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**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

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CLERK OF COURT
COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

**VILLAGE OF WOODCREEK
CONDOMINIUM OWNERS'
ASSOCIATION, INC.** :

Plaintiff :

vs. :

KELLY L. DIEDENHOFER, ET AL. :

Defendants :

CASE NO. 2015 CVE 00678

Judge McBride

DECISION/ENTRY

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

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

Jason Fountain, assistant prosecuting attorney, for the defendant Clermont County
Treasurer, 101 East Main Street, Batavia, Ohio 45103

Lerner, Sampson, & Rothfuss, Jeffrey R. Helms, counsel for the defendant Bank of
America, N.A., successor by merger to BAC Home Loans Servicing, LP f.k.a.
Countrywide Home Loans Servicing, P.O. Box 5480, Cincinnati, Ohio 45103

Ohio Homeowner Assistance LLC, c/o John F. Kukara III SA, 88 East Broad Street,
Suite 1800, Columbus, Ohio 43215

This cause is before the court for consideration of the proper amount of damages to award the plaintiff Village of Woodcreek Condominium Owners' Association, Inc. in relation to the default judgment the court entered against the defendants Kelly Diedenhofer and John Doe, Unknown Spouse, if any, of Kelly Diedenhofer. The court held a hearing on damages on May 13, 2016.

Upon consideration of the plaintiff's motion, 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 claim of the plaintiff Village of Woodcreek Condominium Owners' Association, Inc. 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, then the Declaration provides that 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

Ms. Diedenhofer failed to pay assessments due under the Declaration. 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").⁷ The Lien states that the plaintiff "claims a lien for unpaid assessments, including late charges and other fees, on the property * * * in the amount of One Thousand Three Hundred Ninety and 00/100 Dollars

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.

⁷ Pls. Ex. A., Duncan Aff., ¶, 9, Pls. Ex. 3 to Duncan Aff.

(\$1,390.00) plus filing fees, interest, late fees, attorney fees and monthly unpaid common assessments in the amount of \$195.00 per month, as said expenses accrue."⁸

On May 28, 2015 the plaintiff Village of Woodcreek Condominium Owners' Association, Inc. filed a complaint in foreclosure against the defendants: Kelly L. Diederhofer; John Doe, Unknown Spouse, if any, of Kelly L. Diederhofer; 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, LP f.k.a. Countrywide Home Loans Servicing (hereinafter referred to as the "Bank"). The complaint brings a claim against Ms. Diederhofer for a breach of the condominium Declaration, and it seeks to foreclose on Ms. Diederhofer's property.⁹

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

On February 29, 2016, the court entered a default judgment against the defendants Kelly Diederhofer and John Doe, Unknown Spouse, if any, of Kelly Diederhofer. The court reserved the issue of damages for a hearing, which took place on May 13, 2016.¹⁰

⁸ Pls. Ex. 3 to Duncan Aff.

⁹ The only two parties who filed answers to the complaint are the Clermont County Treasurer and the Bank.

¹⁰ The court denied the plaintiff's motion for summary judgment against the Bank. Granting the motion for summary judgment would have permitted the property to be sold free and clear of the Bank's loan, which the Bank opposed. However, on February 23, 2016 the Bank filed a motion to amend its answer and complaint. The Bank had previously been opposed to foreclosing on its loan with Ms. Diederhofer. In its motion to amend, the Bank alleged that Ms. Diederhofer has since defaulted on her loan to the Bank. The Bank's amended complaint requests an entry in foreclosure against Ms. Diederhofer. The Bank's title search that accompanied its amended

During the May 13, 2016 hearing on damages, the plaintiff presented evidence that, as of April 1, 2016, Ms. Diedenhofer owed \$8,638 in delinquent assessments, lien fees, and late fees.¹¹ Included in this amount is \$3,680 for attorney fees and \$1,805.56 for costs.¹² For each month beginning May 1, 2016, 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.¹³ Counsel for the plaintiff confirmed that the plaintiff has not filed any new liens since February 2015.

LEGAL ANALYSIS

During the hearing on damages, the plaintiff addressed a portion of the court's February 29, 2016 order regarding the plaintiff's lien, which stated:

"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.¹⁴ 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.¹⁵ For this reason, even if an association perfects a filed lien under the framework described above, 'R.C. 5311.18(A) does not perfect a lien

complaint revealed a new creditor with a lien against Ms. Diedenhofer's property, Ohio Homeowner Assistance, LLC. In Official Record Book 2504, Page 1185 of the Clermont County Recorder's Office is an Open-End Save the Dream Mortgage from Ohio Homeowner Assistance, LLC for Ms. Diedenhofer's property. Bank Mot. to Amend, ¶ 9. The plaintiff was also given leave to amend its complaint to add Ohio Homeowner Assistance, LLC as a new defendant. On May 13, 2016 the plaintiff filed a motion for default judgment against Ohio Homeowner Assistance, LLC.

¹¹ Pls. Ex. 2 to Pls. Ex. A, 2nd Duncan Aff.; Pls. Ex. A, 2nd Duncan Aff.

¹² Pls. Ex. 2 from May 13, 2016 Hearing; Pls. Ex. 3 from May 13, 2016 Hearing.

¹³ Pls. Ex. 3 to Pls. Ex. A., 2nd Duncan Aff.; Pls. Ex. A, 2nd Duncan Aff.

¹⁴ *One Bratenahl Place Condominium Ass., Inc. v. Silwinski*, 37 N.E.3d 213, 2015-Ohio-3353, ¶ 16 (8th Dist.).

¹⁵ *Silwinski*, 2015-Ohio-3353 at ¶ 16.

with respect to debts that have not accrued at the time.¹⁶
This is so 'because the statute neither expressly provides for
the perfection of after-acquired debts nor supplies others
with notice."¹⁷

In reviewing the instant case, the court reflected:

"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.¹⁸ As discussed, after an owner's 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.¹⁹ Rather, the unit owner must adjust or modify the lien by filing a later lien to reflect the new charges to the unit owner.²⁰ It is unclear to the court whether the plaintiff has filed any additional liens against Ms. Diederhofer's property since filing the February 2015 lien."

During the May 13, 2016 hearing, counsel for the plaintiff informed the court that the plaintiff has not filed any subsequent lien after the February 2015 lien. However, the plaintiff argues that the case cited by the court in the above discussion, *One Bratenahl Place Condominium Association., Inc. v. Silwinski*, 37 N.E.3d 213, 2015-Ohio-3353 (8th Dist.), does not prevent the plaintiff from recovering debts acquired after it filed its February 2015 lien. *Silwinski* is a case from the Eighth District Court of Appeals that held that after-acquired debts are not automatically included in a condominium association's lien under R.C. 5311.18, and it is the only case to examine this particular issue under the statute's current language.²¹

¹⁶ *Silwinski*, 2015-Ohio-3353 at ¶ 24.

¹⁷ *Id.*

¹⁸ Pls. Ex. A., Duncan Aff., ¶ 9, Pls. Ex. 3 to Duncan Aff.

¹⁹ *Silwinski*, 2015-Ohio-3353 at ¶ 16.

²⁰ *Id.*

²¹ Two earlier cases also examined R.C. 5311.18, as it relates to after-acquired debts. However, the statutory language in place at that time did not refer to "subsequent adjustments" made to the lien, which is language addressed in *Silwinski*. The first case, *In re Barcelli*, 270 B.R. 837, (S.D. Ohio 2001) summarily held that "[t]he statute does not specifically provide for a

The plaintiff set forth multiple arguments as to why *Silwinski* is inapposite to this case: (1) the Declaration states that a lien will cover all amounts due up until the time of the sale, and the lien is valid for the next five years, (2) the Lien includes language that covers future monthly assessments, (3) R.C. 5311.18 mirrors language in the Declaration stating that a filed lien secures unpaid debts for five years, and (4) requiring new lien filings each time a condominium owner owed another expense to the condominium association would be cost prohibitive and ultimately detrimental to the condominium owner.

For the reasons set forth below, the court finds that *Silwinski* is indistinguishable from the instant case. *Silwinski* involved an appeal by a condominium association that claimed the trial court erred in limiting its costs and assessments under R.C. 5311.18 to those that it accrued at the time that the association filed its liens against the defendant condominium owner.²² The lien stated that the association was entitled to "\$3,049.16 plus 8% interest per annum from the 23rd day of June 2009, and any unpaid assessments accruing hereinafter until this lien is satisfied."²³ The association filed a foreclosure action against the defendant and was granted a decree in foreclosure.²⁴

continuing lien. We do not believe the statute has to specifically provide." *Id.* at 839. The court examined a case from the New York Superior Court which, in interpreting a similar statute, cited overriding policy concerns that are meant to ensure the continued viability of the condominium project in protection against those who do not pay their dues. *Id.* Subsequently, in *West Chateau Condominium Unit Owners Ass'n v. Zanders*, 8th Dist. Cuyahoga No. 83298, 2004-Ohio-1450, the *Zanders* Court rejected *In re Barcelli*. *Id.* at ¶ 7. The court noted that *In re Barcelli* cited "sound policy reasons," however, the statute simply does not provide for a condominium association to reach after-acquired debts. *Id.* Because R.C. 5311.18 did not expressly provide for perfection of after-acquired debts, and because it did not provide sufficient notice to others, the court refused to allow a condominium association from using it to reach debts acquired after the filing of the lien. *Id.* at ¶ 9.

²² *Silwinski*, 2015-Ohio-3353 at ¶ 1.

²³ *Id.* at ¶ 2. The association also filed a second lien containing identical language. *Id.*

²⁴ *Id.* at ¶ 3.

The trial court denied the association proceeds for fees that it accrued between the time the original liens were filed and the foreclosure sale.²⁵

On appeal, the association argued that the legislature's inclusion of the phrase "subject to subsequent adjustments" in R.C. 5311.18(A) indicated that the legislature intended to have recorded liens automatically include after-acquired debts.²⁶ The court noted that "subsequent adjustments" is undefined in R.C. Chapter 5311, and therefore it looked towards similar provisions using the phrase "subject to subsequent adjustments."²⁷ In doing so, the court noted that other statutes specifically state when a lien is a "continuing lien" and also specify when a lien is "subject to automatic subsequent adjustments."²⁸ The court contrasted this language with R.C. 5311.18(A), which is "completely devoid of these phrases."²⁹

Significantly, the legislature included language in one statute that automatically perfects after-acquired debts, but it excluded such language from R.C. 5311.18(A).³⁰ Accordingly, the *Silwinski* Court determined that the phrase "'subject to subsequent adjustments,' without more, refers to liens that may be adjusted and modified accordingly with a late-filed lien."³¹ "The language of R.C. 5311.18(A) neither

²⁵ *Silwinski*, 2015-Ohio-3353 at ¶ 7.

²⁶ *Silwinski*, 2015-Ohio-3353 at ¶ 14. R.C. 5311.18(A)(3) provides that the lien must "contain a description of the unit, the name of the record owner of the unit, and the amount of the unpaid portion of the common expenses and, subject to subsequent adjustments, any unpaid interest, administrative late fees, enforcement assessments, collection costs, attorney's fees, and paralegal fees." (Emphasis added.)

²⁷ *Silwinski*, 2015-Ohio-3353 at ¶ 15.

²⁸ *Id.* citing R.C. 5312.12(B)(2).

²⁹ *Silwinski*, 2015-Ohio-3353 at ¶ 16.

³⁰ *Id.*

³¹ *Id.*

references nor contemplates the automatic inclusion of new charges without filing an updated lien."³²

Beyond the plain language of R.C. 5311.18, the Eighth District Court of Appeals also found the statute's legislative history illuminating. In 2009, 2013, and 2015 bills were introduced that would change the language of R.C. 5311.18 to the following: "The lien described in Division (A)(1) of this section is a continuing lien and is subject to automatic subsequent adjustments that reflect any additional unpaid interest, administrative late fees, enforcement assessments, collection costs, attorney's fees, paralegal fees, and court costs."³³ In fact, on April 26, 2016, H.B. No. 534 was introduced, which would change the language of R.C. 5311.18 to allow for a "continuing lien" that is "subject to automatic subsequent adjustments." Hence, the *Silwinski* Court "could not ignore the significance of the legislature's decision to omit 'continuing lien' and 'automatic' in reference to 'subsequent adjustments' in the current condominium lien statute * * *."³⁴

The court concluded that R.C. 5311.18, as is, fails to notify others that the recorded lien would reach after-acquired fees, and that it is also silent on the priority of after-acquired expenses.³⁵ Thus, the overarching problem with allowing a lien to reach after-acquired debts was the language of the statute itself.

The court also rejected arguments that the specific recorded documents involved in *Silwinski* cured this failure of R.C. 5311.18. Similar to this case, the association in *Silwinski* argued that the declaration and liens involved provided adequate notice to the

³² *Silwinski*, 2015-Ohio-3353 at ¶ 16.

³³ (Emphasis added). *Id.* at ¶ 17.

³⁴ *Id.* at ¶ 18.

³⁵ *Id.* at ¶ 19.

defendant that he would be liable for after-acquired expenses.³⁶ The declaration referenced that any association lien would be payable in the same manner as in R.C. 5311.18(A).³⁷ Since the court found R.C. 5311.18 does not provide for a continuing lien, the declaration failed in the same respect. Finally, the court rejected the argument that the lien itself provided adequate notice to others of after-acquired debts, although it included language covering “any unpaid assessments accruing hereinafter until this lien is satisfied.”³⁸

Silwinski provides a thorough statutory analysis and compels the conclusion that R.C. 5311.18 does not reach debts acquired after a lien is filed.³⁹ Therefore, the court rejects the plaintiff’s argument that R.C. 5311.18, on its face, reaches after-acquired debts.

The plaintiff’s next argument is that its Lien is distinguishable from the one at issue in *Silwinski*. However, similar to *Silwinski*, the Lien at issue in this case discusses future costs in terms of those “accruing” after the lien is filed. The Lien states that the plaintiff “claims a lien for unpaid assessments, including late charges and other fees, on the property * * * in the amount of One Thousand Three Hundred Ninety and 00/100 Dollars (\$1,390.00) plus filing fees, interest, late fees, attorney fees and monthly unpaid common assessments in the amount of \$195.00 per month, as said expenses accrue.”⁴⁰ Similarly, the *Silwinski* lien included claims for “any unpaid assessments accruing

³⁶ *Silwinski*, 2015-Ohio-3353 at ¶ 20.

³⁷ *Id.* at ¶ 22.

³⁸ *Id.* at ¶ 23.

³⁹ *Id.* at ¶ 24.

⁴⁰ Pls. Ex. 3 to Duncan Aff.

hereinafter until this lien is satisfied.”⁴¹ Due to the similarity in language, the court does not find the Lien’s language is so different from the lien in *Silwinski* such that *Silwinski* is inapplicable to this case.

The plaintiff also argued that the Declaration states that a lien includes all amounts due up until the time of the sale, and the lien is good for next five years, thus allowing the plaintiff to collect future debt. The plaintiff noted that R.C. 5311.18 mirrors the language in the Declaration in that it secures the amount for non-payment for five years. The plaintiff directed the court to Section 5.7, which states, in pertinent part: “Such lien shall remain valid for a period of five (5) years from the time of filing thereof * * *.”⁴² Similarly, R.C. 5311.18(A)(4) provides: “(4) The lien described in division (A)(1) of this section is valid for a period of five years from the date of filing * * *.” Although the Declaration language is similar to R.C. 5311.18 in that the Lien remains valid for five years, neither provide that the lien will be automatically adjusted to include newly accrued expenses incurred after the lien is filed. Language allowing a lien to remain valid for five years is not tantamount to language providing that the lien will reach new fees as they accrue for the next five years from the filing date.

Finally, the plaintiff argues that requiring a condominium association to file a new lien to secure each new debt it incurs under R.C. 5311.18 would unnecessarily drive up the costs, which would ultimately be borne by the condominium owner who must pay

⁴¹ *Silwinski*, 2015-Ohio-3353 at ¶ 2. The association also filed a second lien containing identical language. *Id.*

⁴² *Pls. Ex. 1 to Duncan Aff.*, pgs. 26-27.

costs. The plaintiff raises a valid policy concern; however, as written, R.C. 5311.18 does not enable the plaintiff to create a continuing lien.⁴³

R.C. 5311.18(A) allows the plaintiffs to maintain a lien for the following expenses:

“(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.”⁴⁴

The plaintiff presented evidence that demonstrates that as of April 1, 2016 it had incurred \$8,638 in delinquent assessments, lien fees, late fees, attorney’s fees, paralegal fees, and costs. It also demonstrated that, beginning May 1, 2016, Ms. Diederhofer continues to incur monthly assessments of \$195 per month, plus applicable late fees, continuing common charges, interest, and the plaintiff’s court costs and reasonable attorney’s fees.

For the above reasons, the court finds that under the Declaration the plaintiff is entitled to \$8,638, and, beginning May 1, 2016 and for each month thereafter, the plaintiff is also entitled to \$195 per month for continuing monthly assessments, plus late fees on future assessments not paid when due, plus continuing common charges, plus interest, plus the plaintiff’s future court costs and reasonable attorney’s fees. Of this sum, under R.C. 5311.18 only \$1,390.00 is perfected by the plaintiff’s lien. The plaintiff is still entitled to the remaining amount due, although its interest in the remainder has not been perfected through its lien.⁴⁵

⁴³ See *Zanders*, 2004-Ohio-1450 at ¶ 7 (acknowledging that there may be “sound policy reasons to allow a condominium association’s lien to reach unpaid fees as they accrue, [but] the statute does not so provide.”).

⁴⁴ R.C. 5311.18(A)(1).

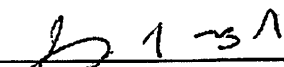
⁴⁵ See *Zanders*, 2004-Ohio-1450 at ¶¶ 10-12.

CONCLUSION

For the foregoing reasons, the court finds that the plaintiff's default judgment against defendants Kelly Diedenhofer and John Doe, Unknown Spouse, if any, of Kelly L. Diedenhofer entitles the plaintiff to damages of \$8,638, plus, beginning May 1, 2016, \$195 per month for continuing monthly assessments, plus late fees on future assessments not paid when due, plus continuing common charges, plus interest, plus the plaintiff's future court costs and reasonable attorney's fees. Of this amount, the plaintiff has a perfected interest in \$1,390.00.

IT IS SO ORDERED.

DATED: 7-11-16



Judge Jerfy R. McBride

NOTICE TO CLERK:

The Clerk is hereby directed to serve upon all parties not in default for failure to appear notice of this judgment and the date of its entry upon the journal. Within three days of entering this judgment upon the journal, the Clerk shall serve the parties in a manner prescribed by Civ.R.5(B) and note the service in the appearance docket.



Common Pleas Judge