

[Cite as *Harbour Light Condominium Assn. v. Unknown Heirs of Gentile*, 2019-Ohio-548.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107625

**HARBOUR LIGHT CONDOMINIUM
NO. 3 ASSOCIATION**

PLAINTIFF-APPELLEE

vs.

UNKNOWN HEIRS OF DONALD LOUIS GENTILE, ET AL.

DEFENDANTS-APPELLEES

[Appeal by Citibank, N.A., as Trustee for
Wachovia Loan Trust 2005-SD1 Asset, Defendant-Appellant]

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-16-857960

BEFORE: Boyle, P.J., E.A. Gallagher, J., and Sheehan, J.

RELEASED AND JOURNALIZED: February 14, 2019

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MARY J. BOYLE, P.J.:

{¶1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1.

{¶2} This case concerns a lien priority dispute between plaintiff-appellee, Harbour Light Condominium No. 3 Association (“Harbour Light”), and defendant-appellant, Citibank, N.A., as trustee for Wachovia Loan Trust 2005-SD1 Asset-Backed Certificates, Series 2005-SD1 (“Citibank”). The trial court ordered that Harbour Light’s lien was superior to Citibank’s

mortgage on the property. Citibank appeals from that judgment, raising one assignment of error for our review:

The trial court erred by adopting the magistrate's decision and in finding that defendant-appellant's [earlier] recorded mortgage lien is subordinate to plaintiff-appellee's later recorded association liens.

{¶3} Finding merit to Citibank's assigned error, we reverse and remand. **I.**

Procedural History and Factual Background

{¶4} In January 1977, Donald Gentile purchased a condominium unit at Harbour Light 3 in North Royalton. He passed away in March 2011. His wife, who was never on the title to the property, passed away in October 2015.

{¶5} Harbour Light is the holder of two liens for unpaid assessments and fees against Gentile's property as well as "the undivided interest in the common elements." Harbour Light recorded the first lien in November 2014, for \$1,349.94. Harbour Light recorded its second lien in November 2015, in which it updated the amount owed to \$4,034.58.

{¶6} On January 26, 2016, Harbour Light filed a complaint for foreclosure and money damages against Gentile's "unknown heirs, devisees, legatees, executors, administrators, spouses and assigns," Citibank, and several other banks. The complaint sought a decree of foreclosure against the condominium unit for unpaid maintenance fees and assessments for common interests.

{¶7} Citibank filed an answer, cross-claim, and counterclaim arguing that it had a mortgage on the property that was superior to Harbour Light's lien. Citibank is the holder of a note, which is secured by a mortgage on the property. Citibank's mortgage was recorded in October 1997. Citibank alleged that Gentile owed \$52,764.30 plus interest on the mortgage. Although all defendants were served with Harbour Light's complaint, Citibank is the only one

who answered. Several of Gentile's primary heirs were discovered, but they failed to appear or otherwise defend.

{¶8} Harbour Light moved for default judgment in January 2017, against all named defendants who did not plead or otherwise defend the complaint. In March 2017, a magistrate granted Harbour Light default judgment and entered judgment against Gentile. The magistrate found that Harbour Light's and Citibank's liens were valid. The magistrate ordered that the proceeds of the sale be distributed in the following order: (1) to the clerk of court for costs, (2) the Cuyahoga County Treasurer for taxes, (3) to Harbour Light in the amount of \$4,034.58 plus interest from August 15, 2015, (4) to Citibank in the amount of \$52,764.30 plus interest from August 15, 2015, and (5) to Harbour Light for additional maintenance fees, legal fees, and assessments that occurred during the pendency of the case.

{¶9} Citibank objected to the magistrate's decision, arguing that its liens were recorded prior to Harbour Light's liens. Harbour Light responded, arguing that Citibank's mortgage was inferior to Harbour Light's lien under R.C. 5311.18(B)(1) because Citibank's mortgage was a second mortgage. The trial court held an evidentiary hearing on Citibank's objections in May 2017 (the transcript is not in the record on appeal). After the hearing, Citibank filed its own motion for default judgment on its cross-claim and counterclaim, which the magistrate granted, noting that "objections to the magistrate's decision dated 03/20/2017 are pending before the court."

{¶10} On August 7, 2018, the trial court adopted the magistrate's decision and overruled Citibank's objections. It is from this judgment that Citibank appeals, raising its sole assignment of error arguing that its mortgage is superior to Harbour Light's lien.

{¶11} We note that Citibank did not seek a stay of the trial court’s decree of foreclosure. Subsequent to Citibank filing its notice of appeal, the property was sold on October 15, 2018. According to the Cuyahoga County Common Pleas Court docket, the trial court confirmed the sale on December 4, 2018. The proceeds from the sale, however, have not been distributed and, thus, this appeal is not moot because the judgment has not been satisfied. *See Blodgett v. Blodgett*, 49 Ohio St.3d 243, 245, 551 N.E.2d 1249 (1990) (“It is a well-established principle of law that a satisfaction of judgment renders an appeal from that judgment moot.”); *U.S. Bank Trust N.A. v. Janossy*, 8th Dist. Cuyahoga No. 106361, 2018-Ohio-2228, ¶ 15 (“If the distribution of the proceeds following the sale of the property has not occurred, in other words, the judgment creditor has not successfully collected on the money judgment, there is no satisfaction of the judgment for the purposes of the mootness doctrine.”).

II. R.C. 5311.18

{¶12} Citibank raises three issues in support of its assigned error that the trial court erred when it found Harbour Light’s liens to be superior to Citibank’s. In the first issue, Citibank assumes for the sake of argument that its mortgage on the property was a second mortgage, but argues that its mortgage was superior to Harbour Light’s under R.C. 5311.18(B)(1) because it recorded its mortgage before Harbour Light recorded its liens.

{¶13} Citibank contends that the trial court erred when it interpreted R.C. 5311.18(B)(1) because its mortgage was recorded before Harbour Light’s lien. Citibank maintains that because its mortgage did not “subsequently arise” after Harbour Light’s lien, it is in the superior position. Harbour Light maintains that under this provision, its lien was superior to Citibank’s mortgage because its interest in the property predated Citibank’s. Specifically, Harbour Light

argues that its interest “has existed since 1977” when it recorded its declaration and bylaws with the county recorder’s office.

{¶14} Normally, “[w]hen reviewing an appeal from a trial court’s adoption of a magistrate’s decision under Civ.R. 53(D)(4)(d), we must determine whether the trial court abused its discretion in adopting the decision.” *Abbey v. Peavy*, 8th Dist. Cuyahoga No. 100893, 2014-Ohio-3921, ¶ 13, citing *Lindhorst v. Elkadi*, 8th Dist. Cuyahoga No. 80162, 2002-Ohio-2385. But in this case, we must interpret a statute. The interpretation of a statute is a question of law that we review de novo. *State v. Pariag*, 137 Ohio St.3d 81, 2013-Ohio-4010, 998 N.E.2d 401, ¶ 9.

{¶15} A court’s main objective when interpreting a statute is to determine and give effect to the legislative intent. *State ex rel. Solomon v. Bd. of Trustees of the Police & Firemen’s Disability & Pension Fund*, 72 Ohio St.3d 62, 65, 647 N.E.2d 486 (1995). We first look to the language of the statute itself to determine the intent of the General Assembly. *Stewart v. Trumbull Cty. Bd. of Elections*, 34 Ohio St.2d 129, 130, 296 N.E.2d 676 (1973). When a statute’s meaning is clear and unambiguous, we apply the statute as written. *Provident Bank v. Wood*, 36 Ohio St.2d 101, 105-106, 304 N.E.2d 378 (1973). If a legislative definition of a term or phrase is available, we construe the words of the statute accordingly. R.C. 1.42. If a term or phrase is undefined in a statute, we accord it the common, everyday meaning. *Id.*

{¶16} R.C. 5311.18(A) provides:

(1) Unless otherwise provided by the declaration or the bylaws, the unit owners association has a lien upon the estate or interest of the owner in any unit and the appurtenant undivided interest in the common elements for the payment of any of the following expenses that are chargeable against the unit and that remain unpaid for ten days after any portion has become due and payable:

(a) The portion of the 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.

{¶17} Harbour Light recorded its declaration on January 7, 1977. Citibank's mortgage was recorded on October 16, 1997 (by another bank of which Citibank was the successor by merger). Harbour Light recorded its first lien on November 7, 2014, and its second lien on November 6, 2015.

{¶18} Harbour Light asserts that its bylaws contain identical language to R.C. 5311.18(A), and therefore, "the right to lien is automatic, reflecting the owner's underlying, ongoing obligation to pay assessments." Because the unit owner's "obligation begins upon [filing] of the declaration, in accordance with R.C. 5311, and runs with the land," Harbour Light asserts that its interest in the property "commenced as of the date the Declaration was filed," which was 20 years before Citibank recorded its lien. Essentially, Harbour Light is arguing that under R.C. 5311.18(A), its lien on the property was automatic without having to record it in the county recorder's office.

{¶19} Harbour Light also argues that R.C. 5311.18(B)(1) "further clarifies the priority issue." This provision states:

The lien described in division (A)(1) of this section 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 be foreclosed in the same manner as a mortgage on real property in an action brought on behalf of the unit owners association by the president or other chief officer of the association pursuant to authority given to that individual by the board of directors.

{¶20} According to Harbour Light, R.C. 5311.18(B)(1) makes it clear that its lien established under R.C. 5311.18(A)(1) is prior to any lien subsequently arising except for real

estate taxes and recorded first mortgages. Harbour Light maintains that Citibank's mortgage is a second mortgage on the property that arose 20 years after Harbour Light recorded its declaration.

{¶21} After review, we find Harbour Light's arguments to be without merit. Harbour Light ignores the fact that R.C. 5311.18(A)(3) explicitly states:

The lien described in division (A)(1) of this section is *effective* on the date that a certificate of lien in the form described in division (A)(3) of this section is *filed for record in the office of the recorder of the county or counties in which the condominium property is situated* pursuant to an authorization given by the board of directors of the unit owners association.

(Emphasis added.)

{¶22} Thus, according to the plain language of R.C. 5311.18(A)(3), Harbour Light's lien that was established under R.C. 5311.18(A)(1) was not effective until Harbour Light recorded it.

Harbour Light did not record its liens until 17 years after Citibank's mortgage was recorded. Therefore, Citibank's lien did not "subsequently arise" after Harbour Light's lien.

{¶23} Moreover, Harbour Light's lien that was established under R.C. 5311.18(A)(1) is not automatic upon filing a declaration as Harbour Light contends. Rather, according to the plain language of R.C. 5311.18(A)(1), a lien that arises from common expenses, interest, late fees, etcetera, does not arise until the expenses "remain unpaid for ten days after any portion has become due and payable[.]" Thus, Harbour Light's lien on the property did not arise until Gentile's expenses remained unpaid for ten days. According to Harbour Light's motion for default judgment, Gentile's account was not in default until sometime in 2012.

{¶24} Further, if the legislature had intended for condominium owners associations' liens to have priority over all other liens, whether the association recorded their lien or not, then the legislature would *not* have included the words "subsequently arising" in R.C. 5311.18(B)(1).

Instead, R.C. 5311.18(B)(1) would have stated, “The lien described in division (A)(1) of this section is prior to any lien or encumbrance except liens for real estate taxes and assessments of political subdivisions and liens of first mortgages that have been filed for record.”

{¶25} R.C. 5301.25(A) also lends support to our interpretation of R.C. 5311.18(B)(1). This provision provides, in pertinent part that “[a]ll deeds * * * and instruments of writing properly executed for the conveyance or *encumbrance of lands* * * * shall be recorded in the office of the county recorder of the county in which the premises are situated.” (Emphasis added.) Recording such an instrument gives constructive notice to all persons dealing with the land of properly recorded instruments in the chain of title. *Deutsche Bank Natl. Trust Co. v. Hill*, 5th Dist. Perry No. 14 CA 00021, 2015-Ohio-1575, ¶ 29. Therefore, “if a lienholder fails to record an encumbrance on real property, the lienholder will not have the benefit of being able to claim constructive notice of the lien against a subsequent purchaser.” *Daniely v. Accredited Home Lenders*, 8th Dist. Cuyahoga No. 99208, 2013-Ohio-4373, ¶ 12. The recorded lien “also protects [a] lienholder by giving the lienholder priority of interest in the secured property.” *Id.*, citing *Swallie v. Rousenberg*, 190 Ohio App.3d 473, 2010-Ohio-4573, 942 N.E.2d 1109 (7th Dist.). There is nothing in R.C. Chapter 5311 that indicates the legislature intended to depart from these well-established rules.

{¶26} A case from the Twelfth Appellate District, *Settlers Walk Home Owners Assn. v. Phoenix Settlers Walk, Inc.*, 12th Dist. Warren Nos. CA2014-09-116, CA2014-09-117, and CA2014-09-118, 2015-Ohio-4821, *discretionary appeal not accepted*, 145 Ohio St.3d 1444, 2016-Ohio-1596, 48 N.E.3d 583 — although not directly on point — also supports our

interpretation of R.C. 5311.18(B)(1).¹ In *Settlers Walk*, the court addressed whether a purchaser of 50 lots in a residential planned community, where all property owners are mandatory members of a homeowners' association and subject to the association's declaration and bylaws, was liable for unpaid assessments and fees that had accrued on the property before the purchaser bought the property. The homeowners' association did not record the unpaid assessments in the county recorder's office. Similar to what Harbour Light is arguing here, the association in *Settlers Walk* argued that its lien against the property "ran with the land by simply recording the Declaration itself without ever recording a separate instrument notifying any potential bona fide purchaser that [the association] had a lien on the property resulting from the unpaid assessments." *Id.* at ¶ 14.

{¶27} The Twelfth District disagreed with the association in *Settlers Walk* and held that the purchaser was not liable for the unpaid assessments and late fees that accrued prior to its

¹*Settlers Walk* involved the interpretation of R.C. 5312.12, which was enacted as part of the Ohio Planned Community Act. See Am.Sub.S.B. No. 197, effective on September 10, 2010. R.C. 5312.12, titled "Lien of association; foreclosure actions; action for discharge of lien," is nearly identical to the relevant portions of R.C. 5311.18, which was enacted as part of the Ohio Condominium Act. See Am.Sub.S.B. No. 18, effective on August 18, 1963. R.C. 5312.12(A) states:

The owners association has a lien upon the estate or interest in any lot for the payment of any assessment or charge levied in accordance with section 5312.11 of the Revised Code, as well as any related interest, administrative late fees, enforcement assessments, collection costs, attorney's fees, and paralegal fees, that are chargeable against the lot and that remain unpaid ten days after any portion has become due and payable.

R.C. 5312.12(B)(1) provides in relevant part that "[t]he lien is effective on the date that a certificate of lien is filed for record in the office of the recorder of the county or counties in which the lot is situated." R.C. 5312.12(B)(3) states that "[t]he lien is valid for a period of five years from the date of filing[.]" Finally, R.C. 5312.12(B)(4) provides:

The lien 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 prior to the recording of the lien, and may be foreclosed in the same manner as a mortgage on real property in an action brought by the owners association.

R.C. 5311.18, the statute at issue in this case, contains these exact provisions.

purchase. *Id.* at ¶ 26. The court noted that “Ohio is what is known as a ‘race/notice’ state.” *Id.* at ¶ 16. The court explained that under R.C. 5301.25(A), “‘a bona fide purchaser for value is bound by an encumbrance upon the property only if he has constructive or actual knowledge of the encumbrance.’” *Id.* at ¶ 17, quoting *Cox v. Estate of Wallace*, 12th Dist. Butler No. CA87-06-078, 1987 Ohio App. LEXIS 10358 (Dec. 31, 1987).

{¶28} The Twelfth District further relied on an Ohio Supreme Court case that held “‘there can be no lien unless there is a debt[.]’” *Id.* at ¶ 18, citing *Choteau, Merle & Sandford v. Thompson & Campbell*, 2 Ohio St. 114 (1853). The Twelfth District stated that “the undisputed facts show that at the time the Declaration was recorded on February 5, 1996, there existed no actual lien upon the subject property as no assessment had been charged, much less stood unpaid or delinquent.” *Id.* at ¶ 19. The court concluded:

* * * Settlers Walk [homeowners’ association] did not have a perfected and enforceable lien on the subject property that ran with the land merely by saying so as part of the recorded Declaration. Again, as the Ohio Supreme Court has stated, “there can be no lien unless there is a debt[.]” *Choteau*, 2 Ohio St. at 124. Therefore, in accordance with the provisions found in R.C. 5301.25(A), once the assessments went unpaid and a debt was established, Settlers Walk [homeowners’ association] should have recorded a separate instrument with the county recorder to perfect its lien and provide notice to any subsequent bona fide purchaser that it had a lien on the subject property. Settlers Walk [homeowners’ association] simply did not do that here.

Id.

{¶29} We agree with the sound reasoning of the Twelfth District’s decision in *Settlers Walk*, 12th Dist. Warren Nos. CA2014-09-116, CA2014-09-117, and CA2014-09-118, 2015-Ohio-4821.

{¶30} In the present case, Harbour Light only cites two Cuyahoga County Common Pleas Court cases in support of its argument. These cases, however, are not binding on this court.

Harbour Light fails to cite to any other authority in support of its position. It relies on policy arguments instead of actual, binding authority. But this court is an error court, not a policy court. We are bound to follow the law set forth by the Ohio Supreme Court and the Ohio General Assembly.

{¶31} Thus, we find merit to Citibank's first issue and agree that because its mortgage was recorded before Harbour Light's lien, its mortgage is superior to Harbour Light's.

{¶32} In Citibank's remaining two issues, it argues that its mortgage is superior to Harbour Light's lien because its mortgage was a first mortgage, not a second mortgage. According to the preliminary judicial report, Beneficial recorded the first mortgage on the property on June 17, 1997. Citibank's mortgage was not recorded until five months later, on October 16, 1997. Beneficial did not respond or otherwise defend against the complaint. In these alternate arguments, Citibank contends that the trial court did not determine the validity of Beneficial's mortgage or determine if Beneficial's mortgage was satisfied. Because we find merit to Citibank's first issue, however, Citibank's remaining issues are moot. Accordingly, we do not need to address Citibank's remaining issues.

{¶33} Citibank's sole assignment of error is sustained.

{¶34} Judgment reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, PRESIDING JUDGE

EILEEN A. GALLAGHER, J., and
MICHELLE J. SHEEHAN, J., CONCUR