Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
February 01, 2019

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

* * * * * *

In re:	)	Case No.: 11-23466-MKN
	)	Chapter 11
SPANISH TRAIL COUNTRY CLUB, INC.,	)	
	)	Date: November 8, 2018
Debtor.	)	Time: 1:30 p.m.
	)	

ORDER ON MOTION FOR DETERMINATION THAT AGREEMENTS ARE NOT EXECUTORY CONTRACTS[1]

On November 8, 2018, the court heard arguments on the Motion for Determination that Agreements Are Not Executory Contracts ("Motion"), brought by Spanish Trail Master Association ("ST Master Association"). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND[2]

On August 24, 2011, Spanish Trail Country Club, Inc. ("Debtor" or "Reorganized Debtor" as appropriate) filed a voluntary Chapter 11 petition. (ECF No. 1). In the "Omnibus

[1] In this Order, all references to "ECF No." are to the number assigned to the documents filed in the case as they appear on the docket maintained by the clerk of court. All references to "AECF No." are to the numbers assigned to the documents filed in any related adversary proceeding. All references to "Section" are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to "FRBP" are to the Federal Rules of Bankruptcy Procedure. All references to "FRE" are to the Federal Rules of Evidence.

[2] Pursuant to FRE 201(b), the court takes judicial notice of all materials appearing on the docket of the above-captioned Chapter 11 proceeding as well as any related adversary proceedings.

Declaration of Farhang Rohani in Support of Debtor's First Day Motions," Debtor's business operations were described as follows:

> 7. Debtor owns and operates Spanish Trail Country Club (the "Club"), one of the oldest and most prestigious, private, not-for-profit, golf and country clubs in Las Vegas, Nevada. Situated within the Spanish Trail Master Association (the "Master Association"), which is a master-planned luxury residential community located west of Rainbow Avenue and south of Tropicana Avenue in Las Vegas, Nevada, the Club sits on a 249.110-acre site ….

(ECF No. 10, ¶ 7).

On September 7, 2011, Debtor filed its schedules of assets and liabilities ("Schedules"). (ECF No. 34). In its Schedule "F," Debtor listed "Spanish Trail Master HO Assoc.," i.e., ST Master Association, as holding an unsecured claim relating to "Home owners association" in the amount of $61,872.02 ("HOA Unsecured Claim"). (ECF No. 34-1, p. 48 of 86). In its executory contract and unexpired lease Schedule "G," Debtor listed a contract with the ST Master Association for "Home owners association." Id. at p. 68 of 86.

On February 17, 2012, Debtor filed its initial Disclosure Statement and Plan. (ECF Nos. 121 and 122).

On February 27, 2012, Debtor filed a motion to sell the Club and all related real and personal property ("Sale Motion"). (ECF No. 130).

On March 21, 2012, Debtor's secured lender, Hermitage Management LLC ("Lender"), filed an objection to the Sale Motion arguing, in pertinent part, that the ST Master Association's control over certain easements relating to the Debtor's real property constituted a potential cloud on title that could chill bidding. (ECF No. 156). That same day, Lender commenced Adversary Proceeding No. 12-01059-BAM against the ST Master Association ("Declaratory Relief Proceeding"). The adversary complaint requested relief in the form of "a declaration that the express easements appurtenant are valid and exist to benefit the dominant estate, the Country Club Property, free of any control by the HOA regardless of its interest in the servient estate …." (AECF No. 1, p. 10).

On March 22, 2012, Debtor filed a reply to Lender's objection to the Sale Motion arguing, in pertinent part, that

> [f]or over twenty-five years, Debtor has operated the Club as a private golf and country club in accordance with the restrictions of use and access that are imposed upon it by way of the Master Association Agreement. As demonstrated by such course of conduct, contrary to the assertions made in the Opposition and the declaratory relief requested in the Complaint, Debtor has not disputed the covenants or restrictions that run with the land. Quite to the contrary, Debtor has enjoyed a long and cooperative relationship with the residents of the Spanish Trail community and the Master Association.

(ECF No. 160, p. 3). Debtor also countered Lender's characterization that the ST Master Association's easements would chill bidding, arguing that

> as Debtor's successful reorganization will depend on increased revenue from Membership Dues from *new members*, Debtor needs to emerge quickly from the shadow of bankruptcy, which has prevented Debtor from successfully acquiring many new members since the commencement of the case. ***Debtor has determined that its greatest opportunity for growth lies with the residents of the Spanish Trail community, who happen to be members of the Master Association. Thus, the pursuit and litigation of the Adversary Proceeding against the Master Association at the expense of individuals who represent Debtor's greatest opportunity for membership growth runs counter to Debtor's strategy at successful reorganization.***

Id. at p. 5. (emphasis added).

On March 23, 2012, the Honorable Bruce A. Markell, the bankruptcy judge then-assigned in this case, conducted a hearing on the Sale Motion, at which time Debtor's counsel, in pertinent part, characterized the ST Master Association as "a supporter of the club and … an essential component to our success." (ECF No. 228 at 27:21-24).

On March 28, 2012, Judge Markell entered an order approving the Debtor's requested sale procedures. (ECF No. 166).

On April 3, 2012, Debtor filed its first amended disclosure statement and plan. (ECF Nos. 171 and 172).

On April 4, 2012, Lender voluntarily dismissed the Declaratory Relief Proceeding pursuant to FRBP 7041. (AECF No. 14).

On April 17, 2012, Debtor filed modified versions of its first amended disclosure statement and plan. (ECF Nos. 204 and 205). On that same day, Judge Markell entered an order approving the modified first amended disclosure statement ("Approved Disclosure Statement").

(ECF No. 206). The modified first amended plan defined (i) the "Club" as "[t]he Spanish Trail Country Club, owned by Debtor, located in Spanish Trail[]"; (ii) "Spanish Trail" as "[a] master planned residential community in Clark County, Nevada in which the Club is located[]"; (iii) the "ST Master Association" as the "Spanish Trail Master Association, a Nevada non-profit corporation, formed pursuant to the Master Declaration for Spanish Trail to own and be responsible for maintaining certain properties within Spanish Trail (but not the club), including the entry, entrance gate, certain commonly used roads, a security system and a swim and tennis facility for the benefit of owners of property within Spanish Trail[]" and (iv) the "ST Master Association Agreement" as "[t]he Agreement between Debtor, ST Master Association and Spanish Trail Associates, a Nevada limited partnership, executed February 21, 1984, and all amendments and modifications thereto."[3] The Approved Disclosure Statement elaborated that the ST Master Association Agreement "governs the cross easements and covenants appurtenant to the Real Property" and that "the amenities available to the [Club's] Members include access to twelve tennis courts and full swimming pool facilities, which facilities are neither owned nor operated by the Club, but rather by the Master Association, which has agreed to provide the Members access to their property in exchange for a monthly fee payable by the Club". (ECF No. 205, p. 7 n.1 and p. 22 n.12).

On May 3, 2012, Judge Markell entered an order approving the Sale Motion, pursuant to which Lender was found to have submitted the highest and best offer via a credit bid, combined with certain other incentives ("Sale Order"). (ECF No. 231). The sale to Lender included the assumption and assignment of certain executory contracts and unexpired leases but was otherwise found by the court to be free and clear of any liens and interests other than certain

[3] The court interprets Debtor's Schedule "G" reference to a contract with the ST Master Association for "Home owners association" as referring to the ST Master Association Agreement.

"Permitted Encumbrances" to be set forth on a schedule attached to any revised plan. Id. at p. 13.[4] The Sale Order also stated the following:

> L. On the date set for Auction and as indicated on the record of the Sale Hearing, Debtor and Secured Creditor reached the Settlement regarding the sale of the Sale Assets. In particular, subject to the terms set forth herein, in the Revised Plan, in the Sale Transaction Documents, and in the Lease Agreement, the Settlement provides that, subject to confirmation of the Revised Plan, Secured Creditor shall purchase the Sale Assets free and clear of Interests by its credit bid of $7 million of the Hermitage Claim (the "Credit Bid") and shall lease the Sale Assets to Debtor, as it exists after the Effective Date (the "Reorganized Debtor") pursuant to the Lease Agreement, which provides, among other things and as further set forth herein, (i) for a "triple net" lease with a four year term and annual base rent of $350,000 (the "Lease Payment") payable semi-annually in advance in two equal payments of $175,000 on each May 1 and November 1 (except that the initial annual payment shall be paid in full on the Effective Date of the Revised Plan) and (ii) until the fourth anniversary of the Effective Date (as more particularly specified in the Lease Agreement), Debtor will have the option to purchase the Sale Assets from Credit Bidder for a purchase price of $7.5 million.

Id. at pp. 7-8.

On May 7, 2012, the Debtor filed a supplement to the Approved Disclosure Statement discussing Lender's successful credit bid and the consequent changes reflected in a second amended plan. (ECF Nos. 235 and 236). In pertinent part, the second amended plan proposed to pay the HOA Unsecured Claim in full in its own Class 3, make no distribution to other general unsecured creditors in class 5, and reject all executory contracts and unexpired leases not identified on an attached Schedule 6.1. The ST Master Association Agreement was not listed in Schedule 6.1. (ECF No. 235, p. 35 of 35). However, pursuant to section 6.1 of the second amended plan, Debtor proposed to assume Membership Contracts, which section 1.1.60 defined as "[t]he executory contracts entered into by and among Debtor and the Members, which provide the Members their rights and interests in the Club pursuant to the Bylaws."

[4] The court observes that the Sale Motion expressly identified "all contracts and agreements between Debtor and the Master Association" as being excluded from the sale. ECF No. 130, ¶ 44.

On May 8, 2018, Judge Markell entered an amended order conditionally approving the supplement to the Approved Disclosure Statement and scheduling a plan confirmation hearing. (ECF No. 237).

On May 10, 2012, Debtor filed an errata to its second amended plan attaching a revised Schedule 6.1 list of executory contracts and unexpired leases that would be assumed upon confirmation. (ECF No. 239). The Membership Contracts were listed, but the ST Master Association Agreement was not.

On May 14, 2012, Debtor filed a second errata to its second amended plan attaching a further revised Schedule 6.1 list of executory contracts and unexpired leases that would be assumed upon confirmation. (ECF No. 242). Again, the Membership Contracts were listed, but the ST Master Association Agreement was not.

On May 31, 2012, Debtor filed its brief in support of plan confirmation as well as a declaration from Mark Hedge, Debtor's president and a member of its Board of Directors. (ECF Nos. 253 and 254). In its confirmation brief, Debtor explained the justification for the separate classification and different treatment of the HOA Unsecured Claim from other general unsecured claims:

> The separate classification of the Claims in Class 3 (Allowed ST Master Association Claims) from Claims in Class 5 (Allowed General Unsecured Claims), is reasonable, in good faith, not unfairly discriminatory, and justified based upon the economic realities of this Chapter 11 Case, including, but not limited to, the agreement between between ST Master Association and Debtor, which requires, *inter alia*, Debtor to pay monthly fees in exchange for access to Debtor's Club, which sits behind the security gates of the ST Master Association, and the use and benefit of certain ST Master Association facilities. To the extent that Debtor fails to fulfill its obligations under the agreement, Debtor may be subject to sanctions, including, but not limited to, denial of access to the Club and the ST Master Association facilities, which sanctions would have dramatic economic consequences on Debtor. *See* Hedge Decl. ¶ 8. As such, the separate classification of Allowed ST Master Association Claims in Class 3 from the General Unsecured Claims in Class 5 satisfies the requirements of Section 1122 of the Bankruptcy Code.

(ECF No. 253, pp. 6-7; see also ECF No. 254, ¶ 8).

On June 5, 2012, Judge Markell entered an order confirming Debtor's second amended plan ("Confirmed Plan") as well as separate findings of fact and conclusions of law ("FF&CL") that, in pertinent part, largely mirrored Debtor's explanation in its confirmation brief regarding the separate classification of the HOA Unsecured Claim from other general unsecured claims (ECF Nos. 255; 256, ¶ 15). Paragraph 8 of the FF&CL stated:

> 8. As of the Effective Date of the Plan, absent the use of the premises leased under the Lease Agreement, Reorganized Debtor will have no substantial assets and has no material obligations beyond its obligations under the Lease Agreement that could be restructured to allow it to continue in business on terms different from the Lease Agreement.

Paragraph 29.b. of the FF&CL stated, in pertinent part:

> Notwithstanding anything to the contrary in the Plan, including, without limitation, anything in the foregoing Debtor's Releases, nothing in the Plan shall relieve or release Debtor of its obligations and liabilities under and/or in connection with the Sale Order, Sale Transaction Documents, Lease Agreement, and transactions contemplated thereby.

On August 29, 2012, Judge Markell approved a stipulation between Debtor and the ST Master Association clarifying the correct, reduced amount of the HOA Unsecured Claim that would be paid under the confirmed plan. (ECF Nos. 276 and 277).

On June 24, 2013, Judge Markell entered a final decree. (ECF Nos. 302 and 303).

On July 9, 2013, this bankruptcy case was closed. (ECF No. 304).

On February 26, 2018, the ST Master Association filed an ex parte motion to reopen the bankruptcy case. (ECF Nos. 305 and 306).

On February 27, 2018, the court entered an order reopening the case, and the reopened case was reassigned due to the retirement of Judge Markell. (ECF Nos. 309 and 310).

On February 28, 2018, the ST Master Association filed the present Motion and the accompanying Declaration of George Rogers. (ECF Nos. 312 and 313). By the Motion, the ST Master Association seeks a court order finding and concluding that the following four agreements were not executory contracts capable of rejection in the Debtor's confirmed plan: (i) the Spanish Trail Country Club Property Agreement, dated January 2, 1984, between Spanish Trail Associates and Debtor ("STCC Property Agreement"), (ii) the ST Master Association

Agreement, (iii) the Master Declaration of Restrictions for Spanish Trail, dated February 28, 1984, made by Spanish Trail Associates ("Master Declaration"), and (iv) the Agreement, dated December 4, 1985, between Spanish Trail Associates and the Debtor ("STA Agreement," and where appropriate in the instant order, all four agreements may be referred to collectively as the "HOA Agreements."

On March 8, 2018, Reorganized Debtor's pre-confirmation attorneys filed a motion seeking to withdraw as counsel ("Motion to Withdraw"), contending that their representation ended approximately six years prior once the plan was confirmed. (ECF No. 316; see also ECF No. 324).

On March 28, 2018, the law firm of Larson Zirzow & Kaplan, LLC entered a Notice of Appearance on behalf of the Reorganized Debtor. (ECF No. 327).

On March 28, 2018, Reorganized Debtor, with the assistance of its new counsel, filed an opposition to the instant Motion ("Opposition"). (ECF No. 328).

On March 30, 2018, Reorganized Debtor filed an errata to its Opposition. (ECF No. 329).

On April 2, 2018, the court entered an order granting the Motion to Withdraw. (ECF No. 330).

On April 4, 2018, ST Master Association filed its reply in support of the Motion ("Reply"). (ECF No. 333).

On May 2, 2018, the court entered an order scheduling a settlement conference before the Honorable Paul Sala on June 15, 2018. (ECF No. 342).

On June 15, 2018, the settlement conference was held and continued to August 15, 2018. (ECF No. 346).

On August 15, 2018, the continued settlement conference was held, but the parties did not reach a resolution.

On August 27, 2018, the court entered an order scheduling another settlement conference before Judge Sala on October 3, 2018. (ECF No. 350; see also ECF No. 352).

On September 28, 2018, the court approved the parties' stipulation to vacate the October 3, 2018, settlement conference. (ECF No. 357). The stipulation also rescheduled to November 8, 2018, the hearing on the merits of the Motion.

DISCUSSION

I. The Parties' Arguments.

The ST Master Association argues that the HOA Agreements are covenants that run with the land that could not, as a matter of law, be deemed to be executory contracts capable of rejection under the Confirmed Plan. Debtor responds that the HOA Agreements are executory contracts that were rejected under the Confirmed Plan because they were not included in Schedule 6.1's list of assumed contracts.[5] Debtor alternatively argues that even if the HOA Agreements were not rejected, they were sold to Lender free and clear of the same, subject to Permitted Encumbrances, which only included, in pertinent part, the Master Declaration[6] and certain deeds attached to the STA Agreement. In its Reply, the ST Master Association contends that Debtor could not sell the Club and related property free and clear of its covenants that run with the land.[7]

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[5] The court observes that during the pre-confirmation period, the Debtor appeared to argue that the ST Master Association Agreement constituted a set of restrictive covenants, as opposed to an executory contract capable of rejection. See generally ECF No. 160; see also ECF No. 228 at 28:11-16.

[6] Debtor made inconsistent statements in its Opposition regarding the HOA Agreements. Specifically, although stating that the STA Agreement supersedes the other three HOA Agreements, Debtor later argued the opposite by acknowledging that the Master Declaration was a Permitted Encumbrance under the sale. See Opposition, p. 4, ¶ 5. This inconsistency is but one of several gaps in this matter because neither this judge nor counsel for either party apparently was involved in this case at any time during the pre-confirmation period. See note 4, supra, and pp. 13-14, infra.

[7] A transcript of the November 8, 2018, hearing on the instant Motion appears on the docket ("Transcript"). (ECF No. 362). At the hearing, the court inquired of counsel whether there is a case or controversy in this matter. Despite filing the Motion, counsel for the ST Master Association seemed to acknowledge that there currently is no case or controversy, though there may be one in the future. See Transcript at 4:8-5:16. Debtor's counsel maintained that a limited case or controversy does exist, but that the ST Master Association is seeking a declaratory judgment that should have been sought through commencement of an adversary proceeding

II. Jurisdiction.

The court has jurisdiction to interpret its own orders, which includes the Confirmed Plan that expressly reserved this grant of jurisdiction to the court. See Travelers Indem. Co. v. Bailey, 557 U.S. 137, 151 (2009) ("[T]he Bankruptcy Court plainly had jurisdiction to interpret and

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under FRBP 7001(9). See Transcript at 12:22-14:6. The Bankruptcy Appellate Panel for this circuit has observed as follows:

> Generally, an adversary proceeding is required for a declaratory judgment under Rule 7001(9).
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> > It is error to circumvent the requirement of an adversary proceeding by using a 'contested matter' under Rule 9014. Such an error may nevertheless be harmless when the record of the procedurally incorrect 'contested matter' is developed to a sufficient degree that the record of an adversary proceeding likely would not have been materially different.
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> *Ruvacalba v. Munoz (In re Munoz)*, 287 B.R. 546, 551 (9th Cir. BAP 2002); *Trust Corp. of Mont., Inc. v. Patterson (In re Copper King Inn, Inc.)*, 918 F.2d 1404, 1407 (9th Cir. 1990) (where the record shows the parties received adequate notice concerning the nature of the issues raised in a contested motion proceeding, extensive hearings occurred, briefing was submitted and the parties were given ample time to air their position; for all practical purposes an adversary proceeding was held). *See also Korneff v. Downey Reg'l Med. Ctr. Hosp., Inc. (In re Downey Reg'l Med. Ctr. Hosp., Inc.)*, 441 B.R. 120, 127 (9th Cir. BAP 2010) (bankruptcy court's decision not to require an adversary proceeding is subject to a harmless error analysis). "In such circumstances, the error does not affect the substantial rights of the parties and is not inconsistent with substantial justice." *In re Munoz*, 287 B.R. at 551. *See, e.g.*, 28 U.S.C. § 2111; Rule 9005; *In re Copper King Inn, Inc.*, 918 F.2d at 1406-07; *Laskin v. First Nat'l Bank (In re Laskin)*, 222 B.R. 872, 874 (9th Cir. BAP 1998); *United States v. Valley Nat'l Bank (In re Decker)*, 199 B.R. 684, 689-90 (9th Cir. BAP 1996).

Diatom, LLC v. Comm. of Creditors Holding Unsecured Claims (In re Gentile Family Indus.), 2014 WL 4091001, at *5 (B.A.P. 9th Cir. Aug. 19, 2014). Here, Reorganized Debtor did not raise this issue in its Opposition but instead first raised it at the hearing. Reorganized Debtor's counsel further conceded that there is no dispute over what is stated in the Confirmed Plan or the Sale Order. See Transcript at 12:22-24. Since the parties only ask the court to interpret the undisputed language of those orders and both parties had the chance to fully brief and argue their respective positions, the court concludes that the record in this contested matter has been developed to a sufficient degree that the record of an adversary proceeding between the instant parties would not have been materially different. See Ganis Credit Corp. v. Anderson (In re Jan Weilert RV, Inc.), 326 F.3d 1028, 1030 (9th Cir. 2003) ("The law does not inflexibly demand form over substance.").

enforce its own prior orders"). See also Confirmed Plan at section 10.1.3 ("Resolve any matters related to the assumption, assignment or rejection of any Executory Contract or Unexpired Lease to which Debtor or Reorganized Debtor are party and to hear, determine and, if necessary, liquidate any Claims arising there from or Cure amounts related thereto …."); section 10.1.7 ("Decide or resolve any cases, controversies, suits or disputes that may arise in connection with the consummation, interpretation or enforcement of any Final Order, this Plan, the Sale Transaction, the Lease Agreement, the Sale Procedures Order, the Sale Order, the Confirmation Order, or obligations of any Persons incurred in connection with such Final Order, this Plan, the Sale Transaction, the Lease Agreement, the Sale Order, the Sale Procedures Order or the Confirmation Order …."); section 10.1.11 ("Determine any other matters that may arise in connection with or relate to, this Plan, any Final Order, the Sale Order, the Sale Procedures Order, the Disclosure Statement, the Confirmation Order or any contract, instrument, release or other agreement or document created in connection with this Plan (unless such contract, instrument, release or other agreement or document expressly provides otherwise), including the Sale Transaction and the Lease Agreement, except as otherwise provided herein ….").

The court does not have jurisdiction, however, to decide the effect of any post-confirmation events. See Battle Ground Plaza, LLC v. Ray (In re Ray), 624 F.3d 1124, 1136 (9th Cir. 2010). For example, the ST Master Association argues in its pleadings that the parties have continued to operate under the HOA Agreements during the post-confirmation period. Presumably, this revelation is intended to persuade the court that the post-confirmation actions of the parties should inform and guide the court's interpretation in this matter. Yet, the parties' post-confirmation actions vis-à-vis the HOA Agreements are irrelevant to this court's determination. Indeed, the court's jurisdiction begins and ends for the limited purpose of interpreting how the HOA Agreements were addressed, if at all, under the Confirmed Plan.

The court also does not have jurisdiction to the extent a party lacks standing. "The court is required to assess a plaintiff's standing 'even if the parties fail to raise the issue.'"[8] Herson v.

[8] Neither party challenged the other's standing.

City of Reno, 806 F. Supp. 2d 1141, 1144 (D. Nev. 2011) quoting FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 230 (1990). "The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of [the jurisdictional] doctrines." Herson, 806 F. Supp. 2d at 1144, quoting FW/PBS, Inc., 493 U.S. at 231 (quotations omitted). In this respect, the ST Master Association is a named party only to the ST Master Association Agreement, and not to any of the other three HOA Agreements (referred to as the "Third Party Agreements"). The counterparty to these Third Party Agreements—Spanish Trail Associates—appears to have been served with the Motion, see ECF No. 345, but did not enter an appearance in this matter for reasons unknown to the court. The ST Master Association did not discuss the basis by which it has standing to ask for a court determination regarding the Third Party Agreements,[9] none of which were listed in Debtor's Schedule "G" or otherwise addressed in the Confirmed Plan.[10] Consequently, the court concludes that it does not have jurisdiction to decide any issues regarding the Third Party Agreements because the ST Master Association lacks standing under those agreements.

The court also concludes that it lacks jurisdiction regarding the Reorganized Debtor's request in the Opposition to determine that the HOA Agreements were sold to Lender free and clear of the HOA Agreements. Indeed, Reorganized Debtor's counsel argued at the hearing that another party has since purchased the property, and that Reorganized Debtor is now, as it was upon plan confirmation, simply a lessee. See Transcript at 14:7-17. Similar to the ST Master

[9] Standing is even more important in light of issues raised during the bankruptcy case involving a Possibility of Reverter in favor of Spanish Trail Associates if the Club is not operated in a certain manner. See, e.g., ECF Nos. 155, 156, 160, and 228; see also Transcript at 3:22-25 (Counsel for the ST Master Association stated her belief that "the original owner, the developer, was concerned that the property would revert back to it if the property wasn't being operated as required and did not want that to happen.").

[10] Reorganized Debtor states that the Master Declaration and the two deeds attached to the STA Agreement were listed as "Permitted Encumbrances" under the Sale Order. See Opposition at ¶16:4-7; Transcript at 17:13-23. Although the court makes no determination as to the accuracy of this representation or the effect thereof, it arguably provides the ST Master Association with the interpretation it was presumably seeking from this court as to these documents.

Association's shortcomings vis-à-vis the Third Party Agreements, the Reorganized Debtor did not discuss the basis by which it has standing to argue whether certain encumbrances exist on property that it does not own.

The court does have jurisdiction if parties with standing present a ripe case or controversy. See Rus, Miliband & Smith, APC v. Yoo (In re Dick Cepek, Inc.), 339 B.R. 730, 734 (B.A.P. 9th Cir. 2006), citing Lee v. State of Oregon, 107 F.3d 1382, 1387 (9th Cir. 1997) ("In determining if it has jurisdiction, a federal court examines whether the parties have standing, the case or controversy is ripe, or the issue is moot."). "'[J]usticiability requires that a dispute be ripe and present an actual controversy.'" In re Dick Cepek, Inc., 339 B.R. at 734-35 quoting Menk v. LaPaglia (In re Menk), 241 B.R. 896, 905 (B.A.P. 9th Cir. 1999). At the hearing, counsel for the Reorganized Debtor argued that the interpretation of the Confirmed Plan vis-à-vis the ST Master Association Agreement presents a live case or controversy that the court has jurisdiction to decide. See Transcript at 16:23-17:4 ("What is going on is the master association is trying to force the club to pay more money. And the club in response has said these agreements don't exist as a result of the bankruptcy. So I do believe – and if I misspoke, I apologize – that there is a live case in [sic] controversy here. Whether you're the correct court to decide that is another matter, and to what extent you should decide the issue."). Additionally, counsel argued that a case or controversy exists over the amount of fees to which the Debtor would be liable under the ST Master Association Agreement. Id. at 17:5-12 ("Whether the fee itself is reasonable, should be increased, decreased, eliminated, or otherwise, those are issues [the court has] jurisdiction to decide."). Based on the record, the court agrees that a case or controversy is presented as to the applicability of the ST Master Association Agreement under the Confirmed Plan. Because neither the Debtor nor ST Master Association argues that any particular amount of fees is impermissible under that agreement, however, the court cannot make a determination respecting the amount of fees that might be charged under the agreement.

III. Disposition.

As discussed above, the sole issue the court has jurisdiction to decide is the treatment of the ST Master Association Agreement under the Confirmed Plan. The ST Master Association

argues that it constitutes a covenant that runs with the land that could not, as a matter of law, have been rejected as an executory contract in the Confirmed Plan. The ST Master Association does not, however, reconcile the inconsistency in the record whereby the ST Master Association Agreement was listed as an executory contract in Schedule "G" but was not listed in the Confirmed Plan's Schedule 6.1 list of assumed contracts. Reorganized Debtor also fails to reconcile its current argument, i.e., that the ST Master Association was an executory contract, with (i) its pre-confirmation position that the agreement comprised easements and covenants that ran with the land, see note 5, supra, which was also conceded by Debtor in its Approved Disclosure Statement that described the ST Master Association Agreement as "govern[ing] the cross easements and covenants appurtenant to the Real Property," see p. 4, supra; (ii) its pre-confirmation position that the continued patronage of its members relied on the continued vitality of the ST Master Association Agreement, which was vital to its reorganization efforts, see p. 3, supra; (iii) its assumption of Membership Contracts in Schedule 6.1 of the Confirmed Plan, see p. 6, supra, which ensured the continued patronage of its members; and (iv) the Confirmed Plan's separate classification and full payment of the HOA Unsecured Claim in order to ensure the continued post-confirmation validity of the ST Master Association Agreement. See id.

Instead of addressing these inconsistencies, the parties focused the bulk of their arguments on whether the ST Master Association Agreement was an executory contract or comprised covenants that ran with the land. However, the court need not, and does not, make any determination regarding the nature of the agreement but instead will focus its attention on the interpretation of the Confirmed Plan under Nevada law.[11] In pertinent part, Nevada law states as follows:

> "[I]n the absence of ambiguity or other factual complexities," contract interpretation presents a question of law that the district court may decide on summary judgment, *Ellison v. Cal. State Auto Ass'n*, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990), with de novo review to follow in this court. *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). Whether a contract is ambiguous likewise presents a question of law. *Margrave v. Dermody Props.*, 110 Nev. 824, 827, 878 P.2d 291, 293 (1994). A contract is ambiguous if its terms may reasonably be interpreted in more than one way, *Anvui, L.L.C. v. G.L.*

[11] Nevada law applies under Section 12.8 of the Confirmed Plan.

> *Dragon, L.L.C.*, 123 Nev. 212, 215, 163 P.3d 405, 407 (2007), but ambiguity does not arise simply because the parties disagree on how to interpret their contract. *Parman v. Petricciani*, 70 Nev. 427, 430-32, 272 P.2d 492, 493-94 (1954) (concluding that summary judgment was appropriate because the interpretation offered by one party was unreasonable and, therefore, the contract contained no ambiguity), *abrogated on other grounds by Wood v. Safeway, Inc.*, 121 Nev. 724, 121 P.3d 1026 (2005). Rather, "an ambiguous contract is 'an agreement obscure in meaning, through indefiniteness of expression, or having a double meaning.'" *Hampton v. Ford Motor Co.*, 561 F.3d 709, 714 (7th Cir. 2009) (quoting *Whiting Stoker Co. v. Chicago Stoker Corp.*, 171 F. 2d 248, 251 (7th Cir. 1948)).

Galardi v. Naples Polaris, LLC, 301 P.3d 364, 366 (Nev. 2013). Based on the record, the court finds no ambiguity with respect to the treatment of the ST Master Association Agreement under the Confirmed Plan. As previously stated, the Approved Disclosure Statement, the Confirmed Plan, and the FF&CL consistently, expressly, and unambiguously reflect that the STA Master Agreement was vital to the Debtor's reorganization and was intended to continue undisturbed during the post-confirmation period. Indeed, the structure of the Confirmed Plan contemplated that Reorganized Debtor would lease the Club from Lender and continue to derive income from the assumed Membership Contracts, with the hopes that it could attract new members based on, in part, the additional benefits and security assured pursuant to the continued vitality of the ST Master Association Agreement. The court therefore concludes that under the Confirmed Plan, the parties to the instant Motion continue to be bound by the terms of the ST Master Association Agreement.[12]

IT IS THEREFORE ORDERED that the Motion for Determination that Agreements Are Not Executory Contracts, brought by Spanish Trail Master Association, Docket No. 312, be, and the same hereby is, **GRANTED IN PART** and **DENIED IN PART**.

IT IS FURTHER ORDERED that the parties to the present Motion remain bound by the agreement between Debtor, ST Master Association and Spanish Trail Associates, a Nevada

[12] The parties to this Motion do not dispute that the underlying real property was sold to the Lender. Because neither party to this Motion currently owns the real property, the court cannot declare whether the obligations under the Spanish Trail Master Association Agreement, or the Third Party Agreements, constitute covenants and restrictions running with the land. Such a determination appears to have been the subject of the Declaratory Relief Proceeding brought by the Lender that was voluntarily dismissed prior to confirmation of the Debtor's plan of reorganization.

limited partnership, executed February 21, 1984, and all amendments and modifications thereto.

IT IS FURTHER ORDERED that no additional determinations are made with respect to the other agreements referenced in the present Motion.

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