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OF THE NINTH CIRCUIT

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. WW-09-1377-JuHRu
LARRY ROBERT FOSTER,)	Bk. No. 08-15310
Debtor.)	Adv. No. 08-01150
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LARRY ROBERT FOSTER,)	
Appellant,)	
v.)	O P I N I O N
DOUBLE R RANCH ASSOCIATION,)	
Appellee.)	

Argued by Video Conference and Telephone Conference
and Submitted on May 21, 2010

Filed - July 19, 2010

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Honorable Thomas T. Glover, Bankruptcy Judge, Presiding.

Before: JURY, HOLLOWELL, and RUSSELL¹, Bankruptcy Judges.

¹ Hon. David E. Russell, Bankruptcy Judge for the Eastern
District of California, sitting by designation.

1 JURY, Bankruptcy Judge.

2
3 Debtor Larry Robert Foster filed an adversary proceeding
4 against Double R Ranch Association (the "Association") seeking a
5 declaration that postpetition homeowners' association ("HOA")
6 dues he owed to the Association were debts dischargeable under
7 § 1328(a).² The Association moved for summary judgment, which
8 the bankruptcy court granted by order entered November 12, 2009.
9 Debtor timely appealed the order.

10 Debtor asserts the bankruptcy court erred in its ruling
11 because the postpetition HOA dues arose out of a prepetition
12 contract and, therefore, any assessments made after the order for
13 relief constitute prepetition debts that fall within the scope of
14 § 1328(a).

15 We disagree. Under Washington law, the affirmative covenant
16 to pay HOA dues is not contractual, but is a covenant running
17 with the land. As such, debtor's personal liability for the dues
18 is an incidence of ownership of his property not affected by the
19 filing of his bankruptcy. Accordingly, we AFFIRM.

20 **I. FACTS**

21 The facts are undisputed. In 2005, debtor purchased real
22 property located on Crocket Road, Blaine, Washington. The real
23 property was subject to an Amended and Restated Declaration of
24 Covenants (the "Declaration") providing for the creation of the
25 Association, a Washington non-profit corporation and homeowners'

26 _____
27 ² Unless otherwise indicated, all chapter, section and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 association existing under WASH. REV. CODE ("RCW") § 64.38.005-.060
2 (2010). In August 2000, the Association recorded the Declaration
3 against debtor's lot and others located within Double R Ranch.

4 The Declaration provided that the Association could charge
5 each lot owner annual dues and that each owner was personally
6 liable for the assessments. Debtor failed to pay HOA dues for
7 several years prior to his bankruptcy filing.

8 On August 20, 2008, debtor filed a Chapter 13 petition.
9 Debtor listed his residence in Schedule A and listed the
10 Association as an unsecured creditor holding a claim of \$1,131.11
11 in Schedule F.

12 On September 4, 2008, debtor filed a proposed plan which did
13 not provide for payment to the Association for either pre or
14 postpetition HOA dues.

15 On October 2, 2008, the Association filed a proof of claim,
16 asserting a secured claim for \$1,265.33 based on prepetition
17 arrears for HOA dues. Attached to the proof of claim was an
18 itemized statement of the dues, late charges, interest and legal
19 fees. Also attached was a "Notice of Lien for Unpaid
20 Assessments" for \$1,888.40 dated May 31, 2007, and recorded by
21 the Whatcom County Auditor that same day as Document Number
22 2070505184. The Notice of Lien erroneously recited that the
23 Association had a lien under RCW § 64.34.364, which provides that
24 unpaid assessments become a lien on an individual's condominium
25 unit under the Washington Condominium Act.³ The Association is

26
27 ³ RCW 64.34.364 provides condominium associations with a
28 statutory lien and states in relevant part:

(continued...)

1 not a condominium association, but a homeowners' association
2 created and governed by RCW § 64.38.005-.060.

3 On April 2, 2009, the Association objected to the
4 confirmation of debtor's plan on the ground that it did not
5 include any payments for past-due sums or his future HOA dues.

6 On April 6, 2009, debtor filed two pleadings with hearings
7 scheduled for May 13, 2009. Debtor filed an objection to the
8 Association's claim, contending that it was unsecured and any
9 amounts arising before the order for relief were dischargeable
10 under § 1328(a). Debtor also maintained that Washington law did
11 not provide a statutory lien for common expenses and other
12 obligations owed to homeowners' associations. In response, the
13 Association argued that its lien was not based on statute, but on
14 language contained in the Declaration.

15 Debtor also filed a motion to avoid the Association's lien
16 on the ground that it constituted a "judicial lien" subject to
17 avoidance. The Association, in opposition, asserted that its
18 lien was not a "judicial lien", but one arising out of the
19 Declaration.

20 In addition, on April 6, 2009, debtor filed the adversary
21 complaint against the Association which is at issue in this
22 appeal.

23 On May 5, 2009, the Association filed a notice and motion
24 for summary judgment in the adversary proceeding. The notice
25

26 ³(...continued)

27 (1) The association has a lien on a unit for any unpaid
28 assessments levied against a unit from the time the
assessment is due.

1 gave debtor until May 6, 2009 to file a response and set a
2 hearing for May 13, 2009. Debtor filed a response on May 11,
3 2009, requesting a continuance until June 10, 2009 to give him
4 additional time to respond to the motion.

5 On May 13, 2009, the bankruptcy court heard oral argument on
6 all three matters. The court ruled in favor of the Association,
7 finding that it had a secured claim under the Declaration for
8 dues levied both before and after debtor's bankruptcy petition
9 and that postpetition HOA dues owed by debtor to the Association
10 were not dischargeable under § 1328(a).⁴ The court granted
11 summary judgment in favor of the Association and dismissed
12 debtor's adversary proceeding.

13 On December 2, 2009, debtor filed an amended plan. On March
14 1, 2010, the bankruptcy court confirmed debtor's amended Chapter
15 13 plan. Debtor's plan provided for the cure of prepetition HOA
16 dues in the event we affirm the bankruptcy court's ruling that
17 the Association held a secured claim. Otherwise, debtor's plan
18 provided for 0% to unsecured creditors. The plan also stated:

19 Debtor has objected to the claim of Double R Ranch
20 Association for prepetition homeowners association
21 fees, and has filed an adversary proceeding to
22 determine the dischargeability of the homeowners [sic]
23 association right to collect fees postpetition. The
24 bankruptcy court has dismissed debtor's objection and
25 adversary proceeding, and debtor has appealed the
26 bankruptcy court's rulings on debtor's claim objection
27 and adversary proceeding. Debtor presents this amended
28 plan to obtain a confirmable plan without waiving any
rights to contest the court's rulings on any of the
foregoing matters.

26 ⁴ Debtor also appealed the court's ruling that the
27 Association held a secured claim, which we affirm in a separate
28 memorandum. See Foster v. Double R Ranch Ass'n (In re Foster),
BAP No. 10-1379.

1 If we determine that the court erred under either part of the
2 test, we must reverse for an abuse of discretion. Id.

3 We review the bankruptcy court's decision to grant a motion
4 for summary judgment de novo. Sigma Micro Corp. v.
5 Healthcentral.com (In re Healthcentral.com), 504 F.3d 775, 783
6 (9th Cir. 2007).

7 We review issues of statutory construction and conclusions
8 of law de novo. Mendez v. Salven (In re Mendez), 367 B.R. 109,
9 113 (9th Cir. BAP 2007).

10 V. DISCUSSION

11 A. Preliminary Issue

12 Before turning to the merits, we address whether the
13 bankruptcy court's summary judgment ruling in favor of the
14 Association constitutes reversible error when debtor did not
15 receive ten days to respond to the Association's motion as
16 required by Fed. R. Civ. P. 56(c) and the court did not follow
17 its own local rule. The Association served its motion on May 3,
18 2009. Debtor requested a continuance in writing on May 11, 2009,
19 and then again orally at the hearing held on May 13, 2009, which
20 the court implicitly denied by ruling on the motion.

21 When the Association filed its motion for summary judgment,
22 the version of Fed. R. Civ. P. 56(c)⁵ in place at the time
23 provided that "[t]he motion must be served at least 10 days
24 before the day set for the hearing." The bankruptcy court's
25 Local Bankruptcy Rule 9013-1(d)(2)(D) lengthened the time to
26

27 ⁵ Fed. R. Civ. P. 56(c) is made applicable to cases under
28 the Bankruptcy Code pursuant to Rule 7056.

1 twenty-four days.

2 The court did not articulate the rule for shortening time on
3 the Association's motion, but we surmise the court acted under
4 Rule 9006(c)(1). That rule allows the bankruptcy court, in the
5 exercise of discretion, to shorten the length of time required or
6 allowed for any act "with or without motion or notice". Rule
7 9006(c)(1).

8 The bankruptcy court noted that the Association's motion for
9 summary judgment, debtor's motion to avoid the Association's
10 lien, debtor's objection to the Association's proof of claim and
11 the Association's objection to confirmation of debtor's Chapter
12 13 plan were "all connected one way or the other." Accordingly,
13 the bankruptcy court had discretion to determine whether, in the
14 interest of convenience and judicial economy, consolidation of
15 the Association's motion for summary judgment with the other
16 matters scheduled for May 13, 2009 was appropriate on shortened
17 time.

18 Our review of the record shows that the issues raised in
19 debtor's adversary complaint were intertwined with the issues the
20 parties raised in the other matters scheduled for May 13, 2009.
21 All matters involved debtor's liability for payment of the HOA
22 dues, arose from a common nucleus of facts and contained some
23 similar and related issues. We recognize, however, that
24 considerations of convenience and economy must yield if there is
25 a risk of prejudice.

26 Although debtor complains that he did not have the
27 opportunity to develop any facts, or present a response, he fails
28 to indicate what other evidence or argument he might have raised

1 had the court given him additional time to respond. Moreover,
2 the issues debtor advanced in his adversary complaint were fully
3 developed in the pleadings filed in connection with the other
4 scheduled matters and at oral argument.⁶ See Maitland v.
5 Mitchell (In re Harris Pine Mills), 44 F.3d 1431, 1439-40 (9th
6 Cir. 1995) (noting that a court may "grant summary judgment
7 without notice if the losing party has had a full and fair
8 opportunity to ventilate the issues involved in the motion.").
9 Under these circumstances, we conclude no prejudice occurred.
10 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane,
11 Federal Practice and Procedure § 2719 (3d ed. 1998) ("[I]f the
12 motion is served less than ten days before the hearing but no
13 prejudice appears to have occurred, proceeding with the summary
14 judgment motion still may be proper."). Thus, the bankruptcy
15 court did not abuse its discretion when it heard the
16 Association's motion for summary judgment on shortened time. We
17 point out, however, that if error occurred, it was harmless.
18 Rosson v. Fitzgerald (In re Rosson), 545 F.3d 764, 776 (9th Cir.
19 2008).

20 **B. The Merits**

21 In our de novo review we engage in the same analysis as the
22 bankruptcy court when considering a motion for summary judgment.
23 Under the familiar summary judgment standards, we must determine
24 whether the pleadings and the evidence show that there is no
25

26 ⁶ We note in particular, that neither at the trial court nor
27 in this appeal has debtor asserted there are any material
28 disputed facts or that the undisputed facts need further
development.

1 genuine issue of any material fact and that the moving party is
2 entitled to a judgment as a matter of law. See Fed. R. Civ. P.
3 56(c)(2). Here, our review of the record shows the issue
4 concerning whether the postpetition HOA dues constitute
5 dischargeable debts under § 1328(a) is purely one of law; no
6 factual dispute exists.

7 Debtor argues that the bankruptcy court erred in granting
8 summary judgment in favor of the Association for two reasons:
9 (1) the discharge exception under § 523(a)(16) governing
10 postpetition HOA dues is inapplicable to § 1328(a); and, (2) the
11 postpetition HOA dues arose out of a prepetition contract with
12 the Association and are thus prepetition debts which are
13 dischargeable under the holding in In re Rosteck, 899 F.2d 694
14 (7th Cir. 1990).⁷

15 In contrast, relying on the holding in River Place E. Hous.
16 Corp. v. Rosenfeld (In re Rosenfeld), 23 F.3d 833 (4th Cir.
17 1994), the Association argues that the covenant governing the
18

19 ⁷ In Rosteck, after moving out of their condominium, debtors
20 filed chapter 7 and obtained their discharge. Rosteck, 899 F.2d
21 at 695. After their bankruptcy case closed, the condominium
22 association obtained a deficiency judgment against them for
23 postpetition assessments. 899 F.2d at 695. The Seventh Circuit
24 found the assessments were discharged, holding that under the
25 broad definitions of "claim" and "debt", the debtors had a debt
26 for future condominium assessments when they filed their
27 petition. Id. at 696. The court reasoned that the condominium
28 declaration was a contract, and that by entering into that
contract, the debtors agreed to pay the association any
assessments it might levy. Id. The court concluded that the
future assessments, although contingent, were prepetition debts
that arose under the prepetition contract and were dischargeable.
Id. at 696-97.

1 assessments runs with the land under Washington law and,
2 therefore, debtor's liability for the postpetition HOA dues
3 cannot be separated from his ownership of the property.⁸
4 Alternatively, the Association asserts that the postpetition
5 assessments lack the required finiteness to be considered a
6 dischargeable prepetition claim under the rationale in Beeter v.
7 Tri-City Prop. Mgm't Servs., Inc. (In re Beeter), 173 B.R. 108,
8 123 (Bankr. W.D. Tex. 1994) (noting that amount of future
9 assessments for common area maintenance such as roof repair are
10 speculative since total cost, time, or repair is not readily
11 ascertainable).

12 Initially, we observe that the parties agree that
13 § 523(a)(16) is inapplicable to the discharge under § 1328(a).
14 What separates the parties is the other question: Is debtor's
15 obligation to pay HOA dues after the order for relief an
16 affirmative covenant that runs with the land, unaffected by
17 debtor's discharge, or did it arise from a contractual obligation
18 between the parties, making it a dischargeable prepetition debt?

19 **1. Section 523(a)(16) Is Inapplicable To The Discharge**
20 **Under § 1328(a) and Vice Versa**

21 Rosteck and Rosenfeld were decided in the context of a

22
23 ⁸ In Rosenfeld, the debtor acquired shares in a housing
24 cooperative association, but never occupied his apartment or
25 rented it. Rosenfeld, 23 F.3d at 835. The Fourth Circuit held
26 that based on the underlying documents and state law, the Chapter
27 7 debtor's obligation to pay assessments postpetition arose from
28 his continued ownership of the property postpetition, not from a
prepetition contractual obligation. Id. at 837. The court
observed that in order to terminate his responsibility for the
assessments, the debtor "must transfer title to the property, if
necessary by a deed in lieu of foreclosure." Id. at 838.

1 chapter 7 discharge under § 727. Notably, neither debtor
2 occupied the underlying property nor collected rent from it after
3 their bankruptcy filing, but each continued to hold legal title.
4 The confusion in the case law created by Rosteck and Rosenfeld
5 and their progeny prompted Congress to amend § 523(a) in 1994,
6 creating an exception to discharge for debts arising from unpaid
7 postpetition HOA dues when a debtor physically occupied a
8 dwelling unit or collected rent from it.⁹ However, the scope of
9 the amended statute continued to create problems since it failed
10 to mention homeowners' associations. See Old Bridge Estates
11 Cnty. Ass'n, Inc. v. Lozada (In re Lozada), 214 B.R. 558, 563

13 ⁹ In 1994, § 523(a)(16) read: A discharge . . . does not
14 discharge an individual debtor from any debt --

15 (16) for a fee or assessment that becomes due and
16 payable after the order for relief to a membership
17 association with respect to the debtor's interest in a
18 dwelling unit that has condominium ownership or in a
19 share of a cooperative housing corporation, but only if
such fee or assessment is payable for a period during
which --

20 (A) the debtor physically occupied a dwelling unit in
21 the condominium or cooperative project; or

22 (B) the debtor rented the dwelling unit to a tenant and
23 received payments from the tenant for such period, but
24 nothing in this paragraph shall except from discharge
25 the debt of a debtor for a membership association fee
26 or assessment for a period arising before entry of the
order for relief in a pending or subsequent bankruptcy
case.

27 § 523, ¶ 16, 103 Pub. L. No. 103-394, § 309, 108 Stat. 4106,
28 § 4137 (Oct. 22, 1994) (current version at 11 U.S.C. § 523, ¶ 16
(2010)).

1 (Bankr. E.D. Va. 1997) aff'd 176 F.3d 475 (4th Cir. 1999). In
2 2005, § 523(a)(16) was amended again to provide:

3 (a) A discharge under section 727, 1141, 1228(a),
4 1228(b), or 1328(b) of this title does not discharge an
individual debtor from any debt -

5 (16) for a fee or assessment that becomes due and
6 payable after the order for relief to a membership
7 association with respect to the debtor's interest in a
8 unit that has condominium ownership, in a share of a
9 cooperative corporation, or a lot in a homeowners
10 association, for as long as the debtor or the trustee
11 has a legal, equitable, or possessory ownership
interest in such unit, such corporation, or such lot,
but nothing in this paragraph shall except from
discharge the debt of a debtor for a membership
association fee or assessment for a period arising
before entry of the order for relief in a pending or
subsequent bankruptcy case[.]

12 The "does not discharge" language in the statute plainly shows
13 that § 523(a)(16) is inapplicable on its face to this case since
14 debtor does not seek a discharge under any of the enumerated
15 sections listed under subsection (a).

16 Nor does § 1328(a) mention § 523(a)(16) as an exception to
17 discharge under Chapter 13. In re Danastorg, 382 B.R. 585, 588
18 (Bankr. D. Mass. 2008). Section 1328(a) provides in relevant
19 part:

20 (a) [T]he court shall grant the debtor a
21 discharge of all debts provided for by the plan or
22 disallowed under section 502 of this title, except any
debt-

23

24 (2) of the kind specified in section 507(a)(8)(C) or in
25 paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8), or
(9) of section 523(a)

26 § 1328(a). We recognize that the discharge provision under
27 chapter 13 is broader than that in chapter 7. However, we doubt
28 the omission of § 1328(a) in § 523(a)(16) or vice versa evinces a

1 legislative intent to discharge postpetition HOA dues under
2 § 1328(a) when the debtor uses the cure and maintenance
3 provisions under chapter 13 to stay in his or her property after
4 the order for relief.¹⁰ See Danastorg, 382 B.R. at 588 (noting
5 that chapter 13 debtors have an ongoing duty to pay postpetition
6 obligations, such as utilities and condominium fees as they come
7 due).

8 Whether the omission of § 1328(a) in § 523(a)(16) or vice
9 versa is a statutory misstep is a question we need not answer.
10 Suffice to say, on the facts before us, there is no statutory
11 default rule regarding an exception to discharge for postpetition
12 HOA dues.

13 We are unpersuaded by debtor's argument that § 523(a)(16)
14

15 ¹⁰ Along these lines, assuming debtor does not seek a
16 hardship discharge in the future and he obtains his discharge
17 under § 1328(a), the court in In re Harvey, 88 B.R. 860, 862-63
18 (Bankr. N.D. Ill. 1988) held that a debtor's postpetition HOA
19 dues would be excepted from discharge under a contract analysis.
20 The court relied on § 1322(b)(5) for its holding. Id. Section
21 1322(b)(5) "allows a debtor to maintain contract payments on
22 long-term debt, whether secured or unsecured, while curing any
23 arrearage that might exist through a chapter 13 plan." Labib-
24 Kiyarash v. McDonald (In re Labib-Kiyarash), 271 B.R. 189, 193
25 (9th Cir. BAP 2001). While this feature affords chapter 13
26 debtors a cure mechanism, it does not provide a discharge
27 mechanism since long-term debts "provided for" in a Chapter 13
28 debtor's plan are excepted from the discharge under § 1328(a)(1).
Here, debtor has "provided for" the Association's prepetition
claim for HOA dues in his confirmed plan thereby bifurcating his
liability to the Association into pre and postpetition debt.
Accordingly, if debtor continues to reside in the property after
completing his plan, debtor's obligation to pay postpetition HOA
dues may properly be considered long-term debt falling within the
scope of § 1322(b)(5) and would be excepted from the discharge
under § 1328(a)(1).

1 establishes generally that postpetition HOA dues constitute
2 "claims" or "debts" which can be discharged. Debtor's argument
3 is conclusory because (a) the statute is inapplicable on its face
4 and (b) state law governs the substance of claims. See Butner v.
5 United States, 440 U.S. 48, 57 (1979); see also Affeldt v.
6 Westbrooke Condo. Ass'n (In re Affeldt), 60 F.3d 1292, 1296 (8th
7 Cir. 1995) (the determinative factor in deciding whether Rosteck
8 or Rosenfeld applies is whether the declaration of covenants and
9 restrictions is a contract or constitutes a running covenant
10 under state law). Accordingly, we revisit the Rosteck and
11 Rosenfeld era.

12 In doing so, our challenge is to harmonize the policy behind
13 the discharge exception in § 523(a)(16) of protecting homeowners'
14 associations with the policy under Chapter 13 that supports home
15 ownership. Food and Drug Admin. v. Brown & Williamson Tobacco
16 Corp., 529 U.S. 120, 133 (2000) (noting that a court must
17 interpret a statute "'as a symmetrical and coherent regulatory
18 scheme' and 'fit, if possible, all parts into an harmonious
19 whole.'") (citations omitted).

20 **2. The Affirmative Covenant To Pay HOA Dues Is One That**
21 **Runs With The Land Under Washington Law**

22 Under Washington law, the Declaration is not a contract, but
23 "a document that unilaterally creates a type of real property."
24 Bellevue Pac. Ctr. Condo. Owners Ass'n v. Bellevue Pac. Tower
25 Condo. Ass'n, 100 P.3d 832, 836 (Wash. Ct. App. 2004); see
26 William B. Stoebuck & John W. Weaver, 17 Wash. Practice, Real
27 Estate § 3.2 (2d ed. 2009) (stating that the majority view is
28 that running covenants are interests in land). The following

1 excerpt underscores the distinction between ordinary contracts
2 and "running covenants" and provides insight to the reasons for
3 different rules governing contracts and "running covenants":

4 Enforcement between the original parties is a matter of
5 the law of contract. . . . But the doctrine with which
6 we are concerned here is the doctrine, generally
7 regarded as part of the law of real property, under
8 which the covenant by the original parties may be
9 enforced by or against persons who succeed to interests
10 they held in the burdened or benefitted land. The
11 doctrine of 'running' is analogous to the contract
12 doctrines of assignment of rights and delegation of
13 duties; it is a doctrine whereby remote parties are
14 bound or benefitted by contractual covenants made by
the original parties. However, while a party must
consensually undertake assignment or delegation, the
law of running covenants imposes a duty or confers a
benefit upon remote parties, not because they
consensually agree, but because the covenant bore a
certain relationship to parcels of land and because
they stepped into a certain relationship with the same
parcels. The essence of the law of running covenants
has to do with what these relationships must be for the
remote parties to be bound or benefitted.

15 Deep Water Brewing, LLC v. Fairway Res. Ltd., 215 P.3d 990, 1006
16 (Wash. Ct. App. 2009) (quoting 17 William B. Stoebuck & John W.
17 Weaver, Wash. Practice, Real Estate § 3.2, at 126 (2d ed. 2004)).

18 Washington courts have held that the affirmative covenant to
19 pay HOA dues is a running covenant that is binding on subsequent
20 grantees.¹¹ Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.,

21 _____
22 ¹¹ Under Washington law, the elements of a running real
23 covenant are:

24 (1) the covenants must have been enforceable between
25 the original parties, such enforceability being a
26 question of contract law except insofar as the covenant
27 must satisfy the statute of frauds; (2) the covenant
28 must "touch and concern" both the land to be benefitted
and the land to be burdened; (3) the covenanting
parties must have intended to bind their successors in

(continued...)

1 84 P.3d 295, 301 (Wash. Ct. App. 2004) citing Rodruck v. Sand
2 Point Maint. Comm'n, 295 P.2d 714 (Wash. 1956). Further, the
3 Declaration itself states that the covenants "shall be binding
4 upon all real property within the Ranch and upon each Lot or
5 parcel therein, and upon their respective Owners and their . . .
6 successors and assigns, through all successive transfer of a Lot
7 or of any other part of the Property."

8 Therefore, under Washington law and the Declaration,
9 debtor's obligation to pay the HOA dues was a function of owning
10 the land with which the covenant runs and not from a prepetition
11 contractual obligation. As such, the holding in Rosenfeld is
12 persuasive. It follows that debtor's liability is "not 'rooted
13 in the pre-bankruptcy past', but rather [is] rooted in the estate
14 in property itself." Beeter, 173 B.R. at 122.

15 The Rosenfeld approach is also consistent with the RESTATEMENT
16 (THIRD) OF PROPERTY: SERVITUDES § 7.9 (2000) which states:

17 No servitude, other than a covenant to pay money that
18 is not imposed as part of a general plan of
19 development, conservation servitude, or easement
20 arrangement, is extinguishable in a bankruptcy
proceeding, unless otherwise required by statute.

21 ¹¹(...continued)
22 interest; (4) there must be vertical privity of estate,
23 i.e., privity between the original parties to the
24 covenant and the present disputants; and (5) there must
25 be horizontal privity of estate, or privity between the
original parties.

26 Leighton v. Leonard, 589 P.2d 279 (Wash. Ct. App. 1978) (citing
27 William B. Stoebuck, Running Covenants: An Analytical Primer, 52
28 Wash. L. Rev. 861 (1977)). Debtor has not argued that any of
these elements have not been met and there is no evidence in the
record to the contrary.

1 Finally, we would be remiss if we ignored the distinction
2 between the treatment of property rights and contract rights
3 under the Bankruptcy Code. While a debtor's personal obligation
4 under a contract may be discharged in most instances, "bankruptcy
5 power is subject to the Fifth Amendment's prohibition against
6 taking private property without compensation." In re Rivera, 256
7 B.R. 828, 834 (Bankr. M.D. Fla. 2000) (quoting United States v.
8 Sec. Indus. Bank, 459 U.S. 70, 75 (1982)). "A homeowners'
9 association's right to impose postpetition assessments pursuant
10 to a recorded Declaration of Covenants and Restrictions is within
11 the scope of the traditional property interests protected by the
12 Fifth Amendment." Rivera, 256 B.R. at 834.

13 Although § 101(5) (A) defines a "claim" as a "right to
14 payment", "[t]he key to distinguishing a right to payment that is
15 or is not subject to . . . discharge is simply whether the right
16 to payment is based on a property interest or something else."
17 Id. at 833. Since Washington law does not view the Declaration
18 as a contract (or "something else") and the affirmative covenant
19 to pay HOA dues is one that runs with the land, it follows that
20 the Association's right to payment of unassessed postpetition HOA
21 dues is based on a property interest not subject to discharge
22 under § 1328(a). The Rivera court explained the reason for this
23 rule:

24 A covenant running with the land, including any express
25 provision for the debtor to be personally obligated to
26 pay the homeowners' association, is an integral part of
27 the property which the debtor acquired when the debtor
28 acquired title to the property. The debtor never had
title clear of the previously recorded covenant running
with the land. Even though a mortgage and deed may be
executed simultaneously, they are separate
transactions. The debtor's acceptance of a deed and

1 the corresponding recorded covenants, however, is one
2 single and inseparable transaction. Therefore, to
3 release the debtor from a recorded covenant is to take
4 a property interest away from the homeowners'
5 association and give the debtor a property interest
6 which the debtor never had in the first place. Any
7 release from a covenant would in effect be a forced
8 conveyance of a property interest from the homeowners'
9 association to the debtor, something clearly beyond the
10 scope of the Chapter 7 discharge.

11 Rivera, 256 B.R. at 833-34.

12 Accordingly, we hold that, as a matter of law, debtor's
13 personal liability for HOA dues continues postpetition as long as
14 he maintains his legal, equitable or possessory interest in the
15 property and is unaffected by his discharge. In essence, the
16 "running" covenant rule in this case boils down to one of "you
17 stay, you pay" since debtor's confirmed plan indicates he will
18 stay in his home by curing his prepetition default on his
19 mortgage and maintain on-going payments through his confirmed
20 Chapter 13 plan.

21 Finally, we observe that Congress' linking of the
22 nondischargeable nature of HOA dues assessed after the order for
23 relief with a debtor's continued interest in real property under
24 § 523(a)(16) is consistent with the case law that holds the
25 affirmative covenant to pay HOA dues is one that runs with the
26 land. See Rosenfeld, 22 F.3d at 837-38 (noting that the debtor
27 "must transfer title to the property, if necessary by a deed in
28 lieu of foreclosure" in order to terminate liability for HOA
assessments); Beeter, 173 B.R. at 122 (noting that debtor's
liability for the assessments was an incident of ownership, and
only termination of that ownership can bring an end to the
ongoing liability).

1 The Association also relies on Beeter for the proposition
2 that postpetition assessments lack the required finiteness to be
3 considered a dischargeable claim under the Bankruptcy Code's
4 broad definition of a claim under § 101(5)(A). Beeter, 173 B.R.
5 at 123. Having concluded that the nature of debtor's obligation
6 arises from a covenant that runs with the land and is a
7 nondischargeable property interest, it is unnecessary to reach
8 this additional argument.

9 **C. Attorneys' Fees on Appeal**

10 The Association seeks an award of attorneys' fees if it
11 prevails in this appeal. Article 4.10 of the Declaration
12 provides in relevant part:

13 The Association shall be entitled to recover any costs
14 and reasonable attorneys' fees incurred in connection
15 with the collection of delinquent Assessments, whether
16 or not such collection activities result in suit being
17 commenced or prosecuted to judgment. In addition, the
18 Association shall be entitled to recover costs and
19 reasonable attorneys' fees if it prevails on appeal and
20 in the enforcement of a judgment. In any other
21 proceeding arising out of an alleged default by an
22 Owner, the prevailing party shall be entitled to
23 recover the costs of the proceeding, and such
24 reasonable attorney's [sic] fees as may be determined
25 by the court. . . . (Emphasis added).

26 "[A]n otherwise enforceable contract allocating attorney's fees
27 (i.e., one that is enforceable under substantive, nonbankruptcy
28 law) is allowable in bankruptcy except where the Bankruptcy Code
29 provides otherwise." Travelers Cas. & Sur. Co. of Am. v. Pac.
30 Gas & Elec. Co., 549 U.S. 443, 448 (2007).

31 It is undisputed that Article 4.10 of the Declaration is
32 binding on debtor and enforceable under Washington law. Debtor
33 argues, however, that the subject matter of the present appeal
34 does not fall within its scope.

1 Washington courts interpret covenants like contracts, see
2 Hollis v. Garwall, Inc., 974 P.2d 836, 843 (Wash. 1999), and
3 “interpret clear and unambiguous terms” contained in a contract
4 “as a question of law.” Wm. Dickson Co. v. Pierce County, 116
5 P.3d 409, 413 (Wash. Ct. App. 2005) (citing Paradise Orchards
6 Gen. P’ship v. Fearing, 94 P.3d 372 (Wash. Ct. App. 2004)).
7 Ambiguous terms are those fairly susceptible to different
8 reasonable interpretations. Wm. Dickson, 116 P.3d at 413. “But
9 a contract is not ambiguous simply because the parties suggest
10 opposing meanings.” Id.

11 We do not perceive Article 4.10 as being ambiguous. The
12 first sentence of Article 4.10 pertains to the Association’s
13 right to recover costs and reasonable attorneys’ fees incurred in
14 connection with the collection of delinquent Assessments, whether
15 or not such collection activities result in suit being commenced
16 or prosecuted to judgment. A fair reading of the second sentence
17 of the provision is that if there is a suit commenced in
18 connection with the collection of delinquent Assessments which is
19 prosecuted to judgment and followed by an appeal, the Association
20 would be entitled to recover costs and reasonable attorneys’ fees
21 if it prevailed. However, this appeal did not involve the
22 collection of delinquent Assessments because debtor’s
23 postpetition HOA dues had not yet been assessed. See Robert L.
24 Rossi, Attorneys’ Fees § 9:11 (3d ed. 2009) (noting that fee-
25 shifting provisions in contracts are generally strictly
26 construed). Accordingly, we agree with debtor that the plain
27 language of Article 4.10 does not support an award of attorneys’
28 fees.

1 **VI. CONCLUSION**

2 For these reasons, we AFFIRM. The Association's request for
3 attorneys' fees on appeal is DENIED.

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