NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. WW-09-1379-JuHRu
LARRY ROBERT FOSTER,	Bk. No. 08-15310
Debtor.	
LARRY ROBERT FOSTER,	
Appellant,	
v.	M E M O R A N D U M[1]
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 RUSSELL[2], Bankruptcy Judges.

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[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

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

Double R Ranch Association (the "Association") filed a proof of claim ("POC") in debtor Larry Robert Foster's Chapter 13 bankruptcy case, asserting a secured claim for $1,265.33 based on prepetition homeowners' association ("HOA") dues, late charges, interest and attorneys' fees. Debtor objected to the POC on the ground that the debt was unsecured. The bankruptcy court overruled his objection by order entered on November 12, 2009. Debtor timely appealed.

For the reasons set forth below, we AFFIRM.

I. FACTS

The facts are undisputed. In 2005, debtor purchased real property located at 7942 Crocket Road, Blaine, Washington. The real property was subject to an Amended and Restated Declaration of Covenants (the "Declaration") providing for the creation of the Association, a Washington non-profit corporation and homeowners' association governed by WASH. REV. CODE ("RCW") § 64.38.005-.060 (2010).[3] In August 2000, the Association recorded the Declaration against debtor's lot and others located within Double R Ranch.

The Declaration provided that the Association could charge each lot owner annual dues. Debtor failed to pay HOA dues for several years prior to his bankruptcy filing.

On August 20, 2008, debtor filed a Chapter 13 petition. Debtor listed his residence in Schedule A and listed the

[3] Throughout this memorandum we refer to relevant portions of the Declaration as "Articles".

Association as an unsecured creditor holding a claim of $1,131.11 in Schedule F.

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

On October 2, 2008, the Association filed its POC, asserting a secured claim for $1,265.33 based on prepetition arrears for HOA dues. Attached to the POC was an itemized statement of the dues, late charges, interest and legal fees. Also attached was a "Notice of Lien for Unpaid Assessments" for $1,888.40 dated May 31, 2007 and recorded by the Whatcom County Auditor that same day as Document Number 2070505184. The Notice of Lien erroneously recited that the Association had a lien under RCW § 64.34.364, which provides that unpaid assessments become a lien on an individual's condominium unit under the Washington Condominium Act.[5] The Association is not a condominium association, but a homeowners' association created and governed by RCW § 64.38 et seq.

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[4] The plan did not pay the Association as a secured creditor. The plan proposed to pay zero (0) percent to unsecured creditors, so even though the debtor's schedules recognized an unsecured debt to the Association, the plan paid nothing on this debt.

[5] RCW § 64.34.364 provides condominium associations with a statutory lien and states in part:

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

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

On April 6, 2009, debtor filed an objection to the Association's POC, contending that the claim was unsecured and any amounts arising before the order for relief were dischargeable under § 1328(a). Debtor maintained that Washington law did not provide a statutory lien for common expenses and other obligations owed to homeowners' associations. In response, the Association argued that its lien was not based on statute, but on language contained in the Declaration.

On May 13, 2009, the bankruptcy court heard oral argument on the matter and found that the Association had a secured claim under the Declaration for dues levied both before and after debtor's bankruptcy petition.[6]

On December 2, 2010, debtor filed an amended plan. On March 1, 2010, the bankruptcy court confirmed debtor's amended Chapter 13 plan. Debtor's plan provided for the cure of

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[6] On April 6, 2009, debtor also filed a motion to avoid the Association's lien on the ground that it constituted a "judicial lien" subject to avoidance. The court denied his motion by order entered November 12, 2009, which debtor did not appeal. Also on April 6, 2009, debtor filed an adversary complaint against the Association seeking a declaration that his postpetition obligations for HOA dues were debts dischargeable under § 1328(a) upon the completion of his plan. On May 5, 2009, the Association filed a motion for summary judgment in the adversary proceeding, which the bankruptcy court granted by order entered November 12, 2009. Debtor appealed that order, which we affirm in a separate published opinion. Foster v. Double R Ranch Assoc. (In re Foster), BAP No. 09-1377.

prepetition HOA dues in the event we affirm the bankruptcy court's ruling that the Association held a secured claim. Otherwise, debtor's plan provided for 0% to unsecured creditors. The plan further provided:

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

II. JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. § 1334 over this core proceeding under § 157(b)(2)(B) and (K). We have jurisdiction under 28 U.S.C. § 158.

III. ISSUE

Whether the bankruptcy court erred as a matter of law in finding that the Association's POC for prepetition HOA dues, late charges, interest and attorneys' fees was a secured claim based upon language in the Declaration.

IV. STANDARD OF REVIEW

We review a bankruptcy court's legal conclusions and application of state law de novo. Circle K Corp. v. Collins (In re Circle K Corp.), 98 F.3d 484, 486 (9th Cir. 1996).

V. DISCUSSION

A. Preliminary Issues

As an initial matter, we briefly explain why this appeal is not moot despite the confirmation of debtor's plan providing for the payment of the Association's prepetition claim as a secured claim. Section 1327(a) provides that "[t]he provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." § 1327(a); Multnomah County v. Ivory (In re Ivory), 70 F.3d 73, 75 (9th Cir. 1995); see also Anaheim Sav. & Loan Ass'n v. Evans (In re Evans), 30 B.R. 530, 531 (9th Cir. BAP 1983) ("An order confirming a Chapter 13 plan is res judicata as to all justiciable issues which were or could have been decided at the confirmation hearing.").

Section 1327(a) does not operate to moot this appeal because debtor's plan explicitly provides that he is not waiving any rights regarding the bankruptcy court's ruling on his objection to the Association's claim. As a result, although the bankruptcy court confirmed debtor's plan with a provision providing for the payment of the Association's prepetition claim as a secured claim, this provision cannot be construed as a binding concession. See also, Giesbrecht v. Fitzgerald, 429 B.R. 682, 689 (9th Cir. BAP 2010) (finding appeal not moot when debtors amended chapter 13 plan to include provision they believed was erroneous in order to have the plan confirmed).

Before reaching the merits, we also attend to another housekeeping matter. The Association argues that it is prejudiced if we consider debtor's argument on appeal since he failed to raise it in the bankruptcy court. "Absent exceptional circumstances, this court generally will not consider arguments raised for the first time on appeal." United Student Funds, Inc. v. Wylie (In re Wylie), 349 B.R. 204, 213 (9th Cir. BAP 2006).

Debtor's sole challenge on appeal is what the word "Assessment" in Article 4.5 of the Declaration means.[7] Article 4.5 entitled "Lien for Assessments" provides:

> The Association shall have a lien on each Lot for any unpaid Assessments levied against a lot from the time the Assessment is due. If an Assessment is payable in installments, the Association has a lien for the full amount of the Assessment from the time the first installment thereof is due.

Debtor argues that the Association's POC for unpaid HOA dues, late charges, interest, and attorneys' fees is an unsecured claim because those charges do not fall within the scope of an "Assessment" as defined elsewhere in the Declaration.

The Association contends that debtor should be precluded from asserting the "dues" versus "Assessments" argument because he raises it for the first time in this appeal. The record shows that debtor objected to the Association's POC on the ground that it was unsecured because he had paid all dues in full. Neither debtor's pleadings nor his attorney's oral argument at the

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[7] In Article 4.5, the terms "Assessments" and "Assessment" are capitalized. For consistency, we use the capitalized version throughout this memorandum unless quoting from the Declaration where it is not capitalized.

May 13, 2009 hearing, ever broached the issue of whether the various charges fell outside the scope of an "Assessment" as the term is used in Article 4.5 of the Declaration. However, the Association opened the door for the argument Debtor now makes. See Nghiem v. Ghazvini (In re Nghiem), 264 B.R. 557, 560 n.5 (9th Cir. BAP 2001), aff'd, 53 Fed. Appx. 489 (9th Cir. 2002) (noting that an appellate court generally will not consider arguments raised for the first time on appeal, but will address arguments that were raised and briefed by the opposing party at trial). The Association's response to debtor's objection implies that there is no distinction between the terms "dues" and "Assessments": "Those assessments are the 'dues' that debtor ... owes." Even if the Association's response had not impliedly raised this issue, we can address the argument on appeal since it raises purely a legal question and the Association will suffer no prejudice since we rule in its favor. Milgard Tempering, Inc. v. Darosa (In re Darosa), 318 B.R. 871, 878 n. 11 (9th Cir. BAP 2004) (noting that the court may consider an issue raised for the first time on appeal if it is purely one of law and the opposing party will suffer no prejudice).

B. The Merits

State law controls the validity of liens in the bankruptcy context. Saslow v. Valley Farm Mgn't, Inc. (In re Loretto Winery Ltd.), 898 F.2d 715, 718 (9th Cir. 1990). Washington courts interpret real property covenants like contracts. See Hollis v. Garwall, Inc., 974 P.2d 836, 843 (Wash. 1999). As a general rule, when interpreting contracts, Washington courts consider the

parties' intentions as questions of fact. Wm. Dickson Co. v. Pierce County, 116 P.3d 409, 413 (Wash. Ct. App. 2005). However, under Washington law "we interpret clear and unambiguous terms" contained in a contract "as a question of law." Id. "An ambiguous provision is one fairly susceptible to two different, reasonable interpretations. But a contract is not ambiguous simply because the parties suggest opposing meanings." Id.

Here, there is no ambiguity since the terms "dues" and "Assessments" are not capable of being understood as having more than one meaning in this context. Thus, our interpretation does not depend on extrinsic evidence.[8] Moreover, both parties base their arguments solely on the language in the Declaration.[9]

We first examine the definitional sections of the governing documents. Article II of the Declaration provides definitions for terms used in the document, but it does not define "dues" or

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[8] At oral argument, the Association argued that the interpretation of the terms in the Declaration was a mixed question of fact and law and that under the Berg context rule, it was entitled to put on extrinsic evidence. Washington uses the Berg rule to define the use of extrinsic evidence: "[E]xtrinsic evidence is admissible as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties' intent." Berg v. Hudesman, 801 P.2d 222 (1990). However, extrinsic evidence is admissible only when it illuminates what was written, not what was intended to be written. Id.

[9] Further, we note that the provisions in the Declaration which pertain to our interpretation were not "negotiated" terms between these parties where their "intent" could be explained by evidence. Debtor bought his property "subject to" the Declaration and had no input on the words contained therein. Additionally, there is no evidence the Association even existed when the Declaration was written.

"Assessments". Although the Declaration refers to the Association's Amended and Restated Bylaws (the "Bylaws") in various provisions, the Bylaws also do not define "dues" or "Assessments".[10]

Debtor points to Article 4.4 in the Declaration to provide the missing definitions of "dues" and "assessments" from Article II. Article 4.4 entitled "Dues and Assessments" states:

> For the purpose of financing the activities of the Association, annual dues shall be levied against each Lot in accordance with the Bylaws and Rules. . . . The Board of Directors shall be empowered to make assessments upon the membership for the costs of maintenance, repair and replacement of the Common Areas, and any capital improvements approved by the membership in the budget approval process described in the Bylaws. Any common expense for services provided to fewer than all the Lots may be specially assessed against the lots so benefitted . . . .

(Emphasis added.) Debtor interprets this provision to provide the definition of "dues" and "assessments" and emphasizes that the terms are not interchangeable; namely, "dues" are "for the purpose of financing the activities of the Association," whereas "assessments" are "for the costs of maintenance, repair and replacement of common areas, and capital improvements benefitting fewer than all of the lots in the Association."

Although the Declaration is a not a model of clarity, we disagree with debtor's interpretation. Such a strained reading fails to consider the plain wording of Article 4.4 of the

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[10] We refer to relevant portions of the Bylaws as "sections".

Declaration and ignores the Bylaws which are incorporated therein. Under § 4.4(f) of the Bylaws, the Association has the power to regulate the maintenance, repair, replacement, and modification of common areas. The Bylaws further provide that the Association, acting through the Board, has an obligation to pay for a variety of Common Expenses listed in § 8.6, including the maintenance, repair, and replacement of improvements on common areas. Paying for and providing the services in § 8.6 are mandatory activities of the Association. Collectively, these provisions in the Bylaws demonstrate that the Association's powers and mandatory duties associated with the maintenance, repair, replacement, and modification of common areas clearly entail an activity of the Association that needs financing.

Accordingly, a fair reading of Article 4.4 of the Declaration is that the provision provides the Association with the mechanism to obtain financing: annual dues "shall be levied against each Lot." Further, Article 4.4 of the Declaration explicitly grants the Association, through its Board of Directors, the power to make assessments to cover the costs of its mandatory duties — the maintenance and repairs of common areas — a power not contained in the Bylaws. In short, under our plain reading, no distinction between "dues" and "Assessments" readily emerges as debtor suggests.

Article 4.4 of the Declaration goes on to read:

> Any dues or assessments which remain unpaid more than thirty (30) days past their due date shall be deemed delinquent and shall bear interest at the maximum rate allowed by law. The Board may by resolution adopt collection policies calculated to maximize the

> Association's receipt of Assessment payments while affording flexibility to Owners.

This language also does not distinguish between "dues" and "assessments" for the purpose of imposing interest for delinquent payments. However, a reasonable reading is that "Assessment" refers to both "dues" and "assessments" with a lowercase "a," as the terms are used in the section. This reading would allow the Association to adopt policies to collect amounts owed in accordance with the Declaration's purpose of "insuring financial stability in the operation of the Association."

A reasonable reading of the Declaration does not support debtor's interpretation. Accordingly, we hold that the HOA dues in question fall under the general umbrella of "Assessments" within the meaning of Article 4.5 of the Declaration. It follows that the Association would have a lien against debtor's lot for the unpaid HOA dues.

We are equally satisfied that the Association has a lien on debtor's property for late charges, interest, and attorneys' fees. Article 4.10 of the Declaration states that the Association shall be entitled to recover any costs and reasonable attorneys' fees incurred in connection with the collection of delinquent Assessments. Likewise, § 7.4 of the Bylaws gives the Association the right to recover any costs and reasonable attorneys' fees incurred in connection with the collection of delinquent Assessments.

Article 4.4 of the Declaration states that any delinquent assessments "shall bear interest at the maximum rate allowed by

law." Section 7.5 of the Bylaws also gives the Board of Directors the right to impose and collect reasonable late charges and further provides that "Delinquent Assessments shall bear interest from the date of delinquency at the rate of 12% per annum . . . ."

In sum, these charges are not only authorized by the governing documents, but are properly added to the amounts for unpaid Assessments as evidenced by the language in Article 4.5 of the Declaration: "[a] release of said lien shall be filed by the Association upon payment in full of said dues with interest and costs, disbursements and attorney's fees incurred by the Association."

VI. CONCLUSION

For the reasons stated above, we AFFIRM.