

**BOARD ON THE UNAUTHORIZED PRACTICE OF LAW
OF
THE SUPREME COURT OF OHIO**



**CLEVELAND METROPOLITAN
BAR ASSOCIATION,** :
Relator, :
v. :
EXPRESS LIEN, INC., dba ZLIEN, et al. :
Respondents. :

Case No. **UPL 15-01**

**ORDER DISMISSING
COMPLAINT (Gov. Bar
R. VII, SEC. 5b(D)(1) –
SETTLEMENT AGREEMENT
ACCEPTED**

I. SUMMARY

This matter was presented to the Board on the Unauthorized Practice of Law (“Board”) at a regular meeting on July 8, 2016, on a complaint filed on May 11, 2015, by the Cleveland Metropolitan Bar Association alleging that Respondent Express Lien, Inc., dba *zlien*, and several individual respondents, engaged in the unauthorized practice of law by preparing and attempting to file a mechanic’s lien on behalf of another in Ohio.

The parties submitted a Settlement Agreement (Exhibit A) on May 13, 2016. Upon review and consideration of the panel’s report and recommendation to approve the settlement agreement, the Board approved the settlement agreement. By this order, the Board hereby adopts the panel’s report and recommendation and for the following reasons, dismisses the complaint styled *Cleveland Metropolitan Bar Association v. Express Lien, et al.*, Case No. UPL 15-01.

II. INTRODUCTION AND PROCEDURAL BACKGROUND

Relator, Cleveland Metropolitan Bar Association, filed a Complaint on May 11, 2015, alleging the unauthorized practice of law against Respondents Express Lien, Inc.,

dba Zlien (*zlien*); Nate Budde; Gretchen Lynn; Jennifer Smiley; Seth J. Smiley; and Scott G. Wolfe, Jr.. The Complaint states that Respondents performed legal services in Ohio through the attempted filing of mechanic's liens on behalf of others and interpreting and advising clients on Ohio-specific law.

In accordance with Gov. Bar R. VII, Sec. 6, a copy of the complaint by certified mail was sent to each respondent with a notice of right to file an answer within twenty days of the mailing of the notice. On June 22, 2015, Respondent Nate Budde submitted an email requesting until July 10, 2015, to file an answer, which request was granted by the Secretary. Gov. Bar R. VII, Sec. 6. The Respondents filed an Answer on July 10, 2015. The Board notes that the answer did not include any signatures but rather listed each respondent. It is therefore unclear who drafted the answer.

On July 16, 2015, a three-member panel was appointed to hear this cause: attorney Leo M. Spellacy, Chair, attorney Regis E. McGann, and Dr. David Tom. Commissioner McGann recused himself from the proceeding and by entry dated September 22, 2015, attorney Robert V. Morris II was appointed as a panel member.

A Case Scheduling Order was issued in this matter, and an Initial Status Conference was held by telephone on August 18, 2015. Daniel Myers and Nicole Wilson, counsel for Relator, participated in the conference, and respondents Nate Budde and Seth Smiley participated *pro se*. By entry dated September 8, 2015, the panel ordered that Respondent Express Lien, Inc. retain Ohio counsel within fourteen (14) days and file a Notice of Appearance, as corporate entities may not appear *pro se*. See, *Union Sav. Ass'n v. Home Owners Aid*, 23 Ohio St. 2d 60, 63 (Ohio 1970). On September 22, 2015, a Notice of Appearance of Counsel for Respondents was filed by Christopher Weber of Kegler, Brown,

Hill, & Ritter. Respondents filed a Motion to Dismiss and/or for Summary Judgment on December 23, 2015, and on January 11, 2016, Relator filed a Motion for Extension of Time to Respond to Respondents' Motion to Dismiss and/or for Summary Judgment. On January 12, 2016, a Notice of Substitution of Counsel on behalf of Respondents was filed by Charles J. Kettlewell. Respondents filed a Memorandum in Opposition to Relator's motion, and on January 15, 2016, Relator filed a Reply in Support of its Motion for Extension of Time.

The panel scheduled a status conference on January 28, 2016, and by entry, the panel granted Relator's motion for extension of time and ordered that the parties submit a joint motion and proposed discovery schedule. On February 1, 2016, Texas attorney Peter D. Kennedy filed a Notice of Appearance as counsel of record for Respondents pursuant to Rule 5.5(c)(1) of the Ohio Rules of Professional Conduct.¹

The parties filed a joint status update on February 11, 2016, indicating that they were negotiating the terms of a protective order and the deadlines for outstanding discovery had not been established. A second joint status update was filed on February 25, 2016, indicating that the parties were engaging in settlement discussions. On March 8, 2016, Relator requested via email a telephone conference with the panel what Relator described as a "Threatening Letter from Zlien to Witness". Relator provided a copy of a letter addressed to Bobby Grambo of Midwest Interiors, a witness for Relator. The letter dated February 12, indicated in part,

¹ Prof. Cond. R. 5.5(c)(1) states: A lawyer who is admitted in another United States jurisdiction, is in good standing in which the lawyer is admitted, and regularly practices law may provide legal services on a temporary basis in this jurisdiction if ... the services are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter...."

...*zlien* is hereby tendering it's [sic] defense to you pursuant to the Terms of Use, and informing you of your obligation to indemnify the company for any loss or damage suffered. *Zlien* is currently represented in the underlying suit, and your obligations require you to assume payment of *zlien*'s attorneys' fees and costs.

The letter concludes with the following:

Thank you for your prompt attention to this matter, and your acceptance of the tender of *zlien*'s defense in the suit raised by your lien. If you do not wish to incur continuing expenses related to *zlien*'s defense, feel free to contact the CMBA and request the dismissal of the complaint.

The panel held a telephone conference on March 11, 2016. Thereafter, counsel for Relator provided the Board with a copy of a letter dated March 8, 2016, from *zlien* to Mr. Grambo stating that "*zlien* will not take further action in pursuit of arbitration with Midwest Interiors LLC, while settlement discussion are [sic] ongoing."

On May 13, 2016, the parties filed a Settlement Agreement. The parties also filed a Motion to Approve Settlement Agreement and a Memorandum in Support of Motion Approve Settlement Agreement. The panel presented its report to the Board at a regular meeting on July 8, 2016, and the settlement agreement was approved.

III. FINDINGS OF FACT

1. Relator, the Cleveland Metropolitan Bar Association, is authorized to investigate and prosecute unauthorized practice of law matters pursuant to Gov. Bar R. VII(4).

2. Respondents Express Lien, Inc., dba *Zlien* ("*zlien*"); Nate Budde ("*Budde*"); Gretchen Lynn ("*Lynn*"); Jennifer Smiley ("*Jennifer Smiley*"); Seth J. Smiley ("*Seth Smiley*"); and Scott G. Wolfe, Jr. ("*Wolfe*") are not admitted to the practice of law in Ohio pursuant to Gov. Bar R. I ("*Admission to the practice of law*") (Answer p. 2.) or otherwise authorized to practice law in Ohio pursuant to Gov. Bar R. II ("*Limited practice of law by*

a legal intern”) or Gov. Bar R. III (“Legal professional associations authorized to practice law”). Complaint ¶ 3.

3. Respondent Budde, the Chief Legal Officer of *zlien*, is admitted to the practice of law in Louisiana. Answer p. 2, ¶ 4. Respondent Seth Smiley was the Chief Operating Officer of *zlien* and is admitted to the practice of law in Louisiana; however, Mr. Smiley is no longer employed with *zlien*. Compl. ¶ 7; Answer p. 2, ¶ 7. Mr. Wolfe, founder and CEO of *zlien*, is admitted to the practice of law in California, Louisiana, Oregon, and Washington. Compl. ¶ 8. Respondents Lynn and Ms. Smiley do not appear to be admitted to the practice of law in any jurisdiction. Lynn is the Director of Client Experience at *zlien*, and Ms. Smiley’s title for the company is unknown. Ms. Smiley is no longer employed at *zlien*. Compl. ¶ 5 and ¶ 6.

4. Respondent *zlien* is not registered with the Ohio Secretary of State. Compl. ¶ 9 ; Answer ¶ 9. Respondents describe *zlien* as a “technology company dedicated to innovating beautifully to put companies in complete control of their security and lien rights.” Answer ¶ 9.

5. Relator states that Respondent Lynn prepared, signed, and attempted to file a lien on behalf of Midwest Interiors LLC, an Ohio company. Compl. ¶ 12. A redacted Affidavit of Mechanics Lien indicated that Respondent Gretchen Lynn is the “authorized and disclosed agent for” the Lien Claimant. Compl. Ex. C. The affidavit was signed by Respondent Lynn and notarized by Respondent Seth Smiley. Compl. ¶ 12.; Compl. Ex. C.

6. Respondents maintain that Ms. Lynn did not file a mechanic’s lien on behalf of Midwest Interiors. Answer ¶ 12. Rather, Respondent “*zlien*’s software took information provided by Midwest Interiors LLC and transferred it verbatim to a form”, which was

merely signed by Respondent Lynn as the authorized and disclosed agent for Midwest Interiors LLC. *Id.* Respondent Lynn signed the Express Lien check made payable to “Fiscal Officer” and dated 2/17/12. Compl. ¶ 14, Ex. D. A letter from the Cuyahoga County Fiscal Office dated 2/21/12 included a handwritten note stating, “Last day of work over the 75 days for commercial property[.] Not recordable.” *Id.*

7. Relator provided an email that appears to be from Respondent Jennifer Smiley that states:

Please see the attached mechanics lien and rejection letter from Cuyahoga county. Usually once the county receives the liens, they are recorded shortly thereafter. However, the county decided to reject the lien for reason(s) such as : Date of last work on the job has surpassed the 75 day window to file a mechanic lien.

Zlien software does calculate deadline(s) such as these for clients so that they do not file an expired lien or miss any deadlines. Your deadline calculate show that you are 33 days past the date for filing.

While zlien does not always agree with the county rejections or decision, sometimes they are right and other times they are wrong; we can only attest [sic] these decisions at our clients [sic] discretion. Compl. Ex. E.

8. Relator indicates that Respondent *zlien* “researches the legal property description and property owner, prepares the mechanics lien, signs the mechanics lien using a power of attorney, delivers and files the lien with the County Recorder, serves the filed lien on the property owner and required parties, and monitors lien deadlines and expirations.” Compl. ¶ 10. Relator provided Respondent *zlien*’s website which features a video entitled “How does *zlien* File your Mechanics Lien?” <http://www.zlien.com/mechanics-lien/how-does-zlien-work/> *Id.* Respondents, however, maintain that the statement *zlien* “will have your mechanics lien document generated and prepared,” is different than *zlien* preparing the document. Answer ¶ 10. Respondents maintain that “*zlien* acts as a technology powered scrivener, and merely copies verbatim the user provided information.” *Id.*

IV. CONCLUSIONS OF LAW

1. The Supreme Court of Ohio has original jurisdiction regarding admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law. Ohio Constitution, Article IV, Section 2(B)(1)(g); *Royal Indemnity Co. v. J.C. Penney Co.*, 27 Ohio St.3d 31, 501 N.E.2d 617 (1986); *Judd v. City Trust & Sav. Bank*, 133 Ohio St. 81, 12 N.E.2d 288 (1937). Accordingly, the Court has exclusive jurisdiction over the regulation of the unauthorized practice of law in Ohio. *Greenspan v. Third Fed. S. & L. Assn.*, 122 Ohio St. 3d 455, 2009 Ohio 3508, 912 N.E.2d 567, 2009 Ohio LEXIS 1938 (Ohio 2009); *Lorain Cty. Bar Assn. v. Kocak*, 121 Ohio St.3d 396, 2009-Ohio-1430, 904 N.E.2d 885, at ¶ 16.

2. The unauthorized practice of law is the rendering of legal services for another by any person not admitted or otherwise registered or certified to practice law in Ohio. Gov.Bar R. VII(2)(A). The use of a power of attorney does not give one the right to practice law on behalf of another. See, *Disciplinary Counsel v. Coleman*, 88 Ohio St.3d 155, 2000-Ohio-288, “a non-lawyer with a power of attorney may not appear in court on behalf of another, or otherwise practice law.”

3. The Court has consistently held that “[t]he practice of law is not limited to appearances in court, but also includes giving legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are preserved.” *Miami Cty. Bar Assn. v. Wyandt & Silvers, Inc.*, 107 Ohio St.3d 259, 2005-Ohio-6430, 838 N.E.2d 655, at ¶ 11 (emphasis added), quoting *Cleveland Bar Assn. v. Misch*, 82 Ohio St.3d 256, 259, 695 N.E.2d 244 (1998); *Land Title Abstract & Trust Co. v. Dworken*, 129 Ohio St. 23, 28, 193 N.E. 650 (1934).

4. R.C. 4705.07(A) provides that “[n]o person who is not licensed to practice law in this state shall do any of the following: (1) Hold that person out in any manner as an attorney at law; (2) Represent that person orally or in writing, directly or indirectly, as being authorized to practice law; (3) Commit any act that is prohibited by the [S]upreme [C]ourt as being the unauthorized practice of law.”

5. In *Ohio State Bar Assn. v. Lienguard, Inc.*, the Supreme Court approved the proposed consent decree of the parties which states that the preparation of an affidavit for mechanic’s lien or in satisfaction of mechanic’s lien is the unauthorized practice of law. 126 Ohio St.3d 400, 2010-Ohio-3827 (2010).

V. PRINCIPAL TERMS OF SETTLEMENT AGREEMENT

1. The parties stipulate that *zlien’s* current policy and practice is not to select or recommend which property description(s) to use in mechanic’s lien affidavits. Settlement Agreement, ¶ 1.

2. Respondents agree that they will not sign any mechanic’s lien affidavits for properties located in Ohio, pursuant to a power of attorney or otherwise, unless they themselves are the lien claimant for the particular lien or licensed to practice law in Ohio. Settlement Agreement, ¶ 3. However, the parties stipulate that if a court of competent jurisdiction determines that signing a mechanic’s lien affidavit is not the practice of law in Ohio, Respondents shall no longer be required to comply with that restriction. Settlement Agreement ¶ 3.

3. The parties agree that *zlien* is not prohibited from providing software that allows customers to complete forms creating mechanic’s lien affidavits to file in Ohio, so long as the forms conform to ORC 1311.06 and *zlien* does not select the property

descriptions to be inserted into the affidavits or advise customers which property descriptions to use. Settlement Agreement ¶ 2.

4. There are no civil penalties to be imposed on any Respondent. Settlement Agreement ¶ 10.

5. Each parties shall bear its own costs in this proceeding. Settlement Agreement ¶ 11.

VI. BOARD ANALYSIS

A. Review of Settlement Agreement Using Factors in Gov.Bar R. VII (5b)(C)

When evaluating a settlement agreement, the Board is required to consider the factors set forth in Gov.Bar R. VII(5b)(C). The Board reviewed the parties' Settlement Agreement using the factors stated in Section 5b(C) and finds the following:

1. The resolution is submitted in the proper form, and includes the required waiver of notice and hearing under Gov.Bar R. VII(7)(H);

2. Respondents continue to deny the material allegations of the unauthorized practice of law as stated in the Complaint;

3. The public is sufficiently protected from future harm, as Respondents have ceased the practice of signing mechanic's lien affidavits for properties in Ohio and further stipulate not to select or recommend to customers which property description to use in mechanic's lien affidavits;

5. The Settlement Agreement resolves all material allegations of the unauthorized practice of law;

6. The Settlement Agreement furthers public policy by both ensuring a cessation of the herein described business practices, because the Settlement

Agreement will be posted for reference by the Board in accordance with Gov.Bar R. VII(5b)(H), placing the public on notice that Respondents have ceased the conduct alleged by Relator to constitute the unauthorized practice of law; and

7. The parties' collaborative efforts to resolve this matter by entering into the Settlement Agreement further the purposes of Gov.Bar. R. VII to prevent protracted litigation.

B. Applicability of Civil Penalties Based on Factors in Gov.Bar R. VII(8)(B) and UPL Reg. 400

When determining whether civil penalties should be imposed in an unauthorized practice of law case, the Board is required to base its recommendation on the factors set forth in Gov.Bar R. VII(8)(B) and UPL Reg. 400(F). Additionally, UPL Reg. 400(F) specifies aggravating and mitigating factors that the Board may use to justify an enhanced or a reduced penalty. The Board considered the general, aggravating, and mitigating factors as described below.

1. General Civil Penalty Factors

With regard to the general civil penalty factors listed in Gov.Bar R. VII(8)(B)(1)-(5) and UPL Reg. 400(F)(1) and (2), the Board finds:

- a. Respondents cooperated with Relator's investigation and participated in the proceeding; and
- b. Relator has not sought the imposition of a civil penalty;

2. Aggravating Civil Penalty Factors

Reviewing the aggravating factors of UPL Reg. 400(F)(3)(a)-(g), which are the basis for a recommendation of a more severe penalty, the Board finds that

the record does not contain evidence or statements establishing any of these factors.

3. Mitigating Civil Penalty Factors

Applying the mitigating factors of UPL Reg. 400(F)(4)(a)-(g), which are the basis for a recommendation of no civil penalty or a less severe penalty, the Board finds:

- a. Respondents have ceased the conduct of filing mechanic's liens in Ohio as alleged in the Complaint; and
- b. Respondents have agreed to cease and desist from similar conduct in the future, unless the conduct is found not be the practice of law in Ohio.

4. Conclusion Regarding Civil Penalties

The Board defers to the Relator's recommendation that civil penalties are not warranted in this case, as Relator conducted the investigation and negotiated the terms of the Settlement Agreement with Respondents.

VII. CONCLUSION

Based upon these findings, the Board hereby approves the Settlement Agreement. It is hereby ordered that pursuant to Gov. Bar R. VII(5b)(H), the Settlement Agreement shall be recorded for reference by the Board, bar association unauthorized practice of law committees, and Disciplinary Counsel. It is further ordered that pursuant to Gov. Bar R. VII(5b)(D)(1), the Complaint in this matter is hereby **DISMISSED**.

**FOR THE BOARD ON THE
UNAUTHORIZED PRACTICE OF
LAW**

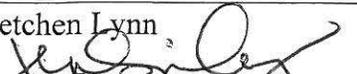
s/Robert V. Morris II, Chair

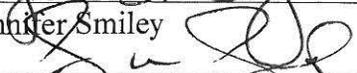
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Nate Budde

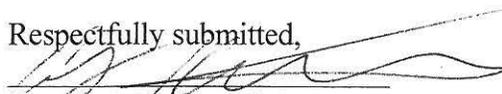
Gretchen Lynn


Jennifer Smiley

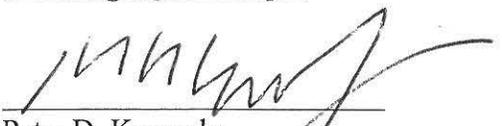

Seth Smiley


Scott G. Wolfe, Jr.

Respectfully submitted,



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Date 5-3-16

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Date 4/24/2016

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