

2010

Wolf Mountain Resorts, L.C., v. ASC Utah, Inc. : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Wolf Mountain Resorts v. ASC Utah*, No. 20100342 (Utah Court of Appeals, 2010).
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IN THE UTAH COURT OF APPEALS

WOLF MOUNTAIN RESORTS,
L.C.,

Plaintiff and Appellant,

vs.

ASC UTAH, INC.,

Defendant and Appellee.

Appellate Case No. 20100342

Trial Court Case No. 070500485

ORAL ARGUMENT REQUESTED

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FILED
UTAH APPELLATE COURTS

NOV 16 2010

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INTRODUCTION

This appeal involves, literally, a four-letter dispute. In two instances, “-or” mistakenly became “-ee,” creating obvious typographical errors in an unambiguous leasehold mortgage in which the term “mortgagee” was inadvertently typed instead of “mortgagor.”

Appellant Wolf Mountain Resorts, LC (“Wolf”) and appellee ASC Utah, Inc. (“ASCU”) are parties to a leasehold mortgage that was designed to secure certain obligations of ASCU, as mortgagor and tenant, to Wolf, as mortgagee and landlord, under a Ground Lease related to property used for the operation of The Canyons ski resort. The property interest which ASCU mortgaged is ASCU’s “right, title and interest in an Amended and Restated Lease Agreement Number 419, by and between the State of Utah, School and Institutional Trust Lands Administration, as landlord, and Mortgagor [ASCU], as tenant,” referred to as the “Mortgaged Estate.” Wolf and ASCU intended to classify certain events as defaults under the leasehold mortgage, but they also employed limited exceptions. Thus, under the “Due-on-Sale” clause, it is an event of default for ASCU to sell, transfer, convey, or assign (i) “all or any portion of, or any interest in, the Mortgaged Estate,” or (ii) “any controlling ownership interest in and to the Mortgagor [ASCU].” However, the parties recognized two exceptions wherein such transfers would not be an event of default. The “First Exception” exempts collateral assignment of the

Mortgaged Estate to a bona fide third party lender from being a default, provided that the assignment specifically states that it is subject to certain rights of Wolf as the Mortgagee. Similarly, under the “Second Exception” the transfer is not a default if it was a “transfer of all or substantially all” of ASCU’s interests in The Canyons resort, including its interests as tenant under the Ground Lease, provided that the transfer specifically states it is subject to Wolf’s rights as Mortgagee under the leasehold mortgage.

The “Second Exception” was ultimately reduced to writing as follows:

except for . . . (ii) any transfer of all or substantially all of *Mortgagee’s* rights in and to the development currently known as The Canyons (including, without limitation, all of *Mortgagee’s* interest as tenant under the Ground Lease and the Mortgaged Estate) whether effected by stock or asset sale, provided that such transfer shall be expressly subject to each and every one of the liens, rights and interests of the Mortgagee under this Leasehold Mortgage. For purposes of the foregoing sentence, “substantially all” shall include all of the assets held by Mortgagor which are necessary for unimpeded operation and development of The Canyons resort as it currently exists or may be improved.

Under well-settled principles of contract interpretation, the only reasonable interpretation of this provision, when viewing the entire contract as a whole, is to construe the first two references to “Mortgagee” as “Mortgagor.” The mortgage defines ASCU (Mortgagor), as the tenant—not Wolf. The mortgage defines the Mortgaged Estate as ASCU’s interest—not Wolf’s. The provision’s purpose is to carve out an exception so that a sale of all of ASCU’s

stock is not an event of default so long as the sale is expressly subject to Wolf's rights as Mortgagee. It would make no sense to carve out an exception for a sale of Wolf's interests so long as the sale was subject to Wolf's interests as Mortgagee. Thus, the first two uses of the term "Mortgagee," as italicized above, are obvious typographical errors. The interpretation of the Due-on-Sale-Clause's Second Exception that Wolf proffers in its brief renders the exception an absurdity, is nonsensical, and ignores the purpose of the Due-on-Sale provision, as well as the plain language of other portions of this and other provisions of the Leasehold Mortgage.

The district court closely analyzed the contract documents, and determined that Wolf's disingenuous interpretation made no sense. Accordingly, the district court granted ASCU's motion for summary judgment, finding as a matter of law that a sale of ASCU's capital stock in 2007 did not violate the leasehold mortgage because the sale complied with the "Second Exception."

Wolf insists that correcting the typographical mistake and conforming to the parties' obvious intentions offends the principles of contract interpretation. To the contrary, the district court's analysis and conclusion were not in error; they complied fully with established Utah law regarding contract interpretation. Accordingly, ASCU requests that the Court affirm

the district court's order, which denied Wolf's motion for summary judgment and granted ASCU's cross-motion.

JURISDICTIONAL STATEMENT

Jurisdiction is proper under Utah Code Ann. § 78A-4-103.

COUNTERSTATEMENT OF ISSUES ON APPEAL

Issue 1. Did the trial court err in granting ASCU's cross-motion for summary judgment based on a reading of the parties' leasehold mortgage that considered the leasehold mortgage as a whole and harmonized its various provisions?

Standard of Review. Appellate courts in Utah "review a district court's grant [or denial] of summary judgment for correctness, affording no deference to the district court." *Jennings Inv., LC v. Dixie Riding Club, Inc.*, 2009 UT App 119, ¶ 5, 208 P.3d 1077 (quoting *Bluffdale City v. Smith*, 2007 UT App 25, ¶5, 156 P.3d 175). The question of whether a contract provision is ambiguous, i.e., susceptible to two or more reasonable interpretations, is a question of law. *Home Sav. and Loan v. Aetna Cas. And Sur. Co.*, 817 P.2d 341, 347 (Utah App. 1991) (citations omitted).

Issue 2. Did the trial court err in excluding extrinsic evidence where the court was presented with unambiguous contracts?

Standard of Review. "Questions of contract interpretation which are confined to the language of the contract itself are questions of law, which we review for correctness." *Mellor v. Wasatch Crest Mut. Ins. Co.*, 2009 UT 5, ¶ 7, 201 P.3d 1004. "If a contract is deemed ambiguous, and the trial court

allows extrinsic evidence of intent, interpretation of the contract becomes a factual matter and our review is strictly limited.’ ” *Radman v. Flanders Corp.*, 2007 UT App 351, ¶ 5, 172 P.3d 668 (quoting *Nielsen v. Gold's Gym*, 2003 UT 37, ¶ 6, 78 P.3d 600).

STATEMENT OF THE CASE

Wolf Mountain Resorts, L.C. (“Wolf”) commenced this action against ASC Utah, Inc. (“ASCU”) and a number other defendants¹ in September 2007 seeking, among other things, to foreclose a leasehold mortgage under which ASCU was the mortgagor and Wolf the mortgagee. (R. 1-9). Wolf alleged that the sale of all of ASCU’s stock to Talisker Canyons Finance Co., LLC (“Talisker Canyons”) was an “event of default” that permitted Wolf to foreclose and recoup damages.

Following discovery, Wolf moved for partial summary judgment under Utah R. Civ. P. 56 seeking a declaration that ASCU had defaulted under the parties’ Leasehold Mortgage. (R. 187-191). ASCU cross-moved, on the grounds that the only reasonable interpretation of the contract documents was to provide an exception to the due-on-sale clause for transfers of ASCU’s assets that were expressly subject to Wolf’s rights as mortgagee; and because the transfer of ASCU’s capital stock to Talisker was subject to Wolf’s

¹ Wolf also sued General Electric Capital Company, Enoch Richard Smith, the estate of Enoch Smith, Jr., Culp Construction Company, Richard Brande Drywall, Inc., Designteam Inc., and STF Electrical Services, Inc. Its claims against these defendants were dismissed.

mortgagee rights, it fell within this exception and was not, as a matter of law, an event of default under the leasehold mortgage.

In a ruling and order dated March 26, 2010, the court below granted ASCU's motion and denied Wolf's motion.

STATEMENT OF FACTS

ASCU operates The Canyons ski resort in Summit County, Utah. (R. 3). In 1997, ASCU, as tenant, entered into a Ground Lease² with Wolf, as landlord, for certain property in Summit County, including some of the land upon which The Canyons operates. Pursuant to the Ground Lease, ASCU agreed to pay Wolf, as annual rent payments, 4% of ASCU's gross sales and lodging revenues at The Canyons and 11% of certain construction and development costs, as well as certain one-time payments based on paid skier visits to The Canyons as additional rent. (Ground Lease at § 3.01).

Several tracts of land are covered by the Ground Lease; one such tract ("Section 2") was leased by Wolf from the State of Utah through its School and Institutional Trust Lands Administration pursuant to the "SITLA Lease." (R. 3). In 1998, With Wolf's consent, ASCU renegotiated and became the direct tenant under the SITLA Lease pursuant to an Amended and

² Hereinafter, the "Ground Lease," a true and correct copy of which is attached as Exhibit 1 to Wolf's February 9, 2010 *Combined Reply Memorandum in Support of Wolf Mountain's Motion for Partial Summary Judgment and Memorandum in Opposition to Defendant ASC Utah, Inc.'s Cross-Motion for Partial Summary Judgment* ("Wolf Combined Reply") (R. 216-260).

Restated Lease Agreement No. 419 (the “Amended and Restated Lease”).³

The resort’s master plan provides for residential development on the Section 2 parcel; this development is referred to as the Red Pine Village. (R. 3).

The Ground Lease authorizes ASCU to transfer its interests under the Ground Lease, including by sale of all or substantially all of ASCU’s voting stock or assets, under certain limited conditions. Specifically, § 10.02 of the Ground Lease states:

Assignment. [ASCU] shall not assign all or any portion of the Lease without obtaining the prior written consent of [Wolf] to any such assignment, which consent [Wolf] may not unreasonably withhold or delay. Notwithstanding the foregoing, Tenant shall not be prohibited from assigning all or any portion of its interest hereunder to any entity affiliated with [ASCU]. Except as provided below, [ASCU] and Holdings shall remain fully liable to perform their respective obligations under this Lease and the related Guaranty, notwithstanding any assignment permitted hereunder.

A sale of all or substantially all [ASCU’s] assets, or a transfer of record or beneficial ownership of more than 50% of the voting stock of [ASCU] to a party unaffiliated with [ASCU], whether by merger, consolidation, or other reorganization, shall constitute an “assignment” for purposes of this Section 10.02. In such event, [Wolf] may not unreasonably withhold or delay its consent provided that the proposed successor of [ASCU] shall be a person or business organization with financial condition and operating capability and expense reasonably adequate to

³ A true and correct copy is attached as Exhibit B to *Defendant ASC Utah, Inc.’s Combined Memorandum: In Opposition to Wolf Mountain’s Motion for Partial Summary Judgment and in Support of ASC Utah, Inc.’s Cross-Motion for Summary Judgment* (“ASCU Combined Memo.”) (R. 196-217).

operate the premises in a manner consistent with other comparably sized ski resorts throughout the United States.

(Ground Lease at § 10.02).

In November 1999, ASCU and Wolf executed an amendment to the Ground Lease (the “Second Amendment,” Exhibit 2 to Wolf Combined Reply). Among other things, the Second Amendment provides that if and when ASCU receives all necessary approvals to commence construction of units at Red Pine Village, ASCU shall grant to Wolf fee simple title to the land for 100 lodging units at that location. Under the Second Amendment, ASCU agreed to secure its obligation by providing a mortgage to Wolf. Specifically, Section 12 of the Second Amendment states:

One Hundred Units. [ASCU] shall grant to [Wolf] fee simple title to land, free and clear of all liens and encumbrances, excepting the Village Management Agreement and the Development Agreement, within Red Pine Village (the “Red Pine Parcel”) on which [ASCU] has obtained approval from Summit County for one hundred (100) Hotel/Lodging Units (as defined in the Development Agreement) (the “100 Units”) in Red Pine village, contemporaneously with [ASCU’s] receipt from Summit County of all necessary approvals to commence construction of its first phase of development of Hotel/Lodging Units in Red Pine Village. To secure [Wolf’s] interest, [ASCU] shall execute and deliver to [Wolf] a leasehold mortgage . . . of [ASCU’s] option to purchase that portion of the State of Utah School and Institutional Trust Lands Administration lands required to satisfy [ASCU’s] obligation hereunder. The leasehold mortgage shall not in any way limit or reduce [ASCU’s] obligation to deliver the Red Pine Parcel to [Wolf] as required hereunder. There shall be no time restriction on the delivery of the 100 Units

other than the requirement that delivery be contemporaneous with the approval, if any, of [ASCU's] first phase of Hotel/Lodging Unit development in Red Pine Village. [Wolf] and [ASCU] shall cooperatively determine the planning, design, and configuration of the 100 Units, provided that such planning and design shall be in all respects consistent with the planning, design, and architectural guidelines for Red Pine Village. The 100 Units shall be an average representative of the entire mix of Hotel/Lodging Units in Red Pine Village, with an average size of 1500 square feet, subject to Summit County approval. [ASCU] shall, at its expense, deliver the final recorded plat for the 100 Units, including all planning, engineering, design, and architecture associated therewith. [ASCU] shall at its sole cost and expense stub roads and all utilities to the boundaries of the lots on which the 100 Units are located. [ASCU] shall at its own cost provide [Wolf] with water rights and entitlement to water delivery for the entire project including the 100 Units. . . .

(Second Amendment at ¶¶ 5-6).

On or about November 23, 2005, ASCU and Wolf executed a “Leasehold Mortgage” with **Wolf as mortgagee** and **ASCU as mortgagor**.⁴ The Leasehold Mortgage defines a limited number of events as defaults. Among them, according to the “Due-on-Sale” clause:

Any of the following shall be an event of default (“Event of Default”):

(iv) any sale, transfer, conveyance or assignment of any or all portion of, or any interest in, the Mortgaged Estate, or the sale, transfer, conveyance or assignment of any controlling ownership interest in and to the Mortgagor

⁴ A true and correct copy of the Leasehold Mortgage is attached as Exhibit B to the Brief of Appellant (hereinafter, “Wolf Brief”).

(which shall not include transfer of controlling ownership interest in the Mortgagor's parent or shareholders). . . .

(Leasehold Mortgage at § 4.A(iv)). There are two exceptions, however, to the Due-on-Sale clause. The "First Exception" exempts collateral assignment of the Mortgaged Estate to a bona fide third party lender from being a default, provided that the assignment specifically states that it is subject to certain rights of Wolf as the Mortgagee. Similarly, the "Second Exception" states:

except for . . . (ii) any transfer of all or **substantially all of Mortgagee's** rights in and to the development currently known as The Canyons (including, without limitation, all of **Mortgagee's interest as tenant under the Ground Lease** and the Mortgaged Estate) whether effected by stock or asset sale, provided that such transfer shall be **expressly subject to each and every one of the liens, rights and interests of the Mortgagee** under this Leasehold Mortgage. For purposes of the foregoing sentence, "**substantially all**" shall include all of the **assets held by Mortgagor** which are necessary for unimpeded operation and development of The Canyons resort as it currently exists or may be improved. The terms of this Paragraph A. shall be strictly construed, and if any collateral assignment hereunder does not include the specific language of agreement and acknowledgment in favor of Mortgagee as required by this paragraph, such collateral assignment shall be null and void.

(Leasehold Mortgage at § 4.A(iv)) (emphasis added).

On July 15, 2007, ASCU and ASCU's then parent company, American Skiing Company ("ASC"), entered into an agreement with Talisker Canyons and Talisker Corp. (together, "Talisker") for ASC to transfer all of the outstanding capital stock of ASCU to Talisker. (R. 7, 26). The Talisker

Purchase Agreement clearly and unambiguously binds Talisker Canyons to each and every one of the liens, rights and interests of Wolf under the Leasehold Mortgage: “the transfer of title to Buyer is subject to each and every one of the liens, rights and interests of Wolf under the Leasehold Mortgage and each and every one of the liens, rights and interests of Wolf under the Leasehold Mortgage shall survive Closing.” (R. 196).

Alleging that the sale of ASCU stock was a default under the Leasehold Mortgage, Wolf commenced the underlying action in September 2007, seeking a judicial decree of foreclosure that would permit Wolf to become sole tenant under the SITLA Lease, as well as expenses and costs under the Leasehold Mortgage. (R. 1-11).

The parties conducted fact discovery and in December 2009, Wolf moved for partial summary judgment, urging the district court to hold ASCU in default under the Due-on-Sale Clause. (R. 187-191). In support of its motion, Wolf submitted an affidavit of its counsel, Bradley E. Rauch dated February 5, 2009.⁵ Among other things, the Rauch Affidavit purported to describe the parties’ negotiations, the exchange of Leasehold Mortgage drafts, and the parties’ intentions. Through the Rauch Affidavit, Wolf alleged for the first time that the Second Exception “was intended to provide Wolf

⁵ Hereinafter, the “Rauch Affidavit,” a true and correct copy of which is attached as Exhibit 5 to the Wolf Combined Reply.

Mountain—the “Mortgagee”—with the right to enter into a joint transaction with ASCU to sell both of their interests in the resorts and its underlying lands to a third party without triggering the Due-on-Sale Clause.” Rauch Affidavit at ¶ 23. ASCU opposed Wolf’s motion and cross-moved for partial summary judgment under Utah R. Civ. P. 56. ASCU explained that the extrinsic evidence confirmed ASCU’s reading: that the Second Exception carves out an exception to default under the Due-on-Sale provision and, therefore, the transfer of ASCU’s capital stock to Talisker Canyons—which met the terms of the Second Exception—was not an event of default under the Leasehold Mortgage.

The district court issued a Ruling and Order on March 26, 2010 denying Wolf’s motion and granting ASCU’s cross-motion. The district court observed that

[t]he negotiated terms are not precisely reflected in the final Leasehold Mortgage. Read literally, it would allow the Mortgagee (Wolf) to transfer its rights. It is clear that the intent was for the interests of ASCU to be transferred subject to Wolf’s interests, not the other way around.

.

The literal language [of the Second Exception] is nonsensical as the word Mortgagee in the first two phrases of 4A(ii) is an error and the only reasonable construction is that the [S]econd [E]xception applies to the transfer of ASCU’s rights, not the transfer of Wolf’s interests. **The court is to avoid an unreasonable interpretation. If the sale of ASCU’s stock is an event of default**

creating an exception to the sale of Wolf's stock (there is no Wolf stock) [the Second Exception] makes no sense. . . . It makes even less sense to say Wolf's transfer of rights is subject to Wolf's rights. But making an exception for ASCU does make sense.

The Talisker sale specifically indicates that now Talisker is subject to the liens, rights and interests of Wolf under the mortgage, further evidencing that such an interpretation makes sense.

(R. 299-321) (emphasis in original). The district court carefully set forth the reasons for its decision:

1. The contract as a whole “leaves NO DOUBT, on its face, apart from the ‘mortgagee’ – ‘mortgagor’ conflict, what was intended. This was intended to secure Wolf against defaults by ASCU, and to protect ASCU from a foreclosure unless it made a transfer that did not protect Wolf's rights and interests.” (Ruling and Order at 13).
2. “Wolf transferring its assets, and as a limited liability it owns no stock of course) cannot be a default under such a Leasehold Mortgage. A Due on sale clause, of course, is designed to protect the interests of the mortgagee (Wolf) by giving the mortgagee a remedy if the mortgagor transfers its interests. Thus, the entire purpose of the entire document on its face is clear.” (Ruling and Order at 14).
3. “Further, the remedies section of the Leasehold Mortgage provides relief for Wolf as mortgagee. If read as Wolf argues, the remedies section would allow Wolf to default in some fashion, then foreclose the mortgage as the defaulting party or accelerate the benefits due to Wolf from ASCU under the mortgage. That is an absurdity and grants Wolf the right to absolutely and arbitrarily terminate the contract. *See Peirce v. Peirce*. That is a construction

that is to be avoided under Utah law.” (Ruling and Order at 14).

4. “Wolf has no interest in the Mortgaged Estate as that term is defined in the Leasehold Mortgage. ‘Mortgaged Estate’ means ASCU’s interest in the SITLA lease.” (Ruling and Order at 15).
5. “Wolf’s reading ... ignores parts of the second exception. It defines ‘substantially all’ as being substantially all of the assets of ASCU, not Wolf... Thus, it is clear from the entire exception that the assets are defined as belonging to mortgagor, ASCU.” (Ruling and Order at 16).
6. “Wolf is not the tenant under the Ground Lease but ASCU is the tenant under the Ground Lease. Given that provision alone, the court can discern the intent of the parties that ASCU, as mortgagor, may transfer its assets without being in default but only if Wolf’s rights are preserved.” (Ruling and Order at 16).
7. “The court, as noted, FROM THE DOCUMENT ITSELF, because as a legal matter there is no facial ambiguity, makes the determinations it has made. The court has not relied on the extrinsic evidence but on the language in the document and the nature of the agreement and its purposes.” (Ruling and Order at 20).

Thus, the court below properly interpreted the Leasehold Mortgage in accordance with Utah law and granted ASCU’s cross-motion.

SUMMARY OF THE ARGUMENT

The Court should affirm the district court’s March 26, 2010 Ruling and Order in its entirety. As the district court carefully explained in its 22-page order, the only reasonable interpretation of the Second Exception to the Due-

on-Sale-Clause, as determined from the face of the document as a whole, is that the provision intended that ASCU be in default upon sale but not if Wolf's interests and rights were protected. Thus, with the obvious typographical errors corrected to reflect the parties' actual intentions, Wolf's foreclosure complaint fails to state a claim.

The district court determined that "based on the face of the document," the Leasehold Mortgage is unambiguous. (R. 310). Accordingly, it properly excluded the parties' extrinsic evidence. The district court carefully assessed whether and the extent to which each party's interpretation of the Second Exception accords with Utah law governing contract interpretation.

The district court properly determined, and careful analysis of the Due-on-Sale Clause and Second Exception makes clear, that the parties must have intended the first two instances of "Mortgagee's," (i.e. Wolf's), in the Second Exception to be "Mortgagor's," (i.e. ASCU's). Conversely, Wolf's literal reading of the obvious typographical errors yields the kind of untenable results Utah courts endeavor to avoid. The district court's decision is supported for the following reasons:

- The parties must have intended to use the word "Mortgagor" because the plain language of the contract documents demonstrates that ASCU—and not Wolf—is the Tenant under the Ground Lease and Mortgaged Estate.

- Wolf's reading ignores language in the Due-on-Sale clause and Second Exception and leads to a nonsensical result. First, conditioning Wolf's transfer of its own interests on compliance with Wolf's rights and interest under the Leasehold Mortgage is absurd. Second, Wolf's reading creates an irreconcilable inconsistency within the Second Exception. The Second Exception states that a transfer of "substantially all" of "Mortgagee's" assets shall constitute an event of default, but goes on to state: "substantially all' shall include all of the assets held by Mortgagor [ASCU] which are necessary for unimpeded operation and development of The Canyons resort as it currently exists or may be improved." (*Id.*)
- Wolf's interpretation is inconsistent with the purpose of the Due On Sale Clause and related Exceptions. Wolf's reading subverts the meaning of the due-on-sale clause, which is intended to protect Wolf as mortgagee against unauthorized sales or transfers by ASCU as mortgagor and would allow Wolf to construct a default by transferring its own interests.
- The sale of ASCU's stock did not violate or constitute a default under the Leasehold Mortgage because it complied with the Second Exception, as it was intended to read.

- The district court reached its result on the basis of contract language alone, and correctly excluded extrinsic evidence.

Consequently, ASCU respectfully requests this Court to fully affirm the district's rulings.

ARGUMENT

POINT I. THE DISTRICT COURT CORRECTLY INTERPRETED THE CONTRACT AS A MATTER OF LAW.

A. The Plain Language and Purpose of the Contract as a Whole Demonstrate that the District Court's Interpretation is the Only Reasonable Interpretation as a Matter of Law.

1. Contract Interpretation

The matter of interpreting a contract is a legal question. *See Oakwood Village LLC v. Albertsons, Inc.*, 2004 UT 101, ¶¶ 8-9, 104 P.3d 1226. The court must look at the plain language of the contract to ascertain the parties' intent. *Envirocare of Utah v. Utah State Tax Com'n.*, 2009 UT 1, ¶ 3, 201 P.3d 982. Utah law is clear that "[t]he primary rule in interpreting a contract is to determine what the parties intended by looking at the entire contract and all of its parts in relation to each other, giving an objective and reasonable construction to the contract as a whole." *Sears v. Riemersma*, 655 P.2d 1105, 1107 (Utah 1982). "Where questions arise in the interpretation of an agreement, the first source of inquiry is within the document itself. It should be looked at in its entirety and in accordance with its purpose. All of

its parts should be given effect insofar as that is possible.” *Big Cottonwood Tanner Ditch Co. v. Salt Lake City*, 740 P.2d 1357, 1359 (Utah App. 1987) (citing *Larrabee v. Royal Dairy Products Co.*, 614 P.2d 160, 163 (Utah 1980)).

So long as the language within the four corners is unambiguous, courts “look no further than the plain meaning of the contractual language.” *Mid-American Pipeline Co. v. Four-Four Inc.*, 2009 UT 43, ¶ 19, 216 P.3d 352; see also *Daines v. Vincent*, 2008 UT 51, ¶ 37, 190 P.3d 1259 (“[W]e do not need to resort to the admission of parol evidence on the question of intent, because absent a finding of facial ambiguity, ‘the parties’ intentions must be determined solely from the language of the contract.”)

In addition, contracts must be construed in a manner that harmonizes their various provisions and avoids an absurd result. See *Olympus Hills Shopping Ctr., Ltd. v. Smith’s Food & Drug Ctrs., Inc.*, 889 P.2d 445, 458 (Utah App. 1994) (stating courts should avoid unreasonable interpretations when a contract provision would reduce the contract to absurdity.) (citing *Barnhart v. McKinney*, 682 P.2d 112, 120 (Kan. 1984)). Thus, “a construction which contradicts the general purpose of the contract or results in a hardship or absurdity is presumed to be unintended by the parties.” *LDS Hosp., Div. of Intermountain Health Care v. Capitol Life Ins. Co.*, 765 P.2d 857, 859 (Utah 1988) (citing *Campbell v. Ticor Title Ins. Co.*, 209 P.3d 859, 862 (Wash. Sup. Ct. 2009); see also *Burt v. Stringfellow*, 143 P. 234 (1914) (“In arriving at

a conclusion [as to the meaning of a contract] all the words and expressions used by the parties in the contract must be given full force and effect, unless to do so leads to an absurdity or is contrary to the manifest purpose and intention of the parties.”)

The standard is similar vis-à-vis contractual ambiguity. When determining whether the plain language of a contract is ambiguous, courts “attempt to harmonize all of the contract’s provisions and all of its terms.” *Central Fla. Invs., Inc. v. Parkwest Assocs.*, 2002 UT 3, ¶12, 40 P.3d 599. Although the district court concluded, and the parties do not dispute, that the Leasehold Mortgage is unambiguous, ASCU and Wolf nonetheless offer competing constructions of the Due-On-Sale Clause and Second Exception. However, a provision is not necessarily ambiguous “simply because one party seeks to endow [it] with a different meaning than that relied upon by the drafter.” *Buehner Block Co. v. UWC Assoc.*, 752 P.2d 892, 895 (Utah 1988).

A court will find ambiguity in contract language “only if it is reasonably susceptible to more than one interpretation.” *Mid-America Pipeline Co.*, 2009 UT 43, ¶ 19, 216 P.3d 352. The different interpretations must be “competing” and “contrary;” if the parties argue for interpretations that are essentially the same, there is no ambiguity. *Daines*, 2008 UT 51 at ¶¶ 29, 31. Moreover, a party cannot successfully claim an ambiguity if its proposed interpretation is the product of forced or strained construction. *Id.* at ¶ 30 n.5.

2. *The District Court Interpreted the Leasehold Mortgage in the Only Way that Harmonizes its Provisions and Effectuates their Purpose.*

The district court recognized that strictly as written, the Leasehold Mortgage led to an absurdity. If the sale of Wolf's interests was intended to be an event of default under the Due-on-Sale clause, the Leasehold Mortgage cannot be construed as a coherent whole. On the other hand, if the first two "Mortgagee"s in the Second Exception were corrected to "Mortgagor's," the whole of the Leasehold Mortgage can be reasonably and objectively constructed. Accordingly, it was *not* error to grant summary judgment in ASCU's favor.

The purpose of a due-on-sale clause is to protect a mortgagee's interests by conditioning the mortgagor's ability to sell or otherwise transfer the real estate subject to the mortgage. Thus, *Black's Law Dictionary*, 8th ed., defines "due-on-sale clause" as "a mortgage provision giving the lender the option to accelerate the debt if the borrower transfers or conveys any part of the mortgaged real estate without the lender's consent." *Black's* makes no mention of a due-on-sale clause protecting the interests of the borrower-mortgagor—because that would make no sense.

ASCU and Wolf intended the Leasehold Mortgage to secure ASCU's obligation, under the Second Amendment to the Ground Lease, to grant Wolf fee simple title to lodging units in ASCU's Red Pine Village. The Due-on Sale

clause in the Leasehold Mortgage was designed to protect Wolf as mortgagee.

Thus, it states that

any sale, transfer, conveyance or assignment of all or any portion of, or any interest in, the Mortgaged Estate [the land subject to the SITLA Lease], or the sale, transfer, conveyance or assignment of any controlling interest in and to the Mortgagor [ASCU]

shall be an event of default. (Leasehold Mortgage at § 4.A(iv)(ii)). The plain language demonstrates that the Due-on-Sale clause is intended to protect Wolf, the mortgagee, where (1) ASCU sells or otherwise transfers its interest in the land subject to the SITLA lease or (2) a controlling interest in ASCU is sold or otherwise transferred to a third party.

The First and Second Exceptions modify the Due-on Sale clause by carving out certain kinds of sales or transfers, so long as the transfers protect the rights of Wolf as mortgagee. After insertion of party names to the Second Exception as written, it states:

(ii) any transfer of all or substantially all of Mortgagee's [Wolf's] rights in and to the development currently known as The Canyons (including, without limitation, all of Mortgagee's [Wolf's] interest as tenant under the Ground Lease and the Mortgaged Estate) whether effected by stock or asset sale, provided that such transfer shall be expressly subject to each and every one of the liens, rights and interests of Mortgagee [Wolf] under the Leasehold Mortgage. For purposes of the foregoing sentence, "substantially all" shall include all of the assets held by Mortgagor [ASCU] which are necessary for unimpeded operation and development of The Canyons resort as it currently exists or may be improved.

(Leasehold Mortgage at § 4.A(iv)(ii)). Read literally, the Second Exception would mean that a transfer of all or substantially all of Wolf's rights in The Canyons (including under the Ground Lease and SITLA Lease) would not give rise to a default under the Leasehold Mortgage as long as the transfer was subject to each of Wolf's "liens, rights, and interests" under the Leasehold Mortgage. This makes no sense. The first two iterations of the word "Mortgagee's" therefore, necessarily must reflect a typographical or scrivener's error; that the word "Mortgagor" was intended by the parties can be gleaned when the Leasehold Mortgage is read as a whole.

- a. *Under the Agreements' Plain Language, Wolf Is Not the Tenant Under the Ground Lease Nor the Mortgaged Estate.*

The Second Exception under the Leasehold Mortgage concerns a transfer of the **tenant's** interest under the Ground Lease. The Leasehold Mortgage expressly defines ASCU as Tenant on more than one occasion:

This Mortgage is given solely for the purpose of securing Mortgagor's obligation set forth in Article 12 of the Second Amendment to Ground Lease Agreement ("Second Amendment"), dated November 12, 1999, by and between **Mortgagor, as tenant**, and Mortgagee, as landlord

Leasehold Mortgage at ¶2 (emphasis added).

...that certain Ground Lease Agreement dated as of July 3, 1997, between Mortgagee, as landlord, and **Mortgagor, as tenant**, as amended ("Ground Lease")

Leasehold Mortgage at ¶4(A)(iii)(a) (emphasis added).

Further, the Ground Lease could not be clearer. It plainly states that it is

made and entered into by and between Wolf Mountain Resorts, L.C., a limited liability company organized under the law of the State of Utah with a principal place of business in Summit County, Utah (“Landlord”), and ASC Utah, Inc., a corporation organized and existing under the laws of the State of Maine with its principal place of business at Bethel, Maine (“Tenant”)

(Ground Lease at 1).

As the district court correctly held:

Wolf is not the tenant under the Ground Lease but ASCU is the tenant under the Ground Lease. Given that provision alone, the court can discern the intent of the parties that ASCU, as mortgagor, may transfer its assets without being in default but only if Wolf’s rights are preserved.

(Ruling and Order at 16).

Although Wolf takes issue with the district court’s interpretation, the plain, unambiguous language of both the Leasehold Mortgage and the Ground Lease demonstrate that ASCU is the tenant. The district court was thus correct in reviewing and analyzing the plain language of the Leasehold Mortgage as it did, without resort to extrinsic evidence. *Mid-American Pipeline Co. v. Four-Four Inc.*, 2009 UT 43, ¶ 19, 216 P.3d 352; *see also Daines v. Vincent*, , 2008 UT 51, ¶ 37, 190 P.3d 1259.

Moreover, the district court’s analysis was correct in determining that the plain language of the Leasehold Mortgage demonstrated that Wolf has no “interest in the Mortgaged Estate,” and thus could not trigger the Due-on-

Sale clause by transferring it. The Leasehold Mortgage defines “Mortgaged Estate” as “all of Mortgagor’s [ASCU’s] right, title and interest in and to” the SITLA Lease. (Leasehold Mortgage at § 1). Additionally, the Amended and Restated SITLA Lease also clearly defines ASCU as “Lessee,” or tenant, and not Wolf. *SITLA Lease No. 419* at 1, attached as Exhibit B to Brief of Appellant. Thus, pursuant to the plain, unambiguous language, the Second Exception’s reference to “Mortgagee’s interest as tenant under the Ground Lease and the Mortgaged Estate” necessarily must refer to ASCU’s interests.

The district court should, therefore, be affirmed.

b. Wolf’s Tortured Interpretation Ignores Material Parts of the Second Exception and Creates a Nonsensical Result.

The terms “Mortgagor” and “Mortgagee” later in the Second Exception confirm that the first two iterations of “Mortgagee’s” were erroneous and unintended. When interpreting contract language, Utah courts must “look[] at the entire contract and all of its parts in relation to each other, giving an objective and reasonable construction to the contract as a whole.” *Sears v. Riemersma*, 65 P.2d at 1108. Wolf’s tortured reading of the Second Exception robs the Second Exception of an “objective and reasonable construction,” to say nothing of the Leasehold Mortgage as a whole.

Read with the scrivener’s error, the Second Exception would allow Wolf to transfer its interest in The Canyons so long as the transfer is subject to the

“liens, rights and interests” of Wolf under the Leasehold Mortgage.

Conditioning Wolf’s transfer of its own interests on compliance with Wolf’s rights and interest under the Leasehold Mortgage is absurd. However, creating an exception to default for the transfer of ASCU’s interest in The Canyons provided that the transfer is subject to the rights and interests of Wolf under the Leasehold Mortgage makes sense and is reasonable, as the district court acknowledged. (R. 134, “subjecting a transfer of Wolf’s rights in and to the development currently known as The Canyons to Wolf’s liens, rights and interests under the Leasehold Mortgage, is not logical and is somewhat nonsensical.”)

Moreover, Wolf’s reading creates an irreconcilable inconsistency within the Second Exception. The Second Exception states that a transfer of “substantially all” of “Mortgagee’s” assets shall constitute an event of default, but goes on to state: “‘substantially all’ shall include all of the assets held by Mortgagor [ASCU] which are necessary for unimpeded operation and development of The Canyons resort as it currently exists or may be improved.” (*Id.*) (emphasis added). If the second sentence is properly drafted, which neither party disputes, it confirms that the reference in the first sentence to “Mortgagee’s” was necessarily a scrivener’s error.

Contracts must be construed in a manner that harmonizes their various provisions and avoids an absurd result. *See Olympus Hills*, 889 P.2d

at 458 (stating courts should avoid unreasonable interpretations when a contract provision would reduce the contract to absurdity) (citing *Barnhart v. McKinney*, 682 P.2d 112, 120 (Kan. 1984)); see also *Burt*, 143 P. at 236 (“In arriving at a conclusion [as to the meaning of a contract] all the words and expressions used by the parties in the contract must be given full force and effect, unless to do so leads to an absurdity or is contrary to the manifest purpose and intention of the parties.”) Wolf’s interpretation is unreasonable because it would create an absurdity, by requiring Wolf to place a condition on itself to not transfer its interests without protecting them and by creating an irreconcilable inconsistency within the Second Exception with respect to the phrase “substantially all of ASCU’s assets.”

c. Wolf’s Interpretation is Inconsistent With the Purpose of the Due On Sale Clause and Exceptions.

There are multiple other problems with Wolf’s literal interpretation of the Due-on-Sale clause in conjunction with the Second Exception.

Under Wolf’s indefensible reading of the Due-on-Sale clause, default would be triggered by the sale of either any interest in the Mortgaged Estate or a controlling interest in ASCU, *unless* such involves a transfer of *all* of Wolf Mountain’s rights in The Canyons. (Wolf Brief at 33). But Wolf’s contorted analysis in its Brief ignores the first part of the clause (“any sale, transfer, conveyance or assignment of all or any portion of, or any interest in,

the Mortgaged Estate”), insisting that only the second part of the clause is implicated here. (See Wolf Brief at 33, “the only trigger at issue in this case is the sale of ASCU”). Wolf maintains that it has an interest in the Mortgaged Estate. (Wolf Brief at 30, “it cannot seriously be argued that Wolf Mountain ‘has no interest in the Mortgaged Estate.’”) Therefore, the reading proffered by Wolf of the Due-on-Sale clause and the Second Exception permit Wolf to trigger a default by transferring less than “all or substantially all” of its rights “in and to” The Canyons. Wolf’s reading would thus allow Wolf to trigger a default of the Leasehold Mortgage and then, as the defaulting party, foreclose and/or accelerate the benefits due from ASCU. Wolf dismisses such a scenario as “speculative” and “hypothetical,” (Wolf Brief at 33), but it is plainly the consequence of Wolf’s interpretation of the Second Exception.

More importantly, Wolf’s reading would subvert the purpose of due-on-sale clauses and render a portion of the Second Exception extraneous. If read literally, the Second Exception would carve out an exception to default for a transfer of Wolf’s interest in The Canyons—which makes no sense. Under that interpretation, Wolf would be agreeing to not hold itself in default. But under the correct, intended meaning of the Second Exception, a sale or transfer of Wolf’s interest would not run afoul of the Due-on-Sale clause. This is because, as set forth above, the purpose of a due-on-sale clause is to protect a mortgagee—here, Wolf—by limiting the ability of a mortgagor—ASCU—to

sell or transfer the mortgaged property. Accordingly, under a proper reading of the Due-on-Sale clause, two situations could give rise to a default: (1) “any sale, transfer or assignment of all or any portion of, or any interest in, the Mortgaged Estate,” i.e., ASCU’s interest in the SITLA Lease, and (2) “the sale, transfer, conveyance or assignment of any controlling ownership interest in and to the Mortgagor [ASCU]. . . .” (Leasehold Mortgage at § 4(A)(iv)). Nothing in the Leasehold Mortgage, as properly constructed, provides that a transfer of Wolf’s interest triggers the Due-on-Sale clause or otherwise constitutes a default. Thus, Wolf’s tortured readings of the Due-on-Sale clause and Second Exception cannot be rationalized.

The remedy sections of the Leasehold Mortgage also sustain the district court’s and ASCU’s reading of the Due-on-Sale clause. Section 4.B of the Leasehold Mortgage states that in the event of a default, Wolf may foreclose the mortgage and shall have the immediate right to receive and collect rent, income and profits from the Mortgaged Estate. There are no remedy provisions in ASCU’s favor.

Further, the phrase “whether effected by stock or asset sale” in the first sentence of the Second Exception is also telling. As the district court observed, “Wolf as a limited liability Wolf has no stock, but ASCU as a corporation does have stock.” (R.313). Thus, as applied to a sale or transfer of Wolf’s interests, the stock language has no meaning, but as applied to a sale

or transfer of the interests of ASCU, the added language makes complete sense, particularly given ASCU's right under Section 10.02 of the Ground Lease to assign its interests in the Ground Lease by stock or asset sale.

The district court correctly rejected Wolf's interpretation because it is unreasonable and reduces the provision to an absurdity. *See, e.g., Olympus Hills*, 889 P.2d at 458.

d. ASCU's Stock Sale Was not a Default Because it Complied with the Second Exception as the Parties Intended it to Read.

Because the district court determined that the parties intended that a sale of ASCU's assets or stock is not an event of default so long as Wolf's rights under the mortgage are protected, it properly entered summary judgment in ASCU's favor.

First, the Talisker Sale Agreement provides for the transfer of 100% of ASCU's outstanding capital stock from ASC to Talisker. (Talisker Sale Agreement at §§ 2.1, 3.2). Necessarily, the transaction "transfer[s] . . . all . . . of [ASCU's] rights in and to the development currently known as The Canyons." (Leasehold Mortgage at § 4.A). Second, the Talisker Sale Agreement clearly and unambiguously binds Talisker to each and every one of the liens, rights, and interests of Wolf under the Leasehold Mortgage. It states:

9.16. Leasehold Mortgage. The Buyers acknowledge that pursuant to that certain Leasehold Mortgage by and between [ASCU], as mortgagor, and Wolf, as mortgagee, dated as of November 23, 2005 (the “Leasehold Mortgage”), the transfer of title to Buyer is subject to each and every one of the liens, rights and interests of Wolf under the Leasehold Mortgage and each and every one of the liens, rights and interests of Wolf under the Leasehold Mortgage shall survive Closing.

(Talisker Sale Agreement at § 9.16).

Because the Talisker Sale Agreement expressly meets the requirements of the Second Exception, ASC’s transfer of all of ASCU’s outstanding capital stock to Talisker Canyons does not constitute a default under the Leasehold Mortgage. Accordingly, Wolf’s foreclosure complaint fails as an undisputed matter of fact and law, and summary judgment was properly granted in ASCU’s favor.

B. Reformation Analysis is Inapposite

Wolf insists that the court below erred because it reformed the Leasehold Mortgage despite the fact that ASCU never alleged or satisfied the legal prerequisites for reformation based on mutual mistake. (Wolf Brief at 18-35). The district court did not “reform” the Leasehold Mortgage in contravention to Utah law, it simply applied the rules of contract interpretation. It did, however, avoid the absurd, untenable results that Wolf’s literal reading would have produced.

Utah courts are charged with interpreting contracting parties' intent as expressed by the language of their agreement. *See e.g., Glenn v. Reese*, 2009 UT 80; *Cafe Rio, Inc. v. Larkin-Gifford-Overton, LLC*, 2009 UT 27, ¶ 25, 207 P.3d 1235 (2009). Thus, as the district court properly stated, “[t]he court is to avoid an unreasonable interpretation.” (R. 303). *See also Olympus Hills*, 889 P.2d at 458 (stating courts should avoid unreasonable interpretations when a provisions would reduce the contract to absurdity); *LDS Hosp., Div. of Intermountain Health*, 765 P.2d at 859 (“a construction which contradicts the general purpose of the contract or results in a hardship or absurdity is presumed to be unintended by the parties.”)

In particular, it is well-established that where a typographical or clerical error makes a particular term or phrase inconsistent with the whole contract, courts are authorized to correct the error and arrive at a reasonable construction. *Restatement (Second) of Contracts*, § 202 cmt. d.⁶ “A written contract should be construed according to the obvious intention of the parties, notwithstanding clerical errors or inadvertent omissions therein which can be corrected by perusing the whole instrument.” *AmJur2d Contracts* § 373; *see also Starr v. Union Pacific Railroad Corp.*, 75P.3d 266, 269 (Kan. App. 2003)

⁶ Utah courts routinely look to *Restatement (Second)* § 202 when determining how to harmonize disparate provisions of a contract. *See, e.g., Johnson v. Morton Thiokol, Inc.*, 818 P.2d 997, 1003 n. 27 (Utah 1991); *Property Assistance Corp. v. Roberts*, 768 P.2d 976, 979 (Utah Ct. App. 1989).

(citing *Brown v. Lang*, 675 P.2d 842 (Kan. 1984) (typographical error in contract does not necessarily render the contract ambiguous)); and *Doe v. Texas Ass'n of School Boards, Inc.*, 283 S.W.3d 451 (Tex. App. Fort Worth 2009) (noting that typographical mistakes must “yield to the well-established doctrine that written contracts will be construed according to the intention of the parties, notwithstanding errors and omissions, by perusing the entire document” (quoting *City of Galveston v. Galveston Mun. Police Ass'n*, 57 S.W.3d 532, 539 (Tex.App.-Houston [14th Dist.] 2001))).

Not surprisingly, other courts have had the occasion to employ these same tenets of contract interpretation in the context of a mix-up of “-ee” for “-or” terms, similar to the issue presented with the instant leasehold mortgage. For instance, in *Roth v. Phillips Petroleum Company*, 739 S.W.2d 598 (Mo. App. 1987) the court interpreted a lease, determining that the contract was not ambiguous even though it contained the word “lessor” where logically the word “lessee” should have appeared in the options to renew provision. *Id.* at 600. Similar to the instant action, the lessor in *Roth* argued that the use of “-or” term in place of the “-ee” term created an ambiguity requiring the consideration of extrinsic evidence. The appellate court affirmed the trial court’s holding “that the word ‘lessor’ was a typographical error and should be interpreted as ‘lessee’” and held that the trial court would only resort to extrinsic evidence if it had found an ambiguity. *Id.*

The Mississippi Supreme Court has similarly upheld a trial court's interpretation of a lease in which the term "grantee" was used in a provision which should have read "grantor." See *Robinson v. Martel Enterprises, Inc.*, 337 So.2d 698 (Miss. 1976). The Court applied the general rule that: "[t]he intention of the parties must be collected from the whole agreement, and every word therein must be given effect, if possible, and be made to operate according to the intention of the parties." *Id.* at 701 (citation omitted). In construing the provision to read "grantor" instead of "grantee," the Court found that: "No apparent purpose would be served if [grantee] gave notice to himself of his intent to exercise the option. With the word 'grantee' in the clause, it has no meaning or purpose, but when the word 'grantor' is substituted, the clause becomes clear and its meaning readily ascertainable." *Id.*

As in *Roth* and *Robinson*, the district court simply applied well-settled rules of contract interpretation to reach the only reasonable interpretation of the Due-on-Sale Clause, ascertaining the intention of the parties from the entire agreement on its face. Thus, Wolf's lengthy exposition on the law of contract reformation is misplaced. The district court did not purport to reform the Leasehold Mortgage and explicitly stated as much:

The court does not believe it is indeed involved in a reformation as that concept is normally meant. The court finds and concludes, FROM THE ENTIRETY OF THE

CONTRACT ON ITS FACE, that such was intended and the error of placing “ee” rather than “or” was the product of confusion or a scrivener’s error.

(R. 317) (emphasis in original). By finding that the parties erroneously transposed “-ee” and “-or” in the first two instances of the Second Exception, the district court recognized and corrected what the Utah Supreme Court in *Guardian State Bank v. F.C. Stangl III*, 778 P.2d 1 (Utah 1989), called “a mistake in recordation or memorialization of an agreement.” It would have been error to grant Wolf’s Rule 56 motion by slavishly applying the obvious typographical errors in the Second Exception. The district court’s avoidance of an “unreasonable interpretation” did not, therefore, run afoul of reformation doctrine; rather, it comported with Utah law on contract interpretation.⁷

⁷ Wolf spends considerable time arguing that ASCU waived an affirmative defense of mistake by not asserting it in its answer, but this issue was never raised below and it is inappropriate for Wolf to rely upon such a theory on appeal. *See State v. Winfield*, 2006 UT 4, ¶ 22, 128 P.3d 1171 (“[U]nder ordinary circumstances, we will not consider an issue brought for the first time on appeal” (internal quotation marks omitted)). The trial court never made any such finding of waiver, has not had the opportunity to address the potential applicability of Rule 15 of the Utah Rules of Civil Procedure, any facts giving rise to such a defense were not known until after ASCU responded to Wolf’s complaint. Moreover, as the Utah Supreme Court has recognized, “the policy of our rules of procedure is to decide cases on the merits rather than pleading technicalities.” *Guardian State Bank v. Stangl*, 778 P.2d at 8. A court may “reform a document if a mutual mistake is established, even if the issue of mutual mistake was not raised and reformation was not demanded in the pleadings.” *Id.* (citing *Mabey v. Kay Peterson Constr. Co.*, 682 P.2d 287, 290 (Utah 1984)).

C. *The District Court Did Not Employ a “Lack of Clarity” Standard*

Wolf claims that the district court erred by inventing and applying a “lack of clarity” standard. (Wolf Brief at 16-18). Wolf is mistaken, and “[t]he characterization of error [] does not affect the right to a remedy.” *Guardian State Bank v. F.C. Stangl III*, 778 P.2d 1, 7 (Utah 1989).

Wolf’s mischaracterization, based on one passing reference, does not change the fact that the district court carefully applied the proper contract interpretation rules to the parties’ cross-motions under Rule 56. (R. 307-08, 319). The district court agreed with the parties that the Leasehold Mortgage was unambiguous and could be interpreted as a matter of law. (R. 310, “the court now finds and concludes, based on the face of the document, that it was not ambiguous.”; 314, “[t]he court thus determines that the document is not ambiguous on its face. . . .”). The district court recited Utah law regarding contract interpretation and decided accordingly. (R. 308, “[t]he court interprets this contract in accord with Utah law”; 309-314). Wolf’s accusations to the contrary are not supported by the record.

**POINT II. THE DISTRICT COURT PROPERLY EXCLUDED
EXTRINSIC EVIDENCE**

The district court did not, as Wolf contends, err in excluding extrinsic evidence. No party has alleged the agreements at issue here are ambiguous, and the district court held they are not ambiguous based upon a facial

review. Therefore, it would have been error for the district court to rely upon extrinsic evidence.

The district court accurately described and applied Utah law regarding the role of extrinsic evidence in construing contracts. “The court must first make a legal determination whether there is a facial ambiguity before turning to extrinsic evidence.” (R. 309) (citing *Daines*, 2008 UT 51; *Ward v. Intermountain Farmers Ass’n*, 907 P2d. 264 (1995)). So long as the language within the four corners is unambiguous, courts “look no further than the plain meaning of the contractual language.” *Mid-American Pipeline Co. v. Four-Four Inc.*, 2009 UT 43, ¶ 19, 216 P.3d 352; *see also Daines*, 2008 UT 51, ¶ 37, (“[W]e do not need to resort to the admission of parol evidence on the question of intent, because absent a finding of facial ambiguity, ‘the parties’ intentions must be determined solely from the language of the contract.”))

Although trial courts have some discretion in determining whether an ambiguity exists,

[T]he proffered alternate interpretation must be plausible and reasonable in light of the language used [T]o merit consideration as an interpretation that creates an ambiguity, the alternative rendition must be based upon the usual and natural meaning of the language used and may not be the result of a forced or strained construction. . . . At minimum one universal standard applies to this determination: words and phrases do not qualify as ambiguous simply because one party seeks to endow them with a different interpretation according to his or her own interests. . . .

Saleh v. Farmers Ins. Exch., 2006 UT 20, ¶ 17 (internal citations omitted).

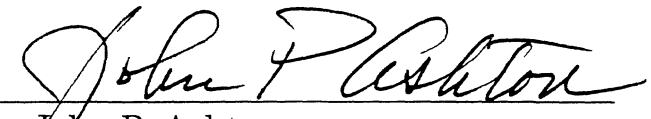
The parties and district court are in agreement that the Leasehold Mortgage is unambiguous. Nevertheless, Wolf urges that the district court should have considered extrinsic evidence to determine the parties' intentions. Such an approach is directly in contravention to Utah law.

Moreover, Wolf's claim that the trial court relied upon extrinsic evidence proffered by ASCU, but not the evidence proffered by Wolf is unsupported and untrue. The contract documents at issue are not extrinsic evidence. The contract documents were the sole source of the district court's interpretation. The district court painstakingly went out of his way to point this out several times in his Ruling and Order. *See e.g. Ruling and Order* at 16, 17, 19, 20, and 21. In sum, because the both parties and the district court agree that the leasehold mortgage is unambiguous on its face, the district court properly refused to rely upon extrinsic evidence.

CONCLUSION

For the foregoing reasons, ASCU respectfully requests that the Court issue an Order (i) affirming the district court's March 26, 2010 order denying Wolf Mountain Resorts, L.C.'s motion for summary judgment and granting ASC Utah, Inc.'s motion for summary judgment, and (ii) granting such other and further relief as it deems just and proper.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 2010, I caused a true and correct copy of the within and foregoing **BRIEF OF APPELLEE** to be mailed, postage prepaid, to:

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