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U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
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Blaine F. Bates
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE VISTA RIDGE DEVELOPMENT, LLC, doing business as Chartered Homes of Colorado, Debtor.	BAP No. CO-10-050
VISTA RIDGE DEVELOPMENT, LLC, Appellant, v. VISTA RIDGE ASSOCIATION, INC., and UNITED STATES TRUSTEE, Appellees.	Bankr. No. 09-37789 Chapter 11 OPINION*

Appeal from the United States Bankruptcy Court
for the District of Colorado

Before MICHAEL, THURMAN, and RASURE, Bankruptcy Judges.

THURMAN, Bankruptcy Judge.

The Debtor appeals a bankruptcy court order granting Appellee's motion to treat its claim as an administrative expense pursuant to 11 U.S.C. § 503(b)(1)(A).[1]

* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

[1] Unless otherwise noted, all further statutory references in this decision will be to the Bankruptcy Code, which is Title 11 of the United States Code.

We affirm.[2]

I. BACKGROUND

Vista Ridge Development, LLC ("Debtor") is a builder and developer that is creating a subdivision of homes within a planned luxury community near Erie, Colorado called "Vista Ridge." Appellee, Vista Ridge Association, Inc. ("HOA"), is a homeowners' association for Vista Ridge properties.

The Debtor purchased 139 lots of Vista Ridge property in 2005, and has since completed 39 homes on those properties. The Debtor filed a voluntary Chapter 11 petition on December 31, 2009, and a proposed plan ("Plan") on March 30, 2010. At the time its petition was filed, the Debtor had already sold 33 of its 39 completed homes, and the remaining 6 completed, but unsold, properties were vacant. The Debtor listed the HOA as a secured creditor on Schedule D of its petition, with a listed claim of $120,678.96. The Plan provided that the HOA would retain any liens securing its claim on each parcel, and that the assessments on each parcel would be paid in full, with interest, upon its sale. Thus, the Debtor proposed to pay the HOA, upon each closing, the total assessments applicable to that property, whether incurred pre- or post-petition, plus interest. On April 8, 2010, the HOA filed a motion to treat its post-petition assessments as administrative expenses and to have them immediately paid. The Debtor objected.

In support of its motion, the HOA submitted the Affidavit of Christopher Mansfield ("Affidavit"), a member of the HOA's Board of Directors. The Affidavit, in most relevant part, provides:

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[2] The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

7. The HOA uses the monthly assessments from its members to promote the recreation, health, safety and welfare of the HOA community. More specifically, HOA assessments are used by the HOA to undertake, *inter alia*, the following:

> a. Maintenance and operation of the HOA Community Center and parking lot, which are then used for education and exercise classes, social activities, and children's activities, for the benefit of HOA members. These matters also include building maintenance, snow removal from sidewalks and parking lots, repaving the parking lot, and parking lot lighting.
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> b. Employment of staff to manage the community center, plan social activities, manage sports leagues and children's summer camps, all for the benefit of HOA members.
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> c. Purchase and maintenance of fitness equipment at the community center, and to provide sports facilities and equipment for HOA members' use at the community center.
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> d. Maintenance of nine (9) community parks known as "Tot Lots," maintenance of park equipment, landscaping and snow removal for such parks.
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> e. Maintenance and staffing of HOA community swimming pools and spa facilities.
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> f. Maintenance of running/walking trails within the community.
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> g. Management of the HOA and enforcement of all HOA covenants and restrictions by a management company.

8. The HOA assessments, and the use of such funds as described above, directly and substantially benefit all Lot or Unit owners, including Debtor (and Debtor's bankruptcy estate), by improving and preserving the quality and desirability of the entire Vista Ridge community, thereby maintaining and increasing the value of all Vista Ridge Lots or Units, including the Debtor Lots.

9. The payment of the monthly HOA assessments is a direct benefit to Debtor by preserving the value of each and every Debtor Lot, and by preventing the deterioration of Vista Ridge that would result if the HOA expenditures described above were to cease.

10. Without the expenditure of the HOA monthly assessments, as described above, the value and quality of all Lots or Units in Vista Ridge, including the Debtor Lots, would decrease substantially as common areas, facilities and maintenance thereof would quickly

deteriorate.[3]

Debtor did not file any responsive affidavits, but did "dispute" the Affidavit in its objection to HOA's motion, as follows:

> The Debtor disputes that the HOA has provided any benefit to the estate. Nearly all of the expenses for which dues are charged to the Debtor apparently relate to the recreation center. The HOA does not provide any benefit to the lots or common areas within Latitude@Vista Ridge [Debtor's subdivision]. It does not provide or pay for maintenance, snow removal, insurance, taxes or the like. None of the six homes the Debtor owns are occupied and the estate derives no benefit whatever from the presence of the recreation center. The one hundred lots which the Debtor ones [sic] are vacant land and also derive no benefit from the HOA charges.[4]

Following a brief hearing, at which the parties agreed to submit the matter to the Bankruptcy Court for its review and ruling, the Bankruptcy Court granted the HOA's motion for administrative treatment of its claim, but denied its request for immediate payment.

II. APPELLATE JURISDICTION

The Debtor timely appealed the order granting the HOA's motion for administrative treatment of its claim, which is a final order for purposes of appeal.[5] Neither party elected to have the appeal heard by the district court and,

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[3] *Affidavit of Christopher Mansfield in Support of Motion by Creditor Vista Ridge Association, Inc. for Determination of Administrative Expense, and Motion to Compel Immediate Payment Thereof* at 2-3, *in* Appellant's Appendix ("App.") at 185-86.

[4] *Debtor's Objection and Request for Hearing on Motion for Determination and Payment of Administrative Expense* at 3, ¶ 14, *in* App. at 199. *See also Debtor's Objection and Request for Hearing on Amended Motion by Creditor Vista Ridge Association, Inc., for Determination of Administrative Expense Pursuant to 11 U.S.C. § 503(b)(1)(A), and Motion to Compel Immediate Payment Thereof* at 3-4, ¶ 15, *in* App. at 209-10. Both of these pleadings were signed only by Debtor's counsel.

[5] Orders denying administrative treatment of claims are routinely treated as final, appealable orders. *See, e.g., In re Econ. Lodging Sys., Inc.*, 234 B.R. 691, 693 (6th Cir. BAP 1999); *United States v. Hillsborough Holdings Corp. (In re Hillsborough Holdings Corp.)*, 116 F.3d 1391, 1393 (11th Cir. 1997) (implying that either grant or denial would be appealable). One case specifically held that orders *granting* priority were final, determining that such an order is final and

(continued...)

therefore, the BAP has valid appellate jurisdiction.[6]

III. ISSUE AND STANDARD OF REVIEW

The issue on appeal is whether the Bankruptcy Court properly allowed the HOA's claim for property assessment fees as an administrative expense under § 503(b)(1)(A). Bankruptcy courts have broad discretion to determine whether a particular claim is entitled to administrative treatment.[7] However, it is also widely held that administrative expense treatment should be narrowly construed.[8] In this case, the parties have agreed that the legal standard applicable to consideration of a claim as an administrative expense is "actual benefit," *i.e.*, did the service provided by the HOA confer an actual benefit to the estate under § 503(b)(1)(A)? Debtor disputes only whether the Bankruptcy Court properly applied that standard to the evidence. Application of facts to a statutory standard presents mixed issues of law and fact, the legal aspects of which are reviewed de novo, and the factual aspects of which are reviewed for clear error.[9]

IV. DISCUSSION

Section 503(b)(1)(A), upon which the HOA relied for administrative treatment of its assessments, provides: "[a]fter notice and a hearing, there shall be allowed administrative expenses . . . including the actual, necessary costs and expenses of preserving the estate[.]"

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[5] (...continued)
appealable pursuant to the collateral order doctrine. *See In re Flight Transp. Corp. Sec. Litig.*, 874 F.2d 576, 580 (8th Cir. 1989). Based upon the principles set forth in these cases, we consider an order granting administrative priority to a claim to be final and appealable.

[6] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002.

[7] *See, e.g., In re Butcher*, 108 B.R. 634, 636 (Bankr. E.D. Tenn. 1989).

[8] *See, e.g., In re Cheatle*, 150 B.R. 266, 270 (Bankr. D. Colo. 1993).

[9] *In re U.S. Med., Inc.*, 370 B.R. 340, 342 (10th Cir. BAP 2007), *aff'd*, 531 F.3d 1272 (10th Cir. 2008).

This Court has previously noted that § 503(b)(1)(A) priority should "be narrowly construed [b]ecause the presumption in bankruptcy cases is that the debtor's limited resources will be equally distributed among his creditors."[10] There are only a few cases within the Tenth Circuit that have interpreted § 503(b)(1)(A) as it relates to homeowners' association assessments, two of which are from the District of Colorado Bankruptcy Court. In the first, *In re Lenz*,[11] upon which the HOA principally relies, the court granted administrative priority to homeowners' association assessments, in their entirety, stating:

> The question then is whether [monthly assessments, late charges and interest] were actual, necessary costs and expenses of preserving the estate. The Court finds that they were because it is through the assessments that [the homeowners' association] carries out its duties under the covenants to operate and maintain the swimming pool, maintain the greenbelt and open space areas of the subdivision, and pay the property tax on the common areas. These activities necessarily confer benefit and value to all of the properties in the subdivision, including the Debtor's property.[12]

The Debtor criticizes the *Lenz* decision as treating homeowners' association assessments as per se beneficial, rather than requiring a showing of "an actual and quantifiable benefit" to the estate.[13]

The Debtor principally relies on *In re Cheatle*,[14] a Chapter 7 case in which the court denied administrative treatment of homeowners' association assessments in their entirety. The *Cheatle* court required a showing of an "actual, concrete

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[10] *In re Native Am. Sys., Inc.*, 351 B.R. 135, 139 (10th Cir. BAP 2006) (internal quotation marks omitted).

[11] 90 B.R. 458 (Bankr. D. Colo. 1988) (J. Brumbaugh).

[12] *Id.* at 460. Although the *Lenz* court granted administrative expense status to the homeowners' association assessments in that case, it also offset them, in their entirety, with the damages incurred by the debtor and caused by the association.

[13] *Appellant's Opening Brief* at 10-11.

[14] 150 B.R. 266 (Bankr. D. Colo. 1993) (J. Clark).

benefit to the estate" for administrative priority,[15] which is the same standard both parties to the present appeal agree is applicable. The focus in *Cheatle* was on when the relevant property had been effectively abandoned by the Chapter 7 trustee, which is the point at which homeowners' association assessments are no longer the estate's responsibility. The court only secondarily focused on the issue of actual benefit to the estate. Although the *Cheatle* court ultimately concluded that the homeowners' association had failed to meet the required standard, the facts submitted on that issue, if any, were not described.[16]

In the present case, the Bankruptcy Court reviewed a number of standards that have been applied by other courts with respect to administrative treatment of homeowners' association assessments. After reviewing a number of factually similar cases, the Bankruptcy Court concluded that administrative expense treatment of homeowners' association assessments "must be determined on a case by case basis taking into consideration all of the factors" in the five standards it had identified as previously applied.[17]

The Debtor contends that the case by case standard applied by the Bankruptcy Court is inconsistent with applicable law, specifically with *In re Mid Region Petroleum, Inc.*[18] However, the Debtor has interpreted *Mid Region* too restrictively. In *Mid Region*, the Tenth Circuit Court of Appeals ("Tenth

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[15] *Id.* at 269.

[16] The *Cheatle* court itself distinguished the case before it from the one in *Lenz*, noting that the *Lenz* debtor was reorganizing, and therefore keeping the property, whereas *Cheatle* involved a liquidation. *Id.* at 270. Likewise, *Cheatle* involved property that was considered to be of no value to the estate, whereas the property in the present case, and in *Lenz*, is the estate's principal asset.

[17] *Order* dated July 9, 2010, at 4, *in* App. at 296. These five standards were the four set forth in the *Cheatle* decision, and a fifth from *In re Butcher*, 108 B.R. 634, 638 (Bankr. E.D. Tenn. 1989) and *In re Mishkin*, 85 B.R. 18, 21 (Bankr. S.D.N.Y. 1988), including the actual benefit to the estate standard.

[18] 1 F.3d 1130 (10th Cir. 1993).

Circuit") affirmed the bankruptcy and district courts' denials of administrative expense treatment of post-petition rail car rental charges, asserted pursuant to a pre-petition lease that had not been immediately rejected. Interpreting the "actual and necessary" language of § 503(b)(1)(A), the *Mid Region* court concluded, "[t]o be granted administrative expense status, the bankruptcy estate must benefit from the use of the creditor's property," and that neither "potential to benefit the estate," nor "mere possession" satisfies this requirement.[19] The *Mid Region* court did not impose a specific procedure for determining whether a benefit exists, nor did it hold that certain factors, such as possession or potential benefit, should be excluded from consideration. Thus, contrary to the Debtor's suggestion, *Mid Region* does not dictate the manner in which a court reaches its conclusion that an expense either does or does not benefit the estate, only that it must conclude that the estate is benefitted for a claim to be treated as an administrative expense. Therefore, the process of that determination remains within the discretion of the bankruptcy court.

In the present case, the Bankruptcy Court concluded that the homeowners' association assessments provided an "actual benefit" to the Debtor's estate.[20] Therefore, the only issue before this Court is whether the Bankruptcy Court properly determined, upon the facts available, that an actual benefit was conferred. The Debtor repeatedly contends that there was "no evidence" before the Bankruptcy Court from which it could have determined the existence of an actual benefit.[21] According to the Debtor, the absence of evidence in the record is the result of the HOA's declaration at a non-evidentiary hearing on its motion that, "it did not wish to present any evidence and agreed to have the issues

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19 *Id.* at 1133.

20 *Order* at 5, *in* App. at 297.

21 *Appellant's Opening Brief* at 1, 6, 11, 12, 13, 14, 15, 16, 17.

decided as a matter of law, waiving the right to present evidence."[22] Thus, "the HOA elected to stand on the conclusory allegations of its pleadings that there was a benefit to the estate."[23]

We disagree with the Debtor's view of the record. In fact, the HOA submitted a properly verified factual Affidavit in support of its motion below. In it, HOA director Christopher Mansfield averred that Vista Ridge is a planned community subject to a Master Declaration of Covenants, Conditions and Restrictions, which was recorded with the Weld County, Colorado recorder; that the Debtor owes the HOA an assessment of $55 per month, per lot owned in the subdivision; and that the HOA uses the assessments to "promote the recreation, health, safety and welfare of the HOA community," including the Debtor's properties. Mr. Mansfield detailed the HOA's use of its assessments, stating that the assessments directly benefit the Debtor "by preserving the value of" its lots, as well as preventing deterioration of the community's common areas, thereby preventing a decrease in value and quality of all properties within the community.

Pursuant to Rule 43(c) of the Federal Rules of Civil Procedure, a trial court may rely on affidavits as evidence to support factual allegations in a motion.[24] Although given the opportunity to do so at the hearing, the Debtor did not submit any evidence in contravention of the Affidavit,[25] leaving for determination only whether the motion and Affidavit, together, sufficiently established that the HOA

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[22] *Id.* at 4-5.

[23] *Id.* at 13.

[24] Rule 43 is applicable to bankruptcy cases pursuant to Federal Rule of Bankruptcy Procedure 9017.

[25] Both here and in the Bankruptcy Court, the Debtor relied on minimal statements rebutting the Affidavit that were made in its response to the HOA's motion. However, those statements were not supported by the properly authenticated testimony of a person with actual knowledge, and are therefore not proper rebuttal evidence.

was entitled to the relief it sought.

Thus, the issue now before this Court is whether the evidence contained in the Affidavit and the record below was sufficient to allow the bankruptcy court to conclude that the assessments constituted a valid administrative expense. The Affidavit established that every lot in the Vista Ridge development was subject to a monthly HOA assessment, which is used to carry out the HOA's obligations to the community. Those duties include running and maintaining a Community Center, including employment of staff; maintenance and staffing of community swimming pools and spa facilities; maintenance of nine community parks and running/walking trails throughout the community; and engaging a management company to run the HOA and enforce its covenants and restrictions. The Debtor's business is building and selling homes within the Vista Ridge planned community, which it intends to continue.[26] Thus, the inherent "value" of the Debtor's properties is in their marketability. Mr. Mansfield's testimony to the effect that the assessments were needed to maintain the community amenities, the existence of which maintained or increased property values in the community is uncontroverted. In fact, the Debtor's own description of its proposed Plan

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[26] The Debtor's proposed Plan and Disclosure Statement indicate an intent to continue business in much the same manner as it had prior to filing bankruptcy, though the Debtor intends to build "ranch homes" on its remaining lots, rather than the two-story homes it previously built. *See Debtor's Amended Plan of Reorganization* ("*Plan*") at 8, ¶ 6.1, *in* App. at 226; *Disclosure Statement for Plan* at 6-7, ¶¶ II.C, and D., *in* App. at 240-41. In addition, the Debtor sought and received permission from the Bankruptcy Court to hire a realtor "to assist the Debtor in the marketing and sale of its properties." *Disclosure Statement for Plan* at 10, ¶ IV.E., *in* App. at 244 (the document contains two paragraphs denoted "IV.E." and this reference is to the first of those two paragraphs). Based on the date of the order allowing this hiring, March 3, 2010, it appears that the Debtor likely had the benefit of a professional realtor for nearly two months prior to filing its response to the HOA's motion on April 27, 2010. Nonetheless, the Debtor did not offer an affidavit, or any other evidence, that might support its contention that the HOA assessments did not favorably impact the value of its properties. While the burden of proving a "benefit" is on the party seeking administrative treatment of its claim, it still would have behooved the Debtor to submit such evidence if it could have done so.

emphasized its properties' location within Vista Ridge, and the attendant community amenities, when discussing their marketability.[27] Thus, this Court cannot conclude that the Bankruptcy Court's finding that the Debtor's estate was benefitted by the HOA is "clearly erroneous."

In opposition to the HOA's motion in the Bankruptcy Court, the Debtor raised only two objections to treating the assessments as administrative expenses: 1) the HOA failed to provide any evidence of actual benefit to the Debtor's estate; and 2) even if the assessments were given administrative treatment, the court should not order immediate payment.[28] Significantly, the Debtor did not assert before the Bankruptcy Court, as it does now, that the HOA's evidence failed to establish the "value of the benefit the Debtor supposedly received."[29] "An appellate court should not consider new issues not properly raised before the court below."[30] The Debtor's failure to raise the issue of the amount of benefit until this appeal prevented any consideration of that issue in the Bankruptcy Court. In that court, the Debtor conceded the legitimacy and the amount of the HOA's claim in its proposed Plan, then in response to the HOA's motion to treat that claim as an administrative expense, the Debtor asserted only that there was "no evidence of actual benefit" to the estate. The Debtor certainly could have

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[27] *Id.* at 5, ¶ II.B. ("Vista Ridge includes various amenities, including a golf course, swimming pool complex, clubhouse, restaurant, community center, health club, tennis courts and parks and trails"), *in* App. at 239.

[28] The second of these arguments is no longer relevant, as the Bankruptcy Court denied the HOA's request for immediate payment and ordered that its assessments be dealt with in any proposed plan.

[29] *Appellant's Opening Brief* at 12. *See also id.* at 13 (no evidence of "the value of that benefit"); 14 ("there was absolutely no evidence about what the value of the work was"); and 15 (the Bankruptcy Court's finding "does not support a conclusion about the *amount* of the supposed benefit").

[30] *In re Cozad*, 208 B.R. 495, 498 (10th Cir. BAP 1997). *See also*, *Walker v. Mather (In re Walker)*, 959 F.2d 894, 896 (10th Cir. 1992) (general rule is that appeals courts do not consider issues not considered by the trial court).

contested the amount of the claim for administrative treatment, at least as an alternative to its principal argument that the HOA had failed to show "any" benefit. The Debtor's timing of payment argument below, which became relevant only if it lost its principal argument, is precisely the kind of "alternative" argument that should have been asserted before the Bankruptcy Court regarding the "value" of the benefit received by the estate.

We are not persuaded by the Debtor's value of the benefit argument. Rather, the purpose of allowing priority administrative treatment of a claim pursuant to § 503 "is to encourage third parties to provide necessary goods and services to the debtor-in-possession so that it can continue to conduct its business," and the benefit offered by such assistance cannot always be measured in "dollars and cents."[31] In this case, the only evidence was that the HOA assessments are used to maintain community amenities, which in turn are relied upon by the Debtor in its efforts to market its properties. If the Debtor had evidence that disputed those facts, it should have submitted it to the Bankruptcy Court. However, this Court is skeptical, as was the Bankruptcy Court, that $55 per month for amenities such as fully staffed recreation and fitness centers, pools, and running/walking trails does not provide a benefit of at least that amount to each lot. Accordingly, we cannot conclude that the Bankruptcy Court's allowance of the entire assessment as an administrative expense was clearly erroneous.[32]

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[31] *In re TransAmerican Natural Gas Corp.*, 978 F.2d 1409, 1420 (5th Cir. 1992). *See also In re Native Am. Sys., Inc.*, 351 B.R. 135, 139 (10th Cir. BAP 2006) (policy behind priority is to encourage creditors to supply necessary resources to debtors post-petition).

[32] We also disagree with the Debtor's contention that this outcome gives rise to per se administrative treatment of HOA assessments by virtue of mere possession of property. *See Appellant's Opening Brief* at 10. Each case is dependent upon its own facts, and another case might very well involve evidence that the assessments at issue did not fully benefit estate property. For example, there could be evidence to the effect that the community amenities were not well maintained, that the HOA was poorly administered and therefore overcharged

(continued...)

V. CONCLUSION

The Bankruptcy Court's order granting administrative treatment of the HOA's assessments is therefore affirmed.

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[32] (...continued)
owners for its services, or that the assessments were above what was reasonable for the services provided or were otherwise overly burdensome. That is not the present case, however, in which the HOA made an unrebutted prima facie showing of benefit to the estate.