

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

JUL 02 2018

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 PETITION FOR REHEARING

Robert T. Lyles, Jr.  
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Attorneys for Appellant

Other Counsel of Record

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TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS:

This Petition for Rehearing is controlled by SCACR, 221 and 240. Rule 221 provides as follows:

**(a) Rehearing.** Petitions for rehearing must be actually received by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court. *A petition for rehearing shall be in accordance with Rule 240, and shall state with particularity the points supposed to have been overlooked or misapprehended by the court.* No return to a petition for rehearing may be filed unless requested by the appellate court. Ordinarily, however, rehearing will not be granted in the absence of such a request. No petition for rehearing shall be allowed from an order denying a petition for a writ of certiorari under Rule 242, SCACR.

**(b) Remittitur.** The remittitur shall contain a copy of the judgment of the appellate court, shall be sealed with the seal and signed by the clerk of the court, and unless otherwise ordered by the court shall not be sent to the lower court or administrative tribunal until fifteen (15) days have elapsed (the day of filing being excluded) since the filing of the opinion, order, judgment, or decree of the court finally disposing of the appeal. If a petition for rehearing is received before the remittitur is sent, the remittitur shall not be sent pending disposition of the petition by the court. Where a petition for rehearing has been denied, the Court of Appeals shall not send the remittitur to the lower court or administrative tribunal until the time to petition for a writ of certiorari under Rule 242(c) has expired. If a petition for writ of certiorari is filed, the Court of Appeals shall not send the remittitur until notified that the petition has been denied. If the writ is granted by the Supreme Court, the Court of Appeals shall not send the remittitur.

**(c) Rehearing of Motions.** *The appellate court will not entertain petitions for rehearing on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding a party's appeal.* (Emphasis added)

This Petition is based upon the Court of Appeals' failure to address three issues distinctly raised by Appellant that were overlooked or misapprehended, or both, in the Court of Appeals' Per Curiam Order filed June 13, 2018. Those three issues are set forth with particularity below. The Court's action on this petition will have the effect of finally deciding Appellant's appeal.

Appellant's appeal focused squarely on three factual and legal errors by the Master in Equity. The first was the Master in Equity's failure to distinguish between two different

judgments obtained by Appellant. One of the two judgments was for foreclosure, to which deficiency judgment rules applied. The second distinct judgment was for judgment on a guaranty agreement. Deficiency judgment rules, which were the basis of the Master's order, do not apply to the guaranty judgment. Because he failed to distinguish between the two distinct judgments, the Master failed to assess waiver of the guaranty judgment independent of the foreclosure judgment. The Court of Appeals' Per Curiam Order fails to discuss or rule on that issue.

Similarly, the Master modified the prior judgment (which had been in favor of Appellant) under Rule 60(b)(5) four years after it was entered, effectively ruling, without evidentiary support, that Appellant's waiver of a deficiency judgment was also waiver of the guaranty judgment. In so ruling, the Master erroneously relied upon *American General Financial Services v. Brown*, 376 S.C. 580, 658 S.E.2d 99 (2008), which does not support a finding that waiver of a deficiency is also a waiver of a guaranty judgment. The Master disregarded persuasive authority provided to it which holds that deficiency and guaranty judgments are distinct (as they clearly were in the Master's initial Order). *Bank Mutual v. S.J. Boyer Construction Co.*, 785 N.W. 2d 462 (Wis. 2010). He, therefore, erroneously applied the law.

As to the issue of waiver with respect to the guaranty judgment, the Master's Order was also without evidentiary support.

“Waiver is a voluntary and intentional abandonment or relinquishment of a known right. It may be expressed or implied by a party's conduct, and it may be applied to bar a party from relying on a statute of limitations defense.” *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994) (citation omitted). “An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable.” *Lyles v. BMI, Inc.*, 292 S.C. 153, 158–59, 355 S.E.2d 282, 285 (Ct.App.1987). The party asserting waiver has the burden of proof. *Provident Life & Accident Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 929 (Ct.App.1994). “Generally, the party claiming waiver must show that the party

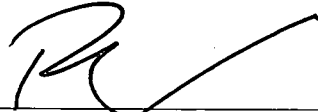
against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended.” *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 387–88 (1992).

*SPUR at Williams Brice Owners Ass'n, Inc. v. Lalla*, 415 S.C. 72, 91, 781 S.E.2d 115, 125 (Ct. App. 2015). There were no facts in this case that support a conclusion that Appellant waived the guaranty judgment. The Per Curiam Order of the Court does not discuss or rule on these appealed issues.

Finally, Appellant contended that the filing of the Rule 60(b)(5) motion by the debtors was not made within a reasonable time (four years after the initial entry of judgment and the debtors were well aware of the entry of the judgment). There was no factual showing or ruling concerning reasonableness of the timing of the Rule 60(b)(5) motion, which was an abuse of discretion by the Master. While the Court of Appeals’ Per Curiam Order recognizes the standard of review, it fails to assess and rule upon the reasonableness of the timing of the Rule 60(b)(5) motion which was raised by Appellant.

Because the Per Curiam Order does not address the three factual and legal errors by the Master in Equity, which were raised on appeal, Appellant petitions the Court for a rehearing.

Respectfully submitted,



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June 28, 2018

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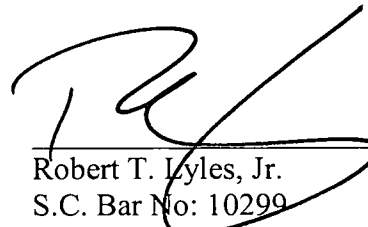
Sustainable Building Solutions, Inc., John Porretto, Sr., Sue A. Porretto, The County of Charleston,  
and Island Preservation Partnership, Defendants,

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

PROOF OF SERVICE

I certify that I have served the Appellant's Petition for Rehearing on counsel for the Respondent by depositing a copy in the United States Mail, First Class postage prepaid, this 28<sup>th</sup> day of June, 2018, addressed to the following:

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, SC 29211

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

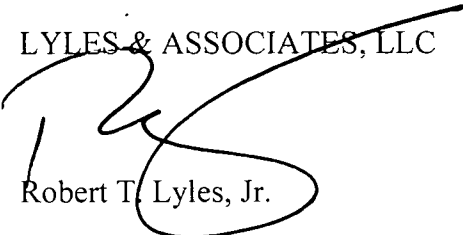
Dear Clerk:

Enclosed please find the original and seven (7) copies each of Appellant's Petition for Rehearing and Proof of Service regarding the above-referenced matter, along with this firm's check in the amount of \$25.00 to cover the required filing fee. I would appreciate your filing these pleadings and returning one (1) file-stamped copy of each to me in the envelope provided for your convenience.

Should you have any questions concerning the enclosed, please do not hesitate to give me a call. Thank you, and with kindest regards, I remain

Very truly yours,

LYLES & ASSOCIATES, LLC

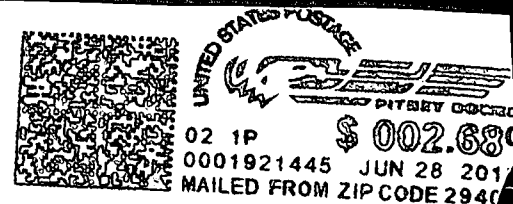
  
Robert T. Lyles, Jr.

RTL/cw

Enclosures

cc: Paul Tinkler, Esquire

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First Class Mail

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