VILLAGE OF WOODCREEK CONDOMINIUM OWNERS' ASSOCIATION, INC.	:	
Plaintiff	:	**CASE NO. 2015 CVE 00678**
vs.	:	**Judge McBride**
KELLY L. DIEDENHOFER, ET AL.	:	**DECISION/ENTRY**
Defendants	:	

Stagnaro, Saba & Patterson Co., L.P.A., Sean P. Donovan, counsel for the plaintiff Village of Woodcreek Condominium Owners' Association, Inc., 2623 Erie Avenue, Cincinnati, Ohio 45208

Kelly L. Diedenhofer, appearing *pro se*, 6457 Parkwood Court, Loveland, Ohio 45140

John Doe, Unknown Spouse, if any, of Kelly L. Diedenhofer, 5989 Meadow Creek Drive, Unit 8, Milford, Ohio 45208

Clermont County Auditor, Linda L. Fraley, 101 East Main Street, Batavia, Ohio 45103

Marshall McCachran, counsel for the defendant Clermont County Treasurer, J. Robert True, assistant prosecuting attorney, 101 East Main Street, Batavia, Ohio 45103

Lerner, Sampson, & Rothfuss, Jeffrey R. Helms and Jennifer Schaeffer, counsel for the defendant Bank of America, N.A., successor by merger to BAC Home Loans Servicing, L.P., fka Countrywide Home Loans Servicing, P.O. Box 5480, Cincinnati, Ohio 45103

This cause is before the court for consideration of the plaintiff Village of Woodcreek Condominium Owners' Association, Inc.'s combined motions for default judgment and summary judgment and request for decree of foreclosure.

The court held a hearing on the motions on October 16, 2015. Following the hearing, the court took the issues raised in the plaintiff's motions under advisement.

Upon consideration of the motions, the evidence presented, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

This matter arises from the plaintiff Village of Woodcreek Condominium Owners' Association, Inc.'s claim that the defendant Kelly L. Diedenhofer breached the terms of the Declaration of Condominium. The plaintiff manages the property and common areas of Village of Woodcreek Condominium, located in Clermont County.[1] Ms. Diedenhofer owns a unit managed by the plaintiff, specifically 5989 Meadow Creek Drive, Unit 8, Milford, Ohio 45208.[2]

The plaintiff has recorded its Association's Declaration and By-Laws of Condominium ("Declaration") in Deed Book 714, page 410 of the Clermont County Recorder's Office.[3] Under the Declaration, Ms. Diedenhofer is required to pay monthly association dues, assessments, special assessments, and late fees.[4] If Ms.

[1] Pls. Ex. A., Duncan Aff., ¶ 2.
[2] Pls. Ex. A., Duncan Aff., ¶ 4.
[3] Pls. Ex. A., Duncan Aff., ¶, 5, Pls. Ex. 1 to Duncan Aff.
[4] Pls. Ex. A., Duncan Aff., ¶, 5, Pls. Ex. 1 to Duncan Aff., pgs. 25-26.

Diedenhofer fails to timely pay an assessment, the costs and reasonable attorney's fees incurred for a lien and a foreclosure action shall be added to the amount of assessments due.[5]

With respect to liens, the Declaration provides:

> "5.7 Liens of Association. The Association shall have a lien upon the estate or interest in any Unit of the owner thereof and upon his percentage of interest in the Common Areas and Facilities for the payment of the portion of the common expenses and late charges as described above chargeable against such Unit which remain unpaid for ten (10) days after the same have become due and payable from the time a certificate therefore, subscribed by the President of the Association, is filed with the Recorder of the Clermont county, Ohio, pursuant to authorization given by the Board of managers of the Association. Such certification shall contain a description of the Unit, the name or names of the record owner or owners thereof and the amount of such unpaid portion of the common expenses and late charges. Such lien shall remain valid for a period of five (5) years from the time of filing thereof, unless sooner released or satisfied in the same manner provided by law for the release and satisfaction of mortgages on real property or discharged by the final judgment or order of the Court in the action brought to discharge such lien as hereinafter provided. In addition, each Unit owner shall be personally liable for all assessments levied by the Association against his Unit while he is a Unit Owner."[6]

The Declaration also provides for the plaintiff's lien priority:

> "5.8 Priority of Association's Lien. The lien provided for in Section 5.7 shall take priority over any lien or encumbrance subsequently arising or created, except liens for real estate taxes and assessments and liens of bona fide first mortgages which have been filed for record. The lien provided for in Section 5.7 may be foreclosed in the same manner as a mortgage on real property in an action brought by the Association. In any such foreclosure action, the owner the owner or owners of the Unit affected shall be required to pay all the Association's expenses incurred in

[5] Pls. Ex. A., Duncan Aff., ¶, 6, Pls. Ex. 1 to Duncan Aff., pgs. 26-28.
[6] Pls. Ex. A., Duncan Aff., ¶, 6, Pls. Ex. 1 to Duncan Aff., pgs. 26-27.

> connection with such foreclosure action, including without limitation, attorney's fees to the extent permitted by law, and a reasonable rental for such Unit during the pendency of such action, and the plaintiff in such action is entitled to the appointment of a receiver to collect the same. In any such foreclosure action, the Association shall be entitled to become a purchaser at the foreclosure sale."

The Condominium Rider incorporated in Ms. Diedenhofer's mortgage provides:

> "* * * B. Borrower promises to pay all dues and assessments imposed pursuant to the legal instruments creating the governing condominium project. C. If Borrower does not pay condominium dues and assessments when due, then Lender may pay them. * * *"[7]

Ms. Diedenhofer is alleged to have failed to pay assessments due under the Declaration. As of August 1, 2015, Ms. Diedenhofer owed $3,682.75 in delinquent assessments, lien fees, and late fees.[8] For each month after September 1, 2015, Ms. Diedenhofer continues to incur monthly assessments of $195 per month, plus any applicable late fees, continuing common charges, interest, and the plaintiff's court costs and reasonable attorney's fees.[9]

The plaintiff recorded a certificate of lien against Ms. Diedenhofer's property on February 11, 2015, which is recorded in the Official Record Book 2557, Pages 2357 – 2358 of the Clermont County Recorder's Office (the "Lien").[10] The Lien is for $1,390 plus filing fees, interest, late fees, attorney fees, and monthly unpaid common assessments for $195 per month.[11] Counsel for the plaintiff attests that the attorney fees charged to the plaintiff, as of August 21, 2015 were a total of $1,136.[12]

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[7] Ex. 2 to Pls. Ex. B, Donovan Aff., pgs. 495-496.
[8] Pls. Ex. A., Duncan Aff., ¶, 7, Pls. Ex. 2 to Duncan Aff.
[9] Pls. Ex. A., Duncan Aff., ¶, 7.
[10] Pls. Ex. A., Duncan Aff., ¶, 9, Pls. Ex. 3 to Duncan Aff.
[11] Pls. Ex. A., Duncan Aff., ¶, 9, Pls. Ex. 3 to Duncan Aff.
[12] Pls. Ex. B, Donovan Aff., ¶ 2.

On May 28, 2015 the plaintiff Village of Woodcreek Condominium Owners' Association, Inc. filed a complaint in foreclosure against the defendants: Kelly L. Diedenhofer; John Doe, Unknown Spouse, if any, of Kelly L. Diedenhofer; Clermont County Auditor, Linda L. Fraley; Clermont County Treasurer, J. Robert True; and Bank of America, N.A., successor by merger to BAC Home Loans Servicing, L.P., fka Countrywide Home Loans Servicing (hereinafter referred to as the "Bank"). The plaintiff served complaints upon all defendants.

In the complaint, the plaintiff asserts a claim against Ms. Diedenhofer for a breach of the condominium Declaration, and it seeks foreclosure with respect to Ms. Diedenhofer's property. The only two parties who filed answers to the complaint are the Clermont County Treasurer and the Bank.[13]

The plaintiff filed a combined motion for default judgment and summary judgement against the defendants on August 24, 2015. Specifically the plaintiff filed for default judgment against Kelly Diedenhofer and John Doe, Unknown Spouse, if any, of Kelly Diedenhofer, and for summary judgment against the Bank.

The Bank filed its response in opposition on September 8, 2015. No other responses were filed. The court heard oral argument on this motion on October 16th, during which Ms. Diedenhofer participated via conference call. Following the hearing, the court took the issues raised under advisement.

[13] The plaintiff lists the Clermont County Auditor as having answered its complaint. However, the docket does not reflect that the Clermont County Auditor has ever filed a responsive pleading.

STANDARD OF REVIEW

(A) DEFAULT JUDGMENT

Pursuant to Civ.R. 55(A):

> "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, the party entitled to a judgment by default shall apply in writing or orally to the court therefor * * *. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper * * *."

(B) SUMMARY JUDGMENT

The court must grant summary judgment, as requested by a moving party when:

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to the party opposing the motion."[14]

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[14] *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). *See Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144 (1993) (holding same); Civ.R. 56(C).

The court must view the evidence in a light most favorable to the nonmoving party.[15] Even the inferences drawn from the evidence and underlying facts must be construed in favor of the nonmoving party, such as inferences drawn from affidavits, depositions, etc.[16] A fact is material when, under the governing substantive law, the facts "might affect the outcome of the suit."[17]

Whether a genuine issue exists is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law"?[18] This threshold inquiry determines whether there are "any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[19]

The movant bears the burden to show that no genuine issue exists as to any material fact, and it is entitled to judgment as a matter of law.[20] This burden requires the movant to "specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."[21] If the movant fails to satisfy its initial burden, the motion for summary judgment must be denied.[22]

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[15] *Welco Indus. Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 356, 617 N.E.2d 1129 (1993); *Willis v. Frank Hoover Supply*, 26 Ohio St.3d 186, 188, 497 N.E.2d 1118 (1986); *Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 152, 309 N.E.2d 924 (1974).
[16] *Hannah v. Dayton Power & Light Co.*, 82 Ohio St.3d 482, 485, 696 N.E.2d 1044 (1998) citing *Turner v. Turner*, 67 Ohio St.3d 337, 341, 617 N.E.2d 1123 (1993).
[17] *Anderson v. Liberty-Lobby Inc.* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986).
[18] Id. at 251-52.
[19] Id. at 250.
[20] *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).
[21] *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus.
[22] Id. *See HSBC Mtge. Serve. v. Williams*, 12th Dist. Butler No. CA2013-09-174, 2014-Ohio-3778, ¶ 8 (holding same).

However, if the movant satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the allegations and denials in his pleadings, demonstrating that a "triable issue of fact" remains.[23] The duty of the nonmoving party is more than that of resisting the motion's allegations.[24] Instead, this burden requires the nonmoving party to "produce evidence on any issue for which [the nonmoving] party bears the burden of production at trial."[25] The nonmoving party must present documentary evidence of specific facts showing that there is a genuine issue for trial.[26] It may not rely on the pleadings or unsupported allegations.[27]

Under Civ.R. 56(C), the only evidence that may be considered when ruling on a motion for summary judgment is "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action."[28] The trial court maintains the sound discretion to admit or exclude relevant evidence.[29] When a document falls outside the enumerated categories in Civ.R. 56(C), the correct method to introduce the document is to incorporate it by reference into a properly framed affidavit.[30]

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[23] *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996).
[24] *Wells Fargo*, 2013-Ohio-855at ¶ 25.
[25] (Citation omitted.) *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991), paragraph three of the syllabus; *See Welco Indus., Inc.*, 67 Ohio St.3d at 346 (holding same).
[28] *Williams*, 2014-Ohio-3778 at ¶ 8. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).
[27] Id.
[28] *See Wells Fargo*, 2013-Ohio-855at ¶ 15 citing *State ex rel. Vamau v. Wenninger*, 12th Dist. Brown No. CA2009-02-2010, 2011-Ohio-3904, ¶ 7 ("Civ.R. 56(C) provides an exclusive list of materials that a trial court may consider when deciding a motion for summary judgment.").
[29] *Green Tree Servicing, L.L.C. v. Roberts*, 12th Dist. Butler No. CA2013-03-039, 2013-Ohio-5362, ¶ 18 quoting *U.S. Bank v. Bryant*, 12th Dist. Butler No. CA2012-12-266, 2013-Ohio-3993, ¶ 10.
[30] *Martin v. Central Ohio Transit Auth.*, 70 Ohio App.3d 83, 89, 590 N.E.2d 411 (10th Dist.1990); *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222, 515 N.E.2d 632 (8th Dist.1986).

Opposing and supporting affidavits must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must affirmatively show that the affiant is competent to testify on the matters in the affidavit.[31] "Personal knowledge" is defined as "[k]nowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."[32] "Absent evidence to the contrary, an affiant's statement that his affidavit is based on personal knowledge will suffice to meet the requirements of Civ.R. 56(E)."[33] Furthermore, if the affiant does not specifically state that he or she has personal knowledge, "personal knowledge may be inferred from the contents of the affidavit."[34]

By contrast, if certain statements in the affidavit "suggest that it is unlikely that the affiant had personal knowledge" of the facts, then "something more than a conclusory averment that the affiant has personal knowledge would be required."[35] Likewise, affidavits that merely set forth legal conclusions or opinions without stating supporting facts are insufficient to satisfy Civ.R. 56(E).[36]

Civ.R. 56(E) provides that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Thus, documents referenced in the affidavit "must be attached to the affidavit."[37] If the affiant

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[31] Civ.R. 56(E); *Wells Fargo v. Smith*, Blue Sky L. Rep. P 75.026, 2013-Ohio-855, ¶ 16 (12th Dist.).
[32] *Wells Fargo*, 2013-Ohio-855 at ¶ 16.
[33] Id. citing *Churchill v. G.M.C.*, 12th Dist. No. CA2002-10-263, 2003-Ohio-4001, ¶ 11.
[34] Id.
[35] Id. quoting *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶ 14.
[36] *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 69, 582 N.E.2d 1040 (12th Dist.1989).
[37] *Wells Fargo*, 2013-Ohio-855 at ¶ 17 citing Civ.R. 56(E).

"relies" on documents in the affidavit but fails to attach those documents, "the portions of the affidavit that reference those document[s] must be stricken."[38]

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be resolved in favor of the nonmoving party.[39] Summary judgment is inappropriate when the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[40]

LEGAL ANALYSIS

Liens for common assessments by condominium associations are governed by R.C. 5311.18.[41] R.C. 5311.18(A) establishes that unless "otherwise provided by the declaration or the bylaws, the unit owners association has a lien" on the condominium owner's unit for certain expenses. These expenses include:

> "(a) The portion of common expenses chargeable against the unit; (b) Interest, administrative late fees, enforcement assessments, and collection costs, attorney's fees, and paralegal fees the association incurs if authorized by the declaration, the bylaws, or the rules of the unit owners association and if chargeable against the unit."[42]

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[38] Id. at ¶ 16, citing *Third Federal S. & L. Assn. of Cleveland v. Farno*, 12th Dist. No. CA2012-04-028, 2012-Ohio-5245, ¶ 10. *See, also, State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-010, 2011-Ohio-3904 (striking portions of affidavit where documents were reviewed and relied upon in drafting affidavit but not attached to the affidavit or served with it).
[39] *Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[40] *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150 (1985).
[41] Of note, Chapter 5311 and not Chapter 5312 applies here because Chapter 5312, which deals with Ohio's Planned Community Law, was not passed until September 10, 2010, which is 25 years after the Declaration was recorded. *Settlers Walk Home Owners Assn. v. Phoenix Settlers Walk, Inc.*, 12th Dist. Warren Nos. CA2014-09-116, CA2014-09-117, CA2014-09-118, 2015-Ohio-4821, ¶ 25.
[42] R.C. 5311.18(A)(1).

An owners association lien obtained under this statute is effective from the date the lien is filed in the recorder's office.[43] With respect to priority and foreclosure, R.C. 5311.18 sets forth that a lien under this statute "is prior to any lien or encumbrance subsequently arising or created except liens for real estate taxes and assessments of political subdivisions and liens of first mortgages that have been filed for record and may foreclosed in the same manner as a mortgage on real property * * *."[44] Hence, the court must examine the foreclosure process for mortgages on real property.

"An action in foreclosure is in equity."[45] As an equitable remedy, foreclosure affords the court "adequate power" to give "full relief to all the parties before it."[46] A lien "is a right to have the debt satisfied out of the land, if not otherwise paid."[47] In terms of priority of liens, Ohio is a "race/notice" state, and as such, "[a]ll deeds * * * and instruments of writing properly executed for the conveyance or encumbrance of lands * * * shall be recorded * * *."[48] In a priority contest of competing liens, the parties who claim to have an interest in the property bear the burden "to assert their claims and interests in the property."[49]

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[43] R.C. 5311.18(A)(3).
[44] R.C. 5311.18(B)(1).
[45] *Stidham v. Wallace*, 12th Dist. Madison No. CA2012-10-022, 2013-Ohio-2640, ¶ 8, citing *Farmers Savings & Loan Co. v. Robinson*, 7th Dist. No. 75 C.A. 39, 1976 WL 188521, *4 (Feb. 11, 1976).
[46] *Stidham*, 2013-Ohio-2640, ¶ 9, quoting *Sharp v. Kuhn*, 2d No. 78 CA 10, 1978 WL 216347, *4 (Oct. 4, 1978).
[47] *Settlers Walk Home Owners Assn.*, 2015-Ohio-4821 at ¶ 18.
[48] Id. at ¶ 16 quoting R.C. 5301.25(A).
[49] *Lexington Ridge Homeowners' Assn. v. Schlueter*, 9th Dist. Medina No. 10CA0087, 2013-Ohio-1601, ¶ 20.

Future purchasers and lenders receive constructive notice of an existing lien on the property when the encumbrance has been properly recorded.[50] As such, if a lienholder does not record an encumbrance, the lienholder does not gain the benefit of constructive notice to a subsequent buyer.[51]

Significantly, "a lien cannot exist in the absence of a debt, the payment of which it secures."[52] Stated differently, all liens "have this characteristic of being secondary to an existing obligation, usually a debt."[53] Hence, when a declaration stating that the owners association has a lien on all the unit owner's unpaid charges is filed before the debt actually exists, there is no lien on the subject property because "no assessment has been charged, much less stood unpaid or delinquent."[54] As such, merely filing a declaration that provides for a lien if the unit owner fails to pay assessments is not an "enforceable lien."[55] Once an assessment has gone unpaid, then "a declaration may allow for the lien."[56]

Once a debt is established and a lien is filed under R.C. 5311.18(A), new charges to the unit owner are not automatically included in the owner association's lien on file.[57] Rather, a lien filed pursuant to R.C. 5311.18(A) must be adjusted or modified by filing a later lien to reflect the new charges to the unit owner.[58] For this reason, even if an association perfects a filed lien under the framework described above, "R.C.

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[50] *Settlers Walk Home Owners Assn.*, 2015-Ohio-4821 at ¶ 17, citing *Deutsch Bank Natl. Trust Co. v. Hill*, 5th Dist. Perry No. 14CA00021, 2015-Ohio-1575, ¶ 29.
[51] *Settlers Walk Home Owners Assn.*, 2015-Ohio-4821 at ¶ 17.
[52] (Citation omitted.) Id. at ¶ 18.
[53] Id. at ¶ 18.
[54] Id. at ¶ 19.
[55] Id.
[56] Id. at ¶ 20.
[57] *One Bratenahl Place Condominium Ass., Inc. v. Silwinski*, 37 N.E.3d 213, 2015-Ohio-3353, ¶ 16 (8th Dist.).
[58] *Silwinski*, 2015-Ohio-3353 at ¶ 16.

5311.18(A) does not perfect a lien with respect to debts that have not accrued at the time."[59] This is so "because the statute neither expressly provides for the perfection of after-acquired debts nor supplies others with notice."[60]

(A) DEFAULT JUDGMENT AGAINST MS. DIEDENHOFER AND JOHN DOE

The plaintiff has filed for default judgment against Kelly Diedenhofer and John Doe, Unknown Spouse, if any, of Kelly Diedenhofer, pursuant to Civ.R. 55.

Pursuant to Civ.R. 55(A):

> "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, the party entitled to a judgment by default shall apply in writing or orally to the court therefor * * *. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper * * *."

In the case at bar, Ms. Diedenhofer and John Doe were served with the complaint by mail on June 29, 2015 and again on July 10, 2015. They failed to file any responsive pleading or request an extension of time to do so. The plaintiff subsequently filed the instant motion for default judgment on August 24, 2015, to which Ms. Diedenhofer and John Does also failed to file any response. Accordingly, the court grants the plaintiff's motion for default judgment.

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[59] *Silwinski*, 2015-Ohio-3353 at ¶ 24.
[60] Id.

By being in default, Ms. Diedenhofer and John Doe confess that all of plaintiff's allegations in the complaint are true. Ms. Diedenhofer and John Doe are forever barred from asserting any right, title, or interest in 5989 Meadow Creek Drive, Unit 8, Milford, Ohio 45208.

The court finds that the Clermont County Treasurer is due taxes and assessments for 5989 Meadow Creek Drive, Unit 8, Milford, Ohio 45208, the amount of which will be ascertainable at the time of sale.

The court finds that Ms. Diedenhofer is in breach of the Declaration by failing to pay her monthly dues, assessments, and fees to the plaintiff as prescribed in the Declaration, filed in Deed Book 714, page 410 of the Clermont County Recorder's Office. The court also finds that the plaintiff has a valid and properly recorded lien pursuant to R.C. 5311.18 against Ms. Diedenhofer's property, filed in Official Record Book 2557, Pages 2357 – 2358 of the Clermont County Recorder's Office. Therefore the plaintiff is entitled to damages.

In terms of damages, an owners association can collect multiple expenses from the defaulting unit owner, including:

> "(a) The portion of common expenses chargeable against the unit; (b) Interest, administrative late fees, enforcement assessments, and collection costs, attorney's fees, and paralegal fees the association incurs if authorized by the declaration, the bylaws, or the rules of the unit owners association and if chargeable against the unit."[61]

Section 5.8 of the Declaration authorizes fees for "the Association's expenses incurred in connection with such foreclosure action, including without limitation,

[61] R.C. 5311.18(A)(1).

attorney's fees to the extent permitted by law, and a reasonable rental for such Unit during the pendency of such action * * *."

Under Ohio law, attorney's fees can be awarded to a homeowners association when it has provided for such fees in its declaration of condominium ownership, as in this case.[62] Such fees in "a foreclosure action against the defaulting unit owner for unpaid common assessments are enforceable and not void as a matter of public policy so long as the fees awarded are fair, just and reasonable as determined by the trial court upon full consideration of all of the circumstances of the case."[63]

In the affidavit of the plaintiff's trial attorney Sean Donovan, he attests that the total amount of attorney's fees "expended in the investigation, preparation and prosecution" of this case was $1,136 as of August 21, 2015.[64] This figure includes "legal and court cost deposits."[65]

The lien of record was filed on February 11, 2015, and is for $1,390 plus filing fees, interest, late fees, attorney fees, and monthly unpaid common assessments for $195 per month.[66] As discussed, after an owners association files a lien against the unit owner's property, new charges to the unit owner are not automatically included in the owner association's lien on file.[67] Rather, the unit owner must adjust or modify the lien by filing a later lien to reflect the new charges to the unit owner.[68] It is unclear to the

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[62] *Nottingdale Homeowners' Ass'n, Inc. v. Darby*, 33 Ohio St.3d 32, 514 N.E.2d 702, at the syllabus (1987).
[63] *Darby*, 33 Ohio St.3d 32, 514 N.E.2d at the syllabus.
[64] Pls. Ex. B, Donovan Aff., ¶ 2.
[65] Pls. Ex. B, Donovan Aff., ¶ 5.
[66] Pls. Ex. A., Duncan Aff., ¶, 9, Pls. Ex. 3 to Duncan Aff.
[67] *Silwinski*, 2015-Ohio-3353 at ¶ 16.
[68] Id.

court whether the plaintiff has filed any additional liens against Ms. Diedenhofer's property since filing the February 2015 lien.

Therefore, the court will hold a hearing to determine the proper amount of damages, including the reasonableness of the plaintiff's attorney's fees. Of note, the plaintiff acknowledges that the Clermont County Treasurer has a lien against the property for taxes and assessments, which has priority over the plaintiff's lien. The priority of the Bank's mortgage will be discussed below. For these reasons, the court finds the plaintiff's motion for default judgment well-taken and hereby grants it.

(B) SUMMARY JUDGMENT AGAINST THE BANK

The plaintiff and the Bank disagree as to whether the plaintiff may foreclose on Ms. Diedenhofer's property and have it sold free and clear of the Bank's mortgage, which is not in default. As permitted in R.C. 5311.18, the plaintiff may foreclose on the property in the same manner as a mortgage. The clearest case involving a mortgage on this inquiry is *Metropolitan Mortgage Co. v. Nugent Furniture Co.*, 40 Ohio App. 302, 179 N.E. 362, 11 Ohio Law Abs. 7, (6th Dist. 1931).[69]

In *Metropolitan,* a junior mortgagee brought a foreclosure action against a property owner. The trial court found that the senior mortgagee had the first and best lien, and the junior mortgagee had the second best lien.[70] Despite this finding, the trial court ordered the property sold without making the sale subject to the senior

[69] *Metropolitan Mortgage Co. v. Nugent Furniture Co.*, 40 Ohio App.302, 179 N.E. 362, 11 Ohio Law Abs. 7, (6th Dist. 1931).
[70] Id. at 305.

mortgagee's lien.[71] The appellate court noted that "a difficulty arises where the first mortgage indebtedness has not matured and the holder thereof does not consent to a sale of the property."[72] The appellate court resolved the issue by holding that the trial court "was without power to order the whole premises sold, thereby foreclosing the lien of the first mortgagee without its consent and before maturity of the debt."[73]

Both parties cite to the later case of *Society Bank & Trust Co. v. Zigterman*, 82 Ohio App.3d 124, 126, 611 N.E.2d 477 (3d Dist. 1992), which adds little clarification. The court observed that "[i]t has long been the law that a mortgagee with an interest senior to all others is not a necessary party in a foreclosure action initiated by a lienor with an interest acquired subsequent to another's interest in the same property."[74] When the senior mortgagee is not a party and the property is sold, the purchaser takes the property subject to the senior mortgagee's prior mortgage.[75] "However, if the senior mortgagee is named as a party-defendant * * * it receives priority in the distribution of the sale proceeds, even if a junior mortgagee initiates the action."[76] This begs the question, when a senior mortgagee is a party to the foreclosure initiated by a junior lienholder, must the property be sold free and clear of the senior mortgagee's mortgage if the junior lienholder demands it?

The plaintiff maintains that *Sharp v. Kuhn*, 2d Dist. Fayette No. 78 CA 10, 1978 WL 216347, (Oct. 4, 1978), supports its position on this issue. *Sharp* dealt with issues different from the case at bar, namely the senior mortgagee was denied intervention in a

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[71] Id.
[72] Id. at 306.
[73] Id. at 307.
[74] *Soc. Bank & Trust Co. v. Zigterman*, 82 Ohio App.3d 124, 126, 611 N.E.2d 477 (3d Dist. 1992).
[75] Id. at 127.
[76] Id.

foreclosure action brought by a junior mortgagee, and the senior mortgagee received no proceeds from the sale of property.[77]

In resolving this issue, the court relied heavily upon Ohio Jurisprudence, which describes when a senior mortgagee is a necessary party:

> "A prior encumbrancer is a necessary party where a sale of the entire property and estate * * * is desired upon the foreclosure of a mortgage; this is requisite in order that the amount of the prior encumbrance may be ascertained and paid out of the proceeds of the sale and in order that the purchaser may thus be protected. On the other hand, where a junior mortgagee seeks a sale subject to a prior mortgage, the prior mortgagee is not a necessary party."[78]

Thus, a senior mortgagee is a necessary party when the property is sold free and clear so that the senior mortgagee can receive the proceeds it is owed. Furthermore, Ohio Jurisprudence directs that "a foreclosure sale may, under the Code, be made subject to prior liens, and therefore prior encumbrancers who are not made and do not become parties to the foreclosure action are not entitled to a share in the proceeds of the sale which is made expressly subject to their prior liens."[79] Hence, the Ohio Jurisprudence quoted in *Sharp* speaks more to the issue of when a senior mortgagee must be a party, as opposed to answering the question of whether a junior lienholder can force a sale of the property free and clear of the mortgage when the senior mortgagee is a party but does not consent.

In support of its position, the Bank highlights R.C. 2329.20, which sets forth the requirements for selling a property through a sheriff's sale subject to a senior lien:

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[77] *Sharp v. Kuhn*, 2d Dist. Fayette No. 78 CA 10, 1978 WL 216347, *1-2 (Oct. 4, 1978).
[78] (Emphasis added.) *Sharp*, 1978 WL 216347 at * 3 quoting 37 Ohio Jurisprudence 2d 533, Section 340.
[79] *Sharp*, 1978 WL 216347 at * 4 quoting 37 Ohio Jurisprudence 2d 656.

> "No tract of land shall be sold for less than two thirds of the value returned in the inquest required by section 2329.17 of the Revised Code; except that in all cases where a junior mortgage or other junior lien is sought to be enforced against real estate by an order, judgment, or decree of court, subject to a prior lien thereon, and such prior lien, and the claims or obligations secured thereby, are unaffected by such order, judgment, or decree, the court making such order, judgment, or decree, may determine the minimum amount for which such real estate may be sold, such minimum amount to be not less than two thirds of the difference between the value of the real estate appraised as provided in such section, and the amount remaining unpaid on the claims or obligations secured by such prior lien."

Notably, the statute does not require the court to order the property sold subject to the first mortgage. Rather, it states instead that the court may determine a minimum amount for the sale, being not less than two-thirds of the difference between the value of the property as appraised and the amount remaining unpaid on the first lien. This provision does not help answer whether a property must be sold subject to a senior lien, which is the issue at hand. Rather, it addresses the process for a sale subject to a prior lien. Stated differently, this provision is of use once it is already determined that the property will be sold subject to a prior lien.

Although R.C. 2329.02 itself does not answer the current issue, case law interpreting it is helpful. In analyzing R.C. 2329.02, the Fourth District Court of Appeals has opined that when there are multiple liens against a property, as in this case, "the equitable principle of marshalling liens provides that proceeds will be applied to all lienholders' claims, in order of their priority."[80] The court expressly noted that under R.C. 2329.02 "there are limits to the right of a junior lienholder to compel sale of

[80] Jackson Production Credit Association v. Perry, 4th Dist. Vinton No. 409, 1984 WL 5628, *2 (Aug. 31, 1984).

property. If a senior mortgagee does not consent to acceleration of its interest, the property may only be sold subject to the continuing mortgage."[81]

Finally, the Bank also highlights on point guidance found in Ohio Jurisprudence that falls in line with *Metropolitan* and *Perry*:

> "When a prior mortgage has not matured, the court is without power, in an action of foreclosure brought by a junior mortgagee, to order the whole property sold, free from the prior mortgage, and thereby foreclose the prior mortgagee without the prior mortgagee's consent and before the maturity of the obligation secured. The proper practice is to allow a foreclosure to the junior mortgagee and to order the property sold subject to the prior mortgage."[82]

In the case at bar, the plaintiff and Bank do not dispute any material facts. Further, the Bank does not oppose the plaintiff's right to foreclose on Ms. Diedenhofer's property. However, the Bank opposes a foreclosure free and clear of its mortgage. Ms. Diedenhofer has not defaulted on her mortgage to the Bank, nor has the Bank accelerated her loan. As such, the Bank wants any foreclosure sale of Ms. Diedenhofer's property to be subject to its mortgage.

The Bank explained during oral argument that a sale subject to its mortgage would require the purchaser to immediately pay off the remainder of Ms. Diedenhoffer's loan. By selling the property subject to the Bank's mortgage, this guarantees that its loan will be repaid. If the property is sold free and clear of the mortgage, the Bank faces the possibility that it may not receive the full value of Ms. Diedenhofer's mortgage.

The plaintiff objects to a sale subject to the Bank's mortgage because it would limit the pool of third party purchasers. The Bank argues that Ohio law does not permit a junior lienholder, like the plaintiff, to sell a property in a foreclosure sale free and clear

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[81] *Perry*, 1984 WL 5628 at *2 citing *Metropolitan Mortgage Co.*, 40 Ohio App.302.
[82] 69 Ohio Jurisprudence 3d, Mortgages, Section 416 (2015).

of the senior lienholder's mortgage when the senior lienholder does not consent. The plaintiff concedes that, if the property is sold free and clear from the Bank's mortgage, the Bank would receive first priority in the proceeds. However, the plaintiff replies that its right to foreclose is set forth in the Declaration and in R.C. 5311.18(A), and because the Declaration was of record before the Bank's mortgage, the plaintiff's lien is not a junior lien for purposes of R.C. 5311.18(A). The plaintiff posits that mortgage lenders, such as the Bank, would have had notice of the plaintiff's right to foreclose at the time the Bank decided to lend to Ms. Diedenhofer.

Pursuant to R.C. 5311.18, the plaintiff's lien "is prior to any lien or encumbrance subsequently arising or created except * * * liens of first mortgages that have been filed for record." Further, R.C. 5311.18 allows the plaintiff to foreclose "in the same manner as a mortgage on real property."[83] The language of R.C. 5311.18 does not state or suggest that the plaintiff's lien has any type of priority over the Bank's mortgage. What is not clear from the language of the statute alone is whether, when foreclosing in the same manner as a mortgage, the plaintiff has the right to have the property sold free and clear of the Bank's mortgage.

Neither the parties nor the court have been able to identify an appellate case dealing with a R.C. 5311.18 foreclosure in which the senior mortgagee will not consent to sell the property free and clear its first mortgage. The most on point case is *Metropolitan*, which would resolve this case in favor of the Bank, by prohibiting this court from ordering the "whole premises sold, thereby foreclosing the lien of the first mortgagee without its consent and before maturity of the debt."[84] The plaintiff argues

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[83] R.C. 5311.18(B)(1).
[84] *Metropolitan Mortgage Co.*, 40 Ohio App. at 307.

that *Metropolitan* is distinguishable because it was decided in 1931, long before R.C. 5311.18 was enacted. Even so, R.C. 5311.18 directs the court to order a foreclosure for the plaintiff in the "same manner" as for a foreclosure of a mortgage on real property, which would allow for application of *Metropolitan*.

The later cases of *Society Bank & Trust Co. v. Zigterman* and *Sharp v. Kuhn* do little to clarify the matter. *Zigterman* instructs that when a property is sold in a foreclosure sale and the senior mortgagee, like the Bank, is a party, it receives the priority in the proceeds, but when it is not a party, the purchaser takes the property subject to the mortgage.[85] *Sharp* similarly advises that a senior lienholder is a necessary party to a sale of an entire property in order to pay the senior lienholder proceeds, but it is not a necessary party when the sale is subject to the senior lienholder's lien.[86] These cases answer <u>when</u> a senior mortgagee or lienholder needs to be a party, not what happens when a senior mortgagee is a party, but will not consent to accelerate its loan.

A more useful case is *Jackson Production Credit Association v. Perry*, 4th Dist. Vinton No. 409, 1984 WL 5628 (Aug. 31, 1984). In quoting *Metropolitan*, the *Perry* Court reaffirmed that "there are limits to the right of a junior lienholder to compel sale of property. If a senior mortgagee does not consent to acceleration of its interest, the property may only be sold subject to the continuing mortgage."[87] So too Ohio Jurisprudence is in accord with *Metropolitan* and *Perry*.

On the whole, there are no cases that strongly support the plaintiff's position, but the Bank's view is underscored by *Metropolitan*, *Perry*, and Ohio Jurisprudence.

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[85] *Zigterman*, 82 Ohio App.3d at 127.
[86] *Sharp*, 1978 WL 216347 at * 3 quoting 37 Ohio Jurisprudence 2d 533, Section 340.
[87] *Perry*, 1984 WL 5628 at *2 citing *Metropolitan Mortgage Co.*, 40 Ohio App.302.

Neither *Zigterman* nor *Sharp* is particularly helpful. The same is true of R.C. 2329.02, which, as discussed, does not explain whether the property can be sold free and clear absent the Bank's consent, but rather it determines how a property subject to a prior mortgage is to be sold. Given this legal backdrop, the weight of the law indicates that foreclosing on Ms. Diedenhoffer's property in the same manner as a mortgage requires the court to order the sale subject to the Bank's mortgage, absent its consent to sell the property free and clear of its lien.

Beyond the statutes and case law, the plaintiff also argues that it has the right to foreclose free and clear of the Bank's mortgage because that the Bank had ample notice of its right to foreclose based on its Declaration of record. However, nothing in the Declaration provides that the plaintiff has a right to foreclose on the property free and clear of a first mortgage. To the contrary, the Declaration reads very similarly to R.C. 5311.18's provisions:

> "5.8 Priority of Association's Lien. The lien provided for in Section 5.7 shall take priority over any lien or encumbrance subsequently arising or created, except * * * liens of bona fide first mortgages which have been filed for record. The lien provided for in Section 5.7 may be foreclosed in the same manner as a mortgage on real property in an action brought by the Association."

Thus, although the Bank would have been on constructive notice that the plaintiff would have a lien on the property and could foreclose, it would have no reason to believe the property could be sold in its entirety absent the Bank's consent because the provision expressly prioritizes first mortgages.

Finally, the plaintiff maintains that the Condominium Rider incorporated in Ms. Diedenhofer's mortgage supports its position to sell the property free and clear of the

Bank's mortgage absent the Bank's consent. It states, in pertinent part, "* * * If Borrower does not pay condominium dues and assessments when due, then Lender may pay them. * * *"[88] Although this provision allows the Bank to remedy Ms. Diedenhofer's delinquency, it is not required to do so, nor does it suggest that a failure to do so then permits the owners association to sell the property free and clear of the Bank's mortgage.

Accordingly, the court finds that in a foreclosure sale Ms. Diedenhofer's property must be sold subject to the Bank's first mortgage and therefore the plaintiff's motion for summary judgment against the Bank is denied. The Bank has the first and best lien against the property, and the plaintiff has the second best lien against the property. Because the property will be sold subject to the Bank's mortgage, the Bank will not receive proceeds from the sale in foreclosure.

CONCLUSION

For the foregoing reasons, the court finds the plaintiff's motion for default judgment against Kelly Diedenhofer and John Doe, Unknown Spouse, if any, of Kelly Diedenhofer is well-taken and is granted. The plaintiff's motion for summary judgment against the Bank is not well-taken and is hereby denied.

The court will set a hearing to determine the plaintiff's damages. Upon such determination, the court orders all liens and interests against Ms. Diedenhofer's property at 5989 Meadow Creek Drive, Unit 8, Milford, Ohio 45208 to be foreclosed and marshalled, except the Bank's first mortgage. The plaintiff may then request that an

[88] Ex. 2 to Pls. Ex. B, Donovan Aff., pgs. 495-496.

order of sale be directed to the Clermont County Sheriff, directing the Sherriff to appraise the property, advertise the property in a paper of general circulation in Clermont County, and sell the property upon execution and according to law, free and clear of the interest of all parties to this action except the Bank's first mortgage.

IT IS SO ORDERED.

DATED: _____

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Judge Jerry R. McBride