[Cite as *One Brathenahl Place Condominium Assn., Inc. v. Sliwinski*, 2015-Ohio-3353.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102493

ONE BRATENAHL PLACE CONDOMINIUM ASSOCIATION, INC.

PLAINTIFF-APPELLANT

vs.

TEDDY SLIWINSKI, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-10-722623

BEFORE: Celebrezze, A.J., McCormack, J., Laster Mays, J.

RELEASED AND JOURNALIZED: August 20, 2015

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FRANK D. CELEBREZZE, JR., A.J.:

{¶1} Appellant, One Bratenahl Place Condominium Association, Inc. ("One Bratenahl"), appeals from the judgment of the Cuyahoga County Court of Common Pleas denying its supplemental motion for distribution in connection with the satisfaction of its liens on a foreclosed condominium unit owned by appellees Teddy Sliwinski ("Sliwinski") and The Sliwinski Family Limited Partership ("SFLP"). One Bratenahl claims the trial court erred in finding that the liens were limited to the costs and assessments that had accrued at the time the liens were filed. Instead, One Bratenahl claims that Sliwinski should be liable under the liens for unpaid association, maintenance, and other fees that accrued between the time the liens were filed and the foreclosure sale.

For the reasons set forth below, we affirm.

I. Factual and Procedural History

{¶2} On July 14, 2009, One Bratenahl filed a lien certificate in the Cuyahoga County Recorder's Office. The lien stated:

> One Bratenahl Place Condominium Association, Inc., hereby claims a lien for unpaid assessments to date against the following unit in said Association

> property and the undivided interest in the Common Elements appertaining thereto.

After identifying the property and naming Sliwinski and his wife as the owners, One Bratenahl included the following in a section entitled "Amount of Lien": "$3,048.16 plus 8% interest per annum from the 23rd day of June 2009, and any unpaid assessments accruing hereinafter until this lien is satisfied." One Bratenahl filed a second lien certificate on August 13, 2009. The second lien contained identical language to the first, except for the amount that was listed as "$3,753.39 plus 8 percent interest from the 22nd day of October 2009, and any unpaid assessments accruing hereinafter until the lien is satisfied."

{¶3} One Bratenahl filed a foreclosure action against Sliwinski on March 29, 2010. In a decision issued on December 1, 2011, the magistrate granted default judgment in favor of One Bratenahl and entered a decree of foreclosure. In so doing, the magistrate found that Sliwinski owed (1) $3,408.16 plus 8 percent interest per annum from June 23, 2009, under the first lien certificate; (2) $3,753.39 plus 8 percent interest from November 13, 2009, under the second lien certificate; and (3) unpaid assessments and late fees accruing after November 13, 2009, "until the property transferred on March 22, 2010, in the amount of $4,013.02, plus interest at the rate of 8 percent per annum from March 22, 2010." Furthermore, the magistrate's decision contained the following:

> The magistrate further finds that there is due the Plaintiff, One Bratenahl Place Condominium Association, unpaid assessments and late fees accruing from the property transfer date of March 22, 2010, to The Sliwinski Family Limited Partnership. As of January 5, 2011, the total amount due and owing the Plaintiff from the Defendant, The Sliwinski Family Partnership,

> is $8,955.33. Additional maintenance fees and assessments through the sheriff's sale date will continue to accrue on the account. A determination for said additional amount is held for further order of the court.

{¶4} After approximately three-and-one-half years of attempted negotiation, settlement, and mediation, the trial court adopted the magistrate's decision on May 19, 2014. The trial court's foreclosure decree ordered SFLP to pay One Bratenahl $8,955.33 from January 5, 2011, and ordered that One Bratenahl's liens against Sliwinski and his wife to be satisfied in the amounts of $3,408.16 and $3,753.39 plus interest. The court did not incorporate the magistrate's decision regarding after-accruing assessments into its decree.

{¶5} The property was sold at a sheriff's sale on September 15, 2014, and the trial court confirmed the sale on September 24, 2014. One Bratenahl subsequently filed a motion to request distribution seeking $122,029.77 from the proceeds to satisfy unpaid assessments that accrued after the two liens were filed in 2009. The trial court denied the motion and, relying on this court's decision in *W. Chateau Condominium v. Zanders*, 8th Dist. Cuyahoga No. 83298, 2004-Ohio-1450, ruled that One Bratenahl's liens did not secure amounts coming due after the liens were filed. However, the court also allowed One Bratenahl to refile its motion, provided One Bratenahl could supply documentation evidencing that it held liens securing the amount over what was claimed in the original liens.

{¶6} On December 16, 2014, One Bratenahl filed an amended and supplemental motion to request distribution. On December 19, 2014, the trial court again denied One Bratenahl's motion on grounds that One Bratenahl was not entitled to a distribution of the

proceeds beyond what was provided for in the foreclosure decree because it had not produced additional liens that secured the alleged additional fees. It is from this order that One Bratenahl appeals.

II. Law and Analysis

{¶7} In its sole assigned error, One Bratenahl argues that the trial court erred in denying its motions requesting an increase in distribution because it was entitled to proceeds for fees that accrued between the time the original liens were filed and the foreclosure sale.

{¶8} In *Zanders*, a case nearly identical to this one, this court held that R.C. 5311.18(A) did not perfect a lien with respect to debts that had not accrued at the time of filing because the statute neither expressly provided for the perfection of after-acquired debts nor supplied other parties with notice. *Zanders*, 2004-Ohio-1450, at ¶ 9. The court acknowledged the valid policy concerns addressed by the federal bankruptcy court interpreting R.C. 5311.18(A)(1) in *In re Barcelli*, 270 B.R. 837 (Bankr.S.D.Ohio 2001). *Zanders* at ¶ 7. However, the *Zanders* court reasoned that the statute did not give adequate notice that a recorded lien would reach after-acquired debts, that it did not require lien filers to state the actual amount of monthly expenses that could accrue, and that it did not provide for the priority of after-accruing expenses. *Zanders* at ¶ 8.

{¶9} Shortly after this court's decision in *Zanders*, R.C. 5311.18(A) was amended by the Ohio General Assembly.[1] The current version of R.C. 5311.18(A) reads:

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[1] *Zanders* was decided on March 25, 2004. The current version of R.C. 5311.18(A) was

> (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.

{¶10} Furthermore, R.C. 5311.18(A)(3) provides:

> The lien described in division (A)(1) 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. This certificate shall contain a description of the unit, the name of the record owner of the unit, and the amount of the unpaid portion of common expenses *and, subject to subsequent adjustments, any unpaid interest, administrative late fees, enforcement assessments, collection costs, attorney's fees, and paralegal fees*. The certificate shall be subscribed by the president or other designated representative of the association.

(Emphasis added.)

A. Standard of Review

{¶11} As R.C. 5311.18(A) has been modified, we must determine whether the current version of the statute abrogates our holding in *Zanders* at ¶ 9. Statutory interpretation involves a question of law, which an appellate court reviews de novo. *State v. Sufronko*, 105 Ohio App.3d 504, 506, 664 N.E.2d 596 (4th Dist.1995). "The

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enacted approximately one month later on April 19, 2004, and became effective on July 20, 2004. *See* 2004 Am.Sub.H.B. No. 135.

primary rule in statutory construction is to give effect to the legislature's intention." *Cline v. Ohio Bur. of Motor Vehicles*, 61 Ohio St.3d 93, 97, 573 N.E.2d 77 (1991), citing *Carter v. Youngstown*, 146 Ohio St. 203, 65 N.E.2d 63 (1946), paragraph one of the syllabus. Legislative intent is found in the words and phrases of the statute read "in context according to the rules of grammar and common usage." *State ex rel. Lee v. Karnes*, 103 Ohio St.3d 559, 2004-Ohio-5718, 817 N.E.2d 76, ¶ 21, citing R.C. 1.42; *Bosher v. Euclid Income Tax Bd. of Review*, 99 Ohio St.3d 330, 2003-Ohio-3886, 792 N.E.2d 181, ¶ 35. Statutory language

> must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative.

D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health, 96 Ohio St.3d 250, 256, 773 N.E.2d 536 (2002), citing *State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Edn.*, 95 Ohio St. 367, 372-373, 116 N.E. 516 (1917).

{¶12} When a statute is clear and unambiguous, it must be applied as written and no further interpretation is necessary. *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.*, 74 Ohio St.3d 543, 545, 660 N.E.2d 463 (1996), citing *State ex rel. Herman v. Klopfleisch*, 72 Ohio St.3d 581, 584, 651 N.E.2d 995 (1995). Thus, a reviewing court may only interpret a statute where the words of the statute are ambiguous. *State ex rel. Celebrezze v. Bd. of Cty. Commrs.*, 32 Ohio St.3d 24, 27, 512 N.E.2d 332 (1987), citing *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902), paragraph one of the syllabus. An ambiguity exists if the language is capable of more than one reasonable

interpretation. *State ex rel. Toledo Edison Co. v. Clyde*, 76 Ohio St.3d 508, 513, 668 N.E.2d 498 (1996).

{¶13} When a statute is ambiguous, the court may consider the legislative history, other statutes upon the same or similar subjects, the statute's objective, and the consequence of a particular construction. *See* R.C. 1.49; *State v. Jordan*, 89 Ohio St.3d 488, 492, 733 N.E.2d 601 (2000). Finally, related statutory provisions must be read together to give the proper effect to each statute. *State ex rel. Cordray v. Midway Motor Sales, Inc.*, 122 Ohio St.3d 234, 2009-Ohio-2610, 910 N.E.2d 432, ¶ 25, citing *Maxfield v. Brooks*, 110 Ohio St. 566, 144 N.E. 725 (1924), paragraph two of the syllabus. Thus, "[a]ll provisions of the Revised Code bearing upon the same subject matter should be construed harmoniously unless they are irreconcilable." *Id.*, citing *Couts v. Rose*, 152 Ohio St. 458, 461, 90 N.E.2d 139 (1950).

B. Analysis

{¶14} One Bratenahl contends that the General Assembly's inclusion of the phrase "subsequent adjustments" into the current version of R.C. 5311.18(A) indicates the General Assembly's intent to have recorded liens automatically reach after-acquired debts. Although the statute has been modified, a plain reading of R.C. 5311.18(A), the statute's legislative history, and a comparison of similar statutory provisions does not compel us to depart from our holding in *Zanders* at ¶ 9.

{¶15} We begin by noting that the Ohio General Assembly did not define "subsequent adjustments" in R.C. Chapter 5311. Thus, we look to similar provisions to

give the phrase meaning. The General Assembly has used the phrase in connection with liens under R.C. Chapter 5312, the Ohio Planned Community Law. R.C. 5312.12(B)(2), which describes liens upon the estate or interest in a planned community lot, reads:

> The lien is a continuing lien upon the lot against which each assessment or charge is made, subject to automatic subsequent adjustments reflecting any additional unpaid interest, administrative late fees, enforcement assessments, collection costs, attorney's fees, paralegal fees and court costs.[2]

{¶16} Thus, the planned community lien statute expressly indicates that liens on a planned community lot are subject to *automatic* subsequent adjustments, and clearly describes the lien as a "continuing lien." By contrast, the condominium lien statute at issue here, R.C. 5311.18(A), is completely devoid of these phrases. Because the General Assembly expressly provided for automatic perfection of after-acquired debts in one statute and not in another, we are unconvinced that the current version of R.C. 5311.18(A) abrogates *Zanders*. Instead, in our view, the phrase "subject to subsequent adjustments," without more, refers to recorded liens that may be adjusted and modified accordingly with a later-filed lien. The language of R.C. 5311.18(A) neither references nor contemplates the automatic inclusion of new charges without the filing of an updated lien.

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[2] R.C. 5312.12(B)(2) was enacted under 2010 Am.Sub.S.B. No. 187 on June 10, 2010, and became effective on September 10, 2010, years after the enactment and effective date of the current version of R.C. 5311.18(A).

{¶17} Our conclusion is further fortified by the legislative history of R.C. 5311.18(A) after 2004. In 2009, 2013, and most recently in May 2015,[3] bills were introduced in the Ohio General Assembly proposing to inject the following language into the condominium lien statute:

> (4) 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.

{¶18} The General Assembly could have included a separate provision in R.C. 5311.18(A) to provide for the automatic inclusion of after-acquired debts into recorded liens as it did in R.C. 5312.12(B)(2). We cannot 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 in light of these proposed amendments and the Ohio Planned Community Law.

{¶19} We also recognize that the current version of R.C. 5311.18(A) does not remedy the concerns we expounded on in *Zanders* at ¶ 8. The statute fails to notify others that a recorded lien would reach after-acquired fees. Even more, the statute remains silent as to the priority of the after-acquired expenses and does not require lien filers to indicate the value of expenses expected to accrue after filing.

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[3] *See* 2009 H.B. No. 408, Section 1; 2013 H.B. No. 572, Section 1; 2015 H.B. No. 226, Section 1. The 2015 bill is currently pending.

{¶20} One Bratenahl contends that this situation is distinguishable from *Zanders* by virtue of its Amended and Reinstated Declaration of Condominium Ownership ("Declaration") and the language used in its liens. Specifically, One Bratenahl argues that these documents adequately placed Sliwinski on notice that he would be liable for after-acquired expenses. We disagree.

{¶21} Article XII, Section 5 of One Bratenahl's Declaration states in pertinent part:

> The Association shall have a lien upon each Ownership Interest for the payment of all assessments, whether for Common Expenses or levied as special assessments * * * payable in like manner and with the same effect as the lien of the Association for Common Expenses accorded by Chapter 5311.

{¶22} One Bratenahl's Declaration references the condominium lien provision of the Ohio Revised Code, R.C. 5311.18(A), and states that any lien filed by One Bratenahl would be "payable in like manner and with the same effect" as that statute. Because we have determined that the current version of R.C. 5311.18(A) does not provide for continuing liens, it follows that One Bratenahl's Declaration similarly does not provide for continuing liens.

{¶23} Furthermore, we remain unconvinced that the language used in One Bratenahl's liens sufficiently apprised Sliwinski that he would be liable for after-accruing debts. One Bratenahl's liens included conflicting provisions. In one portion of the liens, One Bratenahl specifically stated that the liens sought to secure "unpaid assessments to date." However, one section later, One Bratenahl stated that the liens' amounts were for accrued debt and also "for any unpaid assessments accruing hereinafter until this lien is satisfied." The ambiguity inherent in these statements fails to clearly apprise Sliwinski that he would be liable for after-acquired debt. Thus, we believe that *Zanders* is applicable to this case

and hold that One Bratenahl's Declaration and liens do not entitle One Bratenahl to proceeds for after-accruing debts.

III. Conclusion

{¶24} In reaffirming *Zanders* at ¶ 9, we hold that R.C. 5311.18(A) does not perfect a lien with respect to debts that have not accrued at the time of filing because the statute neither expressly provides for the perfection of after-acquired debts nor supplies others with notice. Although R.C. 5311.18(A) has been modified since *Zanders*, the current statute still does not require lien filers to state the actual amount of monthly expenses that could accrue, does not give adequate notice that a recorded lien could reach after-acquired debts, and does not clarify the priority of after-acquired debt. Moreover, our interpretation is fortified by the fact that the General Assembly has made three attempts to amend R.C. 5311.18(A) to include the terms "automatic" and "continuing," and has expressly provided for continuing liens in the Ohio Planned Community Act. Finally, One Bratenahl's Declaration and liens fail to place Sliwinski on notice that he would be liable for after-acquired debt.

{¶25} One Bratenahl's sole assignment of error is overruled.

{¶26} Judgment affirmed.

It is ordered that appellees recover from appellant 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.

FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE

TIM McCORMACK, J., and
ANITA LASTER MAYS, J., CONCUR