken if there was to be a deficiency judgment. Subsequently, on August 15, 2011, the Bank sent a Form 1099 to the debtor declaring "cancellation of debt." (R. p. 140) Such a declaration naturally had tax consequences for both the creditor and the debtor, the former receiving a benefit and the latter a detriment. The guarantors, as owners of the Subchapter S Corporation have this tax detriment flow through to their returns. Under all these circumstances, it is clear that the Bank waived its deficiency judgment and that is what the Master concluded in 2011.

Everyone involved in the transaction relied on that for years until the Bank in 2014 decided to seek to collect the "revived" debt in Texas. After reviewing the 2011

record, the Master again concluded that the Bank had waived the deficiency judgment. The Bank cannot appeal this factual finding by the judge who had to make a determination of what was in his mind five years previously when he had handled the matter totally consistent with a waiver of deficiency judgment. If the Bank had intended in 2011 to maintain its right to seek a deficiency judgment against the Porrettos as guarantors, it could have contacted the Master and asked that the appraisal process be completed and that the deficiency judgment be quantified and documented. There is nothing in the record to indicate that the Bank did that or that it took any action or expressed any intent inconsistent with a waiver. In fact, its issuance of a form 1099 "cancellation of debt," expressed its intent to write the debt off. There is abundant evidentiary support for the Master's finding of a waiver. Accordingly, the Master did not abuse his discretion in finding that the Bank had waived any deficiency judgment.

II. THE MASTER CORRECTLY CONCLUDED THAT A WAIVER OF THE DEFICIENCY JUDGMENT RELEASED THE GUARANTORS.

Appellant relies on *Citizens and Southern Nat. Bank of South Carolina v. Lanford*, 313 S.C. 540, 443 S.E.2d 549 (1994). That case stands for the proposition that the liability of a guarantor arises from a different agreement than does the underlying debt. That is a correct proposition, but it does not address the issue in this case. The question here is whether, by waiving a deficiency judgment against the debtor in a foreclosure action, the bank also waived a deficiency judgment against the guarantors. In *Lanford,* the guarantor sought to avoid liability and attempted to invoke appraisal rights. The South Carolina Supreme Court observed, however, that the *Lanford* case was not a foreclosure case and the guarantor did not have appraisal rights. The instant case, in contrast, *is* a foreclosure case. The statutory scheme as

discussed above provides that when a creditor pursues the equitable remedy of foreclosure, "the debtors, makers, borrowers and/or *guarantors*" have the rights of appraisal and the right to rely on a thirty-day bidding process and second auction before a judicial sale takes place. They have those rights unless the creditor waives a deficiency judgment. There is no way, five years after the fact, to go back and reinstate those rights. There was nothing in the Bank's written waiver document or its subsequent conduct – until it filed proceedings in Texas over three years after the sale – indicating that it intended its waiver to apply only to the debtor and not the guarantor. In fact, the Bank issued a "cancellation of debt" document and reaped the tax benefit flowing from it and the Porrettos incurred the corresponding tax detriment in addition to the detriment of not being allowed their statutory appraisal rights. Given all of these undisputed facts, the Master correctly concluded that the deficiency judgment against the Porrettos, as guarantors, had been waived.

Moreover, from a review of the statutes regarding foreclosure actions and sales, it would appear to be impossible to waive the deficiency judgment against the debtor, but not against a co-defendant guarantor. Appellant cites no precedent to support its contention that such a result is legally possible. *Lanford*, which was not a foreclosure case, does not support Appellant's case.

III. BECAUSE APPELLANT DID NOT RAISE THE ISSUE OF THE "REASONABLENESS OF TIME" FOR THE FILING OF THE RULE 60(b)(5) MOTION, IT CANNOT RAISE THE ISSUE ON APPEAL.

Appellant raises for the first time on appeal the question of reasonableness in the timing of the filing of the Rule 60(b)(5) motion. It asserts, without elaboration, that the one-year interval between the filing of the judgment in Texas and the filing of the 60(b)(5) motion in South Carolina is not a reasonable amount of time. However,

the Bank did not raise this issue before the Master. Accordingly, it is not preserved for appeal. It is axiomatic that issues not raised and ruled upon by the trial judge may not be raised for the first time on appeal. *Creech v. South Carolina Wildlife and Marine Resources Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997).

Even if the Bank had raised the issue timely, the timing of the motion was reasonable. The Bank has articulated no prejudice resulting from a one-year interval between the Texas filing and the filing of the motion in South Carolina. The Bank itself waited over three years from the date of the South Carolina judgment to the filing of proceedings in Texas.

CONCLUSION

Respondents respectfully request that the Master's order finding that Appellant waived its right to seek a deficiency judgment against them be affirmed.

Respectfully submitted,

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September 27, 2016

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Respondents' Final Brief complies with Rule 211(b), SCACR, and that no matter has been included which is irrelevant to this appeal.

September 27, 2016

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PROOF OF SERVICE

I certify that I have served the Final Brief of Respondent on the above named Appellant, by depositing a copy of same in the United States Mail, postage prepaid, on October 5, 2016, addressed to its attorney of record, Robert T. Lyles, Jr., Esquire, Lyles & Lyles, LLC, P.O. Box 773, Charleston, SC 29402.

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October 5, 2016