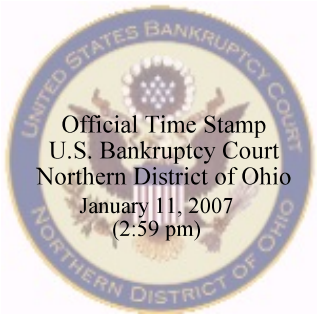
NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:	)	Case No. 06-11949
	)	
GEORGE DEIMLING and	)	Chapter 13
DIANNE DEIMLING,	)	
	)	Judge Pat E. Morgenstern-Clarren
Debtors.	)	
	)	**MEMORANDUM OF OPINION**

On the debtors' motion, the court entered an order directing Lake of the Falls Condominium Association to appear and show cause why it should not be found to have violated the automatic stay provisions of 11 U.S.C. § 362.[1] For the reasons stated below, the court finds that the association committed a willful violation of § 362(a) when it charged the debtors legal fees and collected them in a manner contrary to the association's declaration and bylaws.[2]

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A) and (O).

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[1] Docket 31.

[2] This written opinion is entered only to decide the issues presented in this case and is not intended for commercial publication in an official reporter, whether print or electronic.

THE EVIDENTIARY HEARING

The court held an evidentiary hearing on November 15, 2006.[3] The parties presented their cases through the testimony of John Botkins, president of the association, and Eric Algotson, the association's property manager, as well as exhibits.

FACTS

BACKGROUND

In 1997, George Deimling purchased a condominium unit at 26638 Lake of the Falls (the property). In 2003, he transferred the property so that it was held jointly with his wife, Dianne Deimling. By virtue of the debtors' ownership interest in the property, they are members of the Lake of the Falls Condominium Association (the association), bound by the Declaration of Condominium Ownership (the declaration) and the association's bylaws.[4]

The declaration provides that the association will carry out certain duties.[5] The costs and expenses paid by the association in performing its duties are defined as "common expenses." Those expenses are to be assessed and collected in accordance with the bylaws.[6] The bylaws provide that "each unit owner shall pay the share of the common expenses as shall be proportionate to his respective percentage of interest in the common areas and facilities."[7]

In addition to the power to assess common expenses to all unit holders, the declaration and bylaws have specific provisions that permit the association to assess an individual unit owner

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[3] The plan confirmation hearing was adjourned to the same date for docket reporting purposes. *See* docket entry of November 7, 2006.

[4] Association exh. 1, declaration at ¶ 7.

[5] Association exh. 1, declaration at ¶ 10.

[6] Association exh. 1, declaration at ¶ 11.

[7] Association exh. 1, bylaws at ¶ 8.01.

for certain expenses. For example, if a unit is damaged or destroyed, under certain circumstances the association may assess the unit owner for the cost of repairs.[8] Additionally, the association may assess a unit owner for the costs of patio repairs, as well as repairs to a unit that the owner has failed to attend to after reasonable notice.[9]

An amendment to the declaration and bylaws[10] provides that the association has a lien upon the interest of any unit owner:

> . . . for the payment of any of the additional following expenses that are chargeable against the unit remain [sic] ten (10) days after any portion has become due and payable: The Association shall credit payments made by the Unit Owner for the expenses described heretofore in the following order of priority: First, the interest owed to the Association; second, the administrative late fees owed to the Association; third, to the collection costs, attorney's fees and paralegal fees incurred by the Association; fourth, to the principal amount the Unit Owner owes to the Association for the common expenses or penalty assessment against the unit.

On October 7, 2005, the association recorded a lien for unpaid assessments on the property with the Cuyahoga County recorder's office. The lien states that it is in the amount of "$1,159.85 plus interest at 8% per annum and the current monthly maintenance fee which is estimated at $183.60 from the date of this lien forward."[11] On January 13, 2006, the association

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[8] Association exh. 1, declaration at ¶ 15(a).

[9] Association exh. 1, bylaws at ¶ 7.04(a) and (c).

[10] Association exh. 2, certificate of amendment at ¶ 27. The debtors argue that the association acted contrary to law by adopting this amendment without a vote of the members. As a result, the debtors contend that the amendment is not effective. The court does not need to resolve that issue in light of the disposition discussed below.

[11] Association exh. 8.

filed a state court foreclosure action against the Deimlings.[12] That action was stayed when George and Dianne Deimling filed this chapter 13 case on May 18, 2006.

The debtors listed the association in their schedules as a secured creditor holding two disputed claims, one for $2,342.45 and the second for $1,159.85. In their plan of reorganization, they propose to pay:

(1) nothing to the association on its secured claim; and

(2) $1,038.00 each month to the chapter 13 trustee for distribution to unsecured creditors.

The plan proposes to treat the association's claim in this way:

> [The association] and the State of Ohio Department of Taxation hold or may claim to hold secured judgment liens upon the Debtors' real estate. The value of said lienholders' interest is $0.00 by the way of senior liens upon the Debtors' real estate and interference with the Debtors' state homestead exemptions. The balance of said liens shall be treated as a nonpriority, unsecured claim and their liens shall be released upon successful completion of Debtors' plan.
>
> Debtors dispute the validity of the liens for [the association] and Countrywide Homes to the extent that said debts include any uncollectible attorneys' fees and costs. Any provisions shifting the burden of paying said fees and costs are unenforceable under Ohio law and are additionally unsupported by the parties' documents, including the condominium bylaws and declarations and the mortgage note. Any said fees and costs included in Proofs of Claims filed by lienholders shall not be paid by the Chapter 13 Trustee without an order from this Court specifically allowing those portions of said claims.[13]

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[12] Case CV-06-581818, Cuyahoga County Court of Common Pleas.

[13] Debtors' proposed plan at Article 11, docket 4.

The plan does not address how the debtors intend to deal with their current payments to the association. The association filed a proof of claim in which it asserted a secured claim for $3,271.68, as well as an objection to the proposed plan.[14]

THE DISPUTED ACTION

On August 14, 2006, the debtors made a $180.73 payment to the association which they intended to be applied to the monthly maintenance fee so that they would remain current in their obligations. The legal issue arises out of the manner in which the association applied the payment. The statement[15] sent to the debtors dated August 18, 2006 covers the time period of August 1, 2006 to August 18, 2006 and lists these charges:

8/1/06	Beginning Balance	$0.00
8/1/06	Maintenance Fee	165.73
8/14/06	Legal fee: prep bankruptcy claim	$389.09

The legal fee charge is for services performed and billed to the association postpetition by its legal counsel. The services which are the basis for the legal fee charge include preparing and filing a suggestion of stay in the foreclosure action and preparing a proof of claim. The association applied the debtors' payment to the maintenance fee[16] and applied the remaining $15.00 to the attorney fees, leaving a balance due of $374.09 in attorney fees listed as "unpaid charges." There is a box at the bottom of the statement with this warning:

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[14] Docket 33, 37.

[15] Association exh. 5.

[16] There is nothing in the record to show why the debtors paid an amount greater than the maintenance fee.

> LATE NOTICE STATEMENT! Did you know that as per your Association, late fees are charged monthly on ANY BALANCE DUE (including unpaid prior months late fees).

As far as the court can tell from the evidence presented, the dispute does not arise out of or relate to the lien filed on October 7, 2005.

THE POSITION OF THE PARTIES

The debtors argue that the association violated 11 U.S.C. § 362 by (1) unilaterally applying part of their monthly payment to attorney fees; and (2) threatening to collect late fees on the unpaid legal fees. The debtors' argument starts with the premise–unchallenged by the association–that they have proposed a tight budget that includes payments to the chapter 13 trustee for distribution to unsecured creditors and also a monthly payment of $165.73 to the association to be applied to the current monthly assessment fee. Their goal is to reorganize their finances so that over time they will pay their current expenses plus (a) 100% of their unsecured debts, (2) the undisputed secured debt, and (3) priority claims, with the expectation that they will emerge from their chapter 13 with a clean financial slate. From that premise, they argue that if the association is permitted to charge the debtors for unbudgeted postpetition attorney fees, that between the attorneys fees and the related late fees, the debtors will never be able to make their plan payments and save their home. They contend that this violates the automatic stay because the association is acting to collect its prepetition claim and that the payment applied by the association is property of the estate which it applied in a manner that is inconsistent with the proposed plan. The debtors also challenge the association's right to collect its attorney fees under bankruptcy law, Ohio law, and the contracts between the parties. The association contends

that the bankruptcy code,[17] Ohio law, and the contracts permit it to recover attorneys fees in this context.[18]

DISCUSSION

I. 11 U.S.C. § 362

The filing of a bankruptcy petition operates to impose an automatic stay. *See* 11 U.S.C. § 362(a). An individual debtor injured by a willful violation of the automatic stay may recover under § 362(k)(1). *See* 11 U.S.C. § 362(k)(1). A debtor asserting such a claim is required to show by a preponderance of the evidence that: "1) the actions taken are in violation of the automatic stay; 2) the violation was willful; and 3) the debtor was injured as a result of the violation." *Clayton v. King (In re Clayton)*, 235 B.R. 801, 806 (Bankr. M.D. N.C. 1998). A debtor who proves such injury is entitled to recover "actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(k)(1). To prove willfulness, a debtor is not required to show that the creditor had a specific intent to violate the stay. Instead, "a violation of the automatic stay can [also] be willful when the creditor knew of the stay and violated the stay by an intentional act." *TranSouth Fin. Corp. v. Sharon (In re Sharon),* 234 B.R 676, 687 (B.A.P. 6th Cir. 1999). The debtor has the burden of proving damages. *See Archer v. Macomb County Bank*, 853 F.2d 497, 499-500 (6th Cir. 1988).

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[17] The association initially also argued that it was permitted to recover attorney fees under 11 U.S.C. § 506(b), which applies where a creditor is oversecured. As the association did not have any evidence at the first hearing that it fell within this statute, the court adjourned the matter to permit the association to have the property appraised. The association did not file an appraisal or otherwise pursue this argument and the court considers it waived.

[18] The parties included several other arguments in their briefs and evidence at the hearing that go to other issues. The court will address that situation in a separate order.

A. 11 U.S.C. § 362(a)(6)

The debtors assert that the association violated § 362(a)(6) which stays "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case . . . [.]" 11 U.S. C. § 362(a)(6). The parties focus their dispute under this section on the issue of whether the debtors' alleged obligation to pay attorney fees is a claim that arose before or after the commencement of the case. The court does not need to reach that issue, however, because the evidence presented establishes that the association did not have contractual authority to charge those fees to the debtors in the manner that it did, regardless of when the claim arose.[19]

The declaration and the bylaws, together with the Ohio law governing condominium property, define the rights and responsibilities of the association and its members. As noted above, costs and expenses incurred by the association in administering the condominium property and in performing its duties are defined as "common expenses." Common expenses are to be assessed and collected as provided in the bylaws.[20] The bylaws, in turn, state that each condominium owner shall be assessed for his *proportionate share* of the common expenses.[21] Therefore, if the association incurs attorney fees in performing its duties, those fees fall into the category of common expenses that can be assessed against each unit owner in an amount proportionate to his ownership interest. That is not, however, what happened here. Instead, a

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[19] There is a split in the case authority regarding a debtor's postpetition condominium obligations which may need to be addressed as this case proceeds. One line of authority holds that all of the debtor's obligations to a condominium association are a single contractual debt. *See, for example, In re Rosteck*, 899 F.2d 694 (7th Cir. 1990). Other courts view a debtor's condominium obligations as a covenant running with the land which cannot be separated from the ownership of the property. *See, for example, In re Rosenfeld*, 23 F.3d 833 (4th Cir. 1994).

[20] *See* Association exh. 1, declaration at ¶ 11.

[21] *See* Association exh.1, bylaws at chapter VIII (emphasis added).

law firm hired by the association sent a bill to the association's manager; the manager paid the bill and then billed the debtors directly for those fees. This is contrary to the contractual agreement.

The association's brief acknowledges that attorney fees are common expenses, but relies on paragraph 27 of its amended declaration to support the direct charge. The association's brief suggests the amendment is based on Ohio Revised Code § 5311.18(A). That section provides that:

> (A)(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.
>
> (2) Unless otherwise provided by the declaration, the bylaws, or the rules of the unit owners association, the association shall credit payments made by a unit owner for the expenses described in divisions (A)(1)(a) and (b) of this section in the following order of priority:
>
> (a) First, to interest owed to the association;
>
> (b) Second, to administrative late fees owed to the association;
>
> (c) Third, to collection costs, attorney's fees, and paralegal fees incurred by the association;

> (d) Fourth, to the principal amounts the unit owner owes to the association for the common expenses or penalty assessments chargeable against the unit.

Ohio Rev. Code §§ 5311.18(A)(1), (2) (emphasis added).

The statute gives the association a lien for expenses which are chargeable against a condominium unit; those charges may include attorney fees if charging those fees is "authorized by the declaration, the bylaws, or the rules of the unit owners association[.]" Ohio Rev. Code § 5311.18(A)(1)(B). The only documents in evidence are the declaration and the bylaws, as amended. Those documents do not authorize the association to assess legal fees directly against the debtor in the manner that it did.

Paragraph 27 of the amended declaration does not save the association from this conclusion. That paragraph states that the association has a lien for amounts that are chargeable and prescribes how payments are to be credited, but it does not provide that condominium owners may be charged for attorney fees. The only provision for charging attorney fees is found in paragraph 22 of the amended declaration, titled "Remedies for Breach of Covenants and Rules."[22] That paragraph deals exclusively with eviction actions and states that the "cost of any eviction action brought pursuant to the aforesaid authority of this Section, including reasonable attorney fees, shall be charged to the Unit Owner and shall be subject to a special assessment against the offending unit and made a lien against that unit." In contrast, the attorney fee charges at issue here relate to filing a suggestion of stay in the foreclosure action and preparing a proof of claim. Because the association lacked authority unilaterally to charge fees to the debtors and to collect them, the association violated the automatic stay by doing so.

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[22] Association exh. 2 at ¶ 22.

This decision is consistent with Ohio law. Although the association relies heavily on *Nottingdale Homeowners' Assoc., Inc. v. Darby,* 514 N.E.2d 702 (Ohio 1987), that case does not support its position. In *Nottingdale*, the Ohio Supreme Court considered a condominium declaration that specifically held a unit owner personally responsible for attorney fees incurred by the association when it successfully prosecuted a foreclosure or collection action against the unit owner. The unit owner argued that the fee-shifting provision should not be enforced. The Supreme Court disagreed, holding the provision "enforceable and not void as against public policy so long as the fees awarded are fair, just and reasonable as determined by the trial court upon full consideration of all the circumstances of the case." *Id.*, syllabus.[23]

The situation here is materially different. The most significant difference is that the declaration and bylaws do not provide for the unit owner to be personally responsible for the association's legal fees. Additionally, the cases are not factually similar because there has not been a court determination on the merits concerning foreclosure or collection and there has been no court determination that the fees are fair, just, and reasonable. *See also, Hagans v. Habitat Condo. Owners Ass'n*, 851 N.E.2d 544, 552 (Ohio Ct. App. 2006) (reversing a lower court decision denying a condominium association its attorney fees for unpaid monthly assessments to the extent the declaration and bylaws specifically provided for them, but denying attorney fees based on a unit owner's violation of the bylaws because the phrase "all costs" was insufficient to inform unit owners that they were required to pay legal fees); *First Fed. Sav. Bank v. WSB Invs., Inc.*, 586 N.E.2d 1159, 1164 (Ohio Ct. App. 1990) (holding that a provision that allowed a

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[23] The Ohio Supreme Court rules in effect when *Nottingdale* was decided provided that the syllabus of a Supreme Court opinion "state[d] the controlling points or point of law decided [.]" S. Ct. R. Rep. Op. 1(B) (amended effective May 1, 2002 to provide that "[t]he law stated in a Supreme Court opinion is contained within its syllabus (if one is provided), and in its text, including footnotes.")

condominium association to assess a defaulting unit owner for all expenses incurred in connection with certain "actions or proceedings, including court costs and other fees and expenses and all damages . . ." included liability for attorney fees).

B. 11 U.S.C. § 362(a)(3)

The debtors also assert that the association violated § 362(a)(3) which provides that the filing of a bankruptcy petition operates as a stay of:

> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate[.]

11 U.S.C. § 362(a)(3). Before a plan is confirmed, a debtor's estate includes all of his legal and equitable interests in property as of the case filing, *see* 11 U.S.C. §§ 541(a)(1) and 1306(a), and all such property acquired after the case is filed, as well as postpetition earnings, *see* 11 U.S.C. §§ 1306(a)(1) and (2). Based on this broad definition, the debtors' preconfirmation payment to the association was estate property and the association exercised control over it and violated § 362(a)(3) when it applied the payment to the improper attorney fee charge without first obtaining relief from stay.

C. 11 U.S.C. § 362(k)(1)

A debtor injured by a willful violation of the stay is entitled to recover actual damages and attorney fees. The court may also impose punitive damages in appropriate situations.

The violations here were willful because the association was aware of the debtors' bankruptcy filing and nevertheless acted improperly by applying their payment to its attorney fees and by sending the account statement demanding payment of the remainder of its fees. The debtors are entitled to be repaid the $15.00 which the association incorrectly applied to attorney fees. Additionally, the debtors have requested and are entitled to recover their attorney fees

related to the stay violations and their actions to redress them. The order memorializing this decision will set forth the date by which debtors' counsel is to file an affidavit detailing those fees.

This is not an appropriate case for awarding punitive damages. There was no evidence that this was part of a pattern of disregard for the rights afforded to debtors under the bankruptcy code. Instead, the evidence showed that the association's representatives thought that they were permitted to act as they did and they testified at the hearing that they have not made any other similar assessments to the debtor. The court is satisfied that the association will act in accordance with the declaration and bylaws going forward and that no additional award is necessary or appropriate to insure that compliance.

CONCLUSION

For the reasons stated, the show cause proceeding is concluded with a finding that the association violated the provisions of § 362(a). The debtors are awarded $15.00 in damages and their attorney fees. A separate order reflecting this decision will be entered.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 06-11949
	)	
GEORGE DEIMLING and	)	Chapter 13
DIANNE DEIMLING,	)	
	)	Judge Pat E. Morgenstern-Clarren
Debtors.	)	
	)	**ORDER**

For the reasons stated in the memorandum of opinion entered this same date, the show cause proceeding against Lake of the Falls Condominium Association is concluded with a finding that the association violated the provisions of § 362(a). The debtors are awarded actual damages under 11 U.S.C. § 362(k)(1) of $15.00, plus attorney fees. Within 10 days after the date on which this order is entered, the debtors' counsel is to file an affidavit detailing the fees incurred related to this issue. If the association objects to any part of the fees requested, it is to file an objection on or before 10 days after the affidavit is filed.

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge