

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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S.C. SUPREME COURT

Florida Citizens Bank, Petitioner,

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.

PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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CERTIFICATION REGARDING PETITION FOR REHEARING

Counsel for Petitioner hereby certifies that a Petition for Rehearing was filed with the South Carolina Court of Appeals on November 15, 2018, and the Order Denying Petition for Rehearing was issued on December 13, 2018.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err by failing to distinguish between two separate judgments, one for foreclosure and deficiency and a separate judgment on a guaranty?
2. Did the Court of Appeals err by failing to reverse the Master In Equity's continued modifications of a prior judgment under Rule 60(b)(5)?
3. Did the Court of Appeals err by failing to assess the timeliness of the Rule 60(b)(5) motion made in the lower court?

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 Poretos 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.

The Bank filed a Notice of Appeal on May 9, 2016. A copy of the transcript from the January 19, 2016 hearing was requested by letter dated May 23, 2016 and received on June 9, 2016. Appellant's Initial Brief was filed on July 14, 2016. The Respondent's Initial Brief was filed on August 15, 2016. Appellant's Reply Brief was filed on September 8, 2016. Respondent's Final Brief was filed on October 11, 2016. Appellant's Final Brief and Final Reply Brief were filed on November 4, 2016. Appellant's Amended Final Brief and Amended Final Reply Brief were filed on January 11, 2017. The Court of Appeals' Unpublished Opinion No. 2018-UP-255 was submitted March 1, 2018 and filed June 13, 2018. The Remittitur was sent on June 29, 2018. Appellant's Petition for Rehearing was filed on July 2, 2018. Respondents filed a Motion for Costs

on July 11, 2018. Appellant requested appeal be reinstated by correspondence filed July 12, 2018. Appellant filed a Motion to Recall Remittitur on August 16, 2018. Order recalling remittitur was issued on November 2, 2018. On November 5, 2018, the Court of Appeal recalled Respondents' Motion for Costs as premature. Appellant's Petition for Rehearing was filed November 15, 2018 and the Order Denying Petition for Rehearing was issued on December 13, 2018.

ARGUMENTS

1. THE COURT OF APPEALS SHOULD HAVE REVERSED THE COURT OF APPEALS AND RECOGNIZED THAT APPELLANT OBTAINED TWO SEPARATE JUDGMENTS AND THAT THE WAIVER OF A DEFICIENCY JUDGMENT WAS NOT A WAIVER OF THE JUDGMENT ON THE GUARANTY.
2. THE COURT OF APPEALS SHOULD HAVE REVERSED THE MAGISTRATE'S UNTIMELY AND UNLAWFUL MODIFICATION OF THE PRIOR JUDGMENT.
3. THE COURT OF APPEALS SHOULD HAVE ANALYZED THE TIMELINESS OF RESPONDENTS' RULE 60(B)(5) MOTION AND FOUND IT UNTIMELY.

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 Porrettos 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 Porrettos 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).

1. THE COURT OF APPEALS SHOULD HAVE REVERSED THE COURT OF APPEALS AND RECOGNIZED THAT APPELLANT OBTAINED TWO SEPARATE JUDGMENTS AND THAT THE WAIVER OF A DEFICIENCY JUDGMENT WAS NOT A WAIVER OF THE JUDGMENT ON THE GUARANTY.

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.

2. THE COURT OF APPEALS SHOULD HAVE REVERSED THE MAGISTRATE'S UNTIMELY AND UNLAWFUL MODIFICATION OF THE PRIOR JUDGMENT.

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.

3. THE COURT OF APPEALS SHOULD HAVE ANALYZED THE TIMELINESS OF RESPONDENTS' RULE 60(B)(5) MOTION AND FOUND IT UNTIMELY.

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

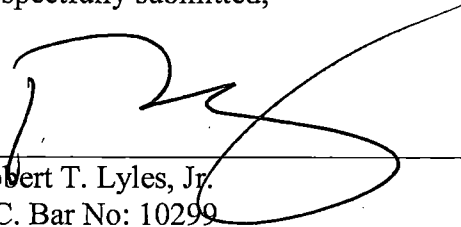
discretion by the Master. While the Court of Appeals' Per Curiam Order recognizes the standard of review, it fails to assess and rule upon the reasonableness of the timing of the Rule 60(b)(5) motion which was raised by Appellant.

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.

CONCLUSION

For the reasons stated, Petitioner asks the Court to grant the petition for a writ of certiorari.

Respectfully submitted,



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February 4, 2019

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PROOF OF SERVICE

I certify that I have served the Petitioner's Petition for Writ of Certiorari on counsel for the Respondents by depositing a copy in the United States Mail, First Class postage prepaid, this 4th day of February, 2018, addressed to the following:

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