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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

6 In re: ) BAP No. WW-09-1379-JuHRu  
7 )  
7 LARRY ROBERT FOSTER, ) Bk. No. 08-15310  
8 )  
8 Debtor. )  
9 )  
9 LARRY ROBERT FOSTER, )  
10 )  
10 Appellant, )  
11 )  
11 v. ) M E M O R A N D U M<sup>1</sup>  
12 )  
12 DOUBLE R RANCH ASSOCIATION, )  
13 )  
13 Appellee. )  
14 )

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<sup>2</sup>, Bankruptcy Judges.

<sup>1</sup> 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.

<sup>2</sup> Hon. David E. Russell, Bankruptcy Judge for the Eastern District of California, sitting by designation.

1 Double R Ranch Association (the "Association") filed a  
2 proof of claim ("POC") in debtor Larry Robert Foster's  
3 Chapter 13 bankruptcy case, asserting a secured claim for  
4 \$1,265.33 based on prepetition homeowners' association ("HOA")  
5 dues, late charges, interest and attorneys' fees. Debtor  
6 objected to the POC on the ground that the debt was unsecured.  
7 The bankruptcy court overruled his objection by order entered on  
8 November 12, 2009. Debtor timely appealed.

9 For the reasons set forth below, we AFFIRM.

#### 10 I. FACTS

11 The facts are undisputed. In 2005, debtor purchased real  
12 property located at 7942 Crocket Road, Blaine, Washington. The  
13 real property was subject to an Amended and Restated Declaration  
14 of Covenants (the "Declaration") providing for the creation of  
15 the Association, a Washington non-profit corporation and  
16 homeowners' association governed by WASH. REV. CODE ("RCW")  
17 § 64.38.005-.060 (2010).<sup>3</sup> In August 2000, the Association  
18 recorded the Declaration against debtor's lot and others located  
19 within Double R Ranch.

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

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

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25  
26 <sup>3</sup> Throughout this memorandum we refer to relevant portions  
27 of the Declaration as "Articles".

1 Association as an unsecured creditor holding a claim of  
2 \$1,131.11 in Schedule F.

3 On September 4, 2008, debtor filed a proposed plan which  
4 did not provide for payment to the Association for either pre or  
5 postpetition HOA dues.<sup>4</sup>

6 On October 2, 2008, the Association filed its POC,  
7 asserting a secured claim for \$1,265.33 based on prepetition  
8 arrears for HOA dues. Attached to the POC was an itemized  
9 statement of the dues, late charges, interest and legal fees.  
10 Also attached was a "Notice of Lien for Unpaid Assessments" for  
11 \$1,888.40 dated May 31, 2007 and recorded by the Whatcom County  
12 Auditor that same day as Document Number 2070505184. The Notice  
13 of Lien erroneously recited that the Association had a lien  
14 under RCW § 64.34.364, which provides that unpaid assessments  
15 become a lien on an individual's condominium unit under the  
16 Washington Condominium Act.<sup>5</sup> The Association is not a  
17 condominium association, but a homeowners' association created  
18 and governed by RCW § 64.38 et seq.

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19  
20 <sup>4</sup> The plan did not pay the Association as a secured  
21 creditor. The plan proposed to pay zero (0) percent to unsecured  
22 creditors, so even though the debtor's schedules recognized an  
23 unsecured debt to the Association, the plan paid nothing on this  
24 debt.

25 <sup>5</sup> RCW § 64.34.364 provides condominium associations with a  
26 statutory lien and states in part:

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

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

12 On May 13, 2009, the bankruptcy court heard oral argument  
13 on the matter and found that the Association had a secured claim  
14 under the Declaration for dues levied both before and after  
15 debtor's bankruptcy petition.<sup>6</sup>

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

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20 <sup>6</sup> On April 6, 2009, debtor also filed a motion to avoid the  
21 Association's lien on the ground that it constituted a "judicial  
22 lien" subject to avoidance. The court denied his motion by order  
23 entered November 12, 2009, which debtor did not appeal. Also on  
24 April 6, 2009, debtor filed an adversary complaint against the  
25 Association seeking a declaration that his postpetition  
26 obligations for HOA dues were debts dischargeable under § 1328(a)  
27 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.

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

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

## 17 **II. JURISDICTION**

18 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
19 § 1334 over this core proceeding under § 157(b)(2)(B) and (K).  
20 We have jurisdiction under 28 U.S.C. § 158.

## 21 **III. ISSUE**

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

## 26 **IV. STANDARD OF REVIEW**

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

1 V. DISCUSSION

2 A. Preliminary Issues

3 As an initial matter, we briefly explain why this appeal is  
4 not moot despite the confirmation of debtor's plan providing for  
5 the payment of the Association's prepetition claim as a secured  
6 claim. Section 1327(a) provides that "[t]he provisions of a  
7 confirmed plan bind the debtor and each creditor, whether or not  
8 the claim of such creditor is provided for by the plan, and  
9 whether or not such creditor has objected to, has accepted, or  
10 has rejected the plan." § 1327(a); Multnomah County v. Ivory  
11 (In re Ivory), 70 F.3d 73, 75 (9th Cir. 1995); see also Anaheim  
12 Sav. & Loan Ass'n v. Evans (In re Evans), 30 B.R. 530, 531  
13 (9th Cir. BAP 1983) ("An order confirming a Chapter 13 plan is  
14 res judicata as to all justiciable issues which were or could  
15 have been decided at the confirmation hearing.").  
16 Section 1327(a) does not operate to moot this appeal because  
17 debtor's plan explicitly provides that he is not waiving any  
18 rights regarding the bankruptcy court's ruling on his objection  
19 to the Association's claim. As a result, although the bankruptcy  
20 court confirmed debtor's plan with a provision providing for the  
21 payment of the Association's prepetition claim as a secured  
22 claim, this provision cannot be construed as a binding  
23 concession. See also, Giesbrecht v. Fitzgerald, 429 B.R. 682,  
24 689 (9th Cir. BAP 2010) (finding appeal not moot when debtors  
25 amended chapter 13 plan to include provision they believed was  
26 erroneous in order to have the plan confirmed).

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

8 Debtor's sole challenge on appeal is what the word  
9 "Assessment" in Article 4.5 of the Declaration means.<sup>7</sup> Article  
10 4.5 entitled "Lien for Assessments" provides:

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

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

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

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27 <sup>7</sup> In Article 4.5, the terms "Assessments" and "Assessment"  
28 are capitalized. For consistency, we use the capitalized version  
throughout this memorandum unless quoting from the Declaration  
where it is not capitalized.

1 May 13, 2009 hearing, ever broached the issue of whether the  
2 various charges fell outside the scope of an "Assessment" as the  
3 term is used in Article 4.5 of the Declaration. However, the  
4 Association opened the door for the argument Debtor now makes.  
5 See Nqhiem v. Ghazvini (In re Nqhiem), 264 B.R. 557, 560 n.5  
6 (9th Cir. BAP 2001), aff'd, 53 Fed. Appx. 489 (9th Cir. 2002)  
7 (noting that an appellate court generally will not consider  
8 arguments raised for the first time on appeal, but will address  
9 arguments that were raised and briefed by the opposing party at  
10 trial). The Association's response to debtor's objection implies  
11 that there is no distinction between the terms "dues" and  
12 "Assessments": "Those assessments are the 'dues' that debtor ...  
13 owes." Even if the Association's response had not impliedly  
14 raised this issue, we can address the argument on appeal since it  
15 raises purely a legal question and the Association will suffer no  
16 prejudice since we rule in its favor. Milgard Tempering, Inc. v.  
17 Darosa (In re Darosa), 318 B.R. 871, 878 n. 11 (9th Cir. BAP  
18 2004) (noting that the court may consider an issue raised for the  
19 first time on appeal if it is purely one of law and the opposing  
20 party will suffer no prejudice).

21 **B. The Merits**

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



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

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

13 We first examine the definitional sections of the governing  
14 documents. Article II of the Declaration provides definitions  
15 for terms used in the document, but it does not define "dues" or  
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17 <sup>8</sup> At oral argument, the Association argued that the  
18 interpretation of the terms in the Declaration was a mixed  
19 question of fact and law and that under the Berg context rule, it  
20 was entitled to put on extrinsic evidence. Washington uses the  
21 Berg rule to define the use of extrinsic evidence: "[E]xtrinsic  
22 evidence is admissible as to the entire circumstances under which  
23 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.

24 <sup>9</sup> Further, we note that the provisions in the Declaration  
25 which pertain to our interpretation were not "negotiated" terms  
26 between these parties where their "intent" could be explained by  
27 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.

1 "Assessments". Although the Declaration refers to the  
2 Association's Amended and Restated Bylaws (the "Bylaws") in  
3 various provisions, the Bylaws also do not define "dues" or  
4 "Assessments".<sup>10</sup>

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

8 For the purpose of financing the activities of the  
9 Association, annual dues shall be levied against each  
10 Lot in accordance with the Bylaws and Rules. . . . The  
11 Board of Directors shall be empowered to make  
12 assessments upon the membership for the costs of  
13 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 . . . .

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

22 Although the Declaration is a not a model of clarity, we  
23 disagree with debtor's interpretation. Such a strained reading  
24 fails to consider the plain wording of Article 4.4 of the  
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26 <sup>10</sup> We refer to relevant portions of the Bylaws as  
27 "sections".

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

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

24 Article 4.4 of the Declaration goes on to read:

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

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

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

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

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

26 Article 4.4 of the Declaration states that any delinquent  
27 assessments "shall bear interest at the maximum rate allowed by  
28

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

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

13 **VI. CONCLUSION**

14 For the reasons stated above, we AFFIRM.  
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