UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA—LOS ANGELES DIVISION

In re: Summit, LLC, Debtor.	Case No.: 2:22-bk-13853-ER Chapter: 11 **MEMORANDUM OF DECISION DENYING SECOND MOTION FOR RECONSIDERATION** **[RELATES TO DOC. NO. 111]** [No hearing required pursuant to Federal Rule of Civil Procedure 78(b) and Local Bankruptcy Rule 9013-1(j)(3)]

Before the Court is the *Emergency Motion for Reconsideration of Order on Hankey Capital, LLC's Motion for Relief from the Automatic Stay* [Bankr. Doc. No. 111] (the "Second Motion for Reconsideration") filed by Summit, LLC (the "Debtor"). Pursuant to Civil Rule 78(b) and LBR 9013-1(j)(3),[1] the Court finds the Second Motion for Reconsideration to be suitable for disposition without oral argument. For the reasons set forth below, the Second Motion for Reconsideration is **DENIED**.

I. Procedural and Factual Background

On July 15, 2022 (the "Petition Date"), the Debtor filed a voluntary Chapter 11 petition. The Debtor's primary asset is a 47-unit apartment complex located at 324 S. Catalina St., Los Angeles, CA 90020 (the "Property"). The Property is encumbered by a First Deed of Trust in favor of Hankey Capital, LLC ("Hankey"). Hankey's First Deed of Trust (the "Hankey DOT")

[1] Unless otherwise indicated, all "Civil Rule" references are to the Federal Rules of Civil Procedure, Rules 1–86; all "Bankruptcy Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001–9037; all "Evidence Rule" references are to the Federal Rules of Evidence, Rules 101–1103; all "LBR" references are to the Local Bankruptcy Rules of the United States Bankruptcy Court for the Central District of California, Rules 1001-1–9075-1; and all statutory references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532.

secures a note in the principal amount of $8.75 million (the "Note"), which matured on September 30, 2022. The Note bears interest at the Prime Rate (published by the *Wall Street Journal*) plus 3.25 percentage points.

On October 21, 2022, upon the motion of Hankey, the Court entered an order finding that as of the Petition Date, the Debtor operated a "single asset real estate business" as defined in § 101(51B). *See* Bankr. Doc. No. 56. The Debtor did not oppose Hankey's request for a determination that it was appropriately classified as a "single asset real estate business."

On November 30, 2022, the Court entered an order fixing December 15, 2022 as the deadline for the Debtor to pay to Hankey all post-petition non-default interested owned on the Note as of December 15, 2022. *See* Bankr. Doc. No. 82 (the "SARE Order"). The SARE Order further stated that if the Debtor failed to pay all post-petition non-default interested by the December 15, 2022 deadline, then the Court would enter an order terminating the automatic stay with respect to the Property pursuant to § 362(d)(3) without further notice or hearing.

On December 15, 2022, the Debtor filed an emergency motion for reconsideration of the SARE Order. *See* Bankr. Doc. No. 95 (the "First Motion for Reconsideration"). In the First Motion for Reconsideration, the Debtor presented various arguments as to why the automatic stay should not be lifted with respect to the Property. At the time the Debtor filed the First Motion for Reconsideration, the Court had not yet entered an order lifting the stay with respect to the Property. Therefore, the Court denied the First Motion for Reconsideration without prejudice on ripeness grounds. *See* Bankr. Doc. No. 103. However, the Court also explained that the First Motion for Reconsideration suffered from serious deficiencies that would likely necessitate denial of the Motion even absent the ripeness issue:

> The Debtor argues that reconsideration is warranted under Civil Rule 60(b)(6) based upon changed circumstances. As the Ninth Circuit has explained, Civil Rule 60(b)(6) "should be used sparingly as an equitable remedy to prevent manifest injustice and is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment. Accordingly, a party who moves for such relief must demonstrate both injury and circumstances beyond his control that prevented him from proceeding with ... the action in a proper fashion." *Zurich Am. Ins. Co. v. Int'l Fibercom, Inc. (In re Int'l Fibercom, Inc.)*, 503 F.3d 933, 941 (9th Cir. 2007) (internal citations and quotations omitted).
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> In the Court's view, the changed circumstances cited by the Debtor are likely not sufficiently extraordinary to warrant granting relief under Civil Rule 60(b)(6). The first changed circumstance is an offer to purchase the Property made by Roman Group, LLC (the "Buyer"). But that offer is subject to significant contingencies, including a lengthy 70-day due-diligence period for the Buyer. The structure of the offer raises serious questions as to the seriousness of the Buyer and the likelihood of the sale actually closing.
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> The second changed circumstance is the series of partial payments made by the Debtor to Hankey on December 14 and 21, 2022. However, there is no dispute that as of the date of the issuance of this Order, the Debtor has not paid Hankey the full amount of post-petition non-default interest owed on the Note, as required by the SARE Order. As set forth in the ruling explaining the basis for entry of the SARE Order [Bankr. Doc. No. 81] (the "SARE Ruling"), prior to the entry of the SARE Order, the Debtor made interest payments to Hankey totaling $192,865. In the Motion for Reconsideration, the Debtor

> argues that for purposes of determining whether it has made the monthly payments required under § 362(d)(3)(B)(ii), it should receive a credit for these pre-SARE Order interest payments. But the Debtor cites no legal authority for this proposition.
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> In sum, any renewed Motion for Reconsideration will most likely be denied unless the Debtor makes a significantly more compelling showing of changed circumstances than that presented to the Court to date.

Order Denying First Motion for Reconsideration [Bankr. Doc. No. 103] at 2–3.

Concurrently with the issuance of the Order Denying First Motion for Reconsideration, the Court entered an order lifting the automatic stay with respect to the Property. *See* Bankr. Doc. No. 104 (the "RFS Order"). The Court stayed the effectiveness of the RFS Order through and including January 26, 2023 to "provide the Debtor an opportunity to re-file the Motion for Reconsideration and schedule a hearing on the Motion on *regular* notice …." RFS Order at ¶ 19 (emphasis added).

On January 25, 2023, the Debtor filed the instant Second Motion for Reconsideration, which states that the Buyer's offer to purchase the Property has fallen through and that the Debtor has been unable to locate a new purchaser. The Debtor filed a Chapter 11 Plan [Bankr. Doc. No. 108] (the "Plan") on January 20, 2023; it argues that the filing of the Plan constitutes a change of circumstances warranting reconsideration of the RFS Order. The Debtor seeks a hearing on the Second Motion for Reconsideration on an emergency basis because a foreclosure sale of the Property is scheduled for January 27, 2023.

II. Findings of Fact and Conclusions of Law

Reconsideration is "an 'extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.'" *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (internal citation omitted). A motion for reconsideration may not be used "to rehash the same arguments made the first time or simply express an opinion that the court was wrong." *In re Greco*, 113 B.R. 658, 664 (D. Haw. 1990), *aff'd and remanded sub nom. Greco v. Troy Corp.*, 952 F.2d 406 (9th Cir. 1991); *see also In re Mannie*, 299 B.R. 603, 608 (Bankr. N.D. Cal. 2003) (internal citation omitted) ("A motion to reconsider should not be used 'to ask the court "to rethink what the court had already thought through—rightly or wrongly"—or to reiterate arguments previously raised.'").[2]

As the Court explained in the Order Denying First Motion for Reconsideration, reconsideration based upon a change in circumstances is an extraordinary remedy that is appropriate only if the party demonstrates "both injury and circumstances beyond his control that

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[2] A motion for reconsideration filed within fourteen days after entry of the order is governed by Civil Rule 59; a motion for reconsideration filed more than fourteen days after entry of the order is governed by Civil Rule 60(b). *In re Negrete*, 183 B.R. at 197. The Second Motion for Reconsideration was filed more than fourteen days after entry of the order and is therefore governed by Rule 60(b). The Court notes that certain of the cases cited above—*Carroll*, *In re Greco*, and *In re Mannie*—deal with motions for reconsideration brought under Civil Rule 59, not Civil Rule 60(b). Nonetheless, the holdings of these cases apply with equal force to a motion for reconsideration governed by Civil Rule 60(b). *See In re Negrete*, 183 B.R. at 197 (applying in the context of a Civil Rule 60(b) motion the legal standards articulated in cases decided under Civil Rule 59).

prevented him from proceeding with ... the action in a proper fashion." *Zurich Am. Ins. Co. v. Int'l Fibercom, Inc. (In re Int'l Fibercom, Inc.)*, 503 F.3d 933, 941 (9th Cir. 2007) (internal citations and quotations omitted).

The change in circumstances cited by the Debtor—the filing of the Plan—does not warrant reconsideration of the RFS Order. As discussed above, the Debtor is subject to § 362(d)(3)'s provisions governing stay relief in a single asset real estate case. Section 362(d)(3) provides:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—
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> > with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later—
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> > (A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or
> > (B) the debtor has commenced monthly payments that—
> > (i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and
> > (ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate ….

Where, as here, property constitutes "single asset real estate," relief "'under § 362(d)(3) is mandatory where its provisions are not strictly complied with.'" *Centofante v. CBJ Dev., Inc. (In re CBJ Dev., Inc.)*, 202 B.R. 467, 470 (B.A.P. 9th Cir. 1996) (citing *NationsBank, N.A. v. LDN Corp. (In re LDN Corp.)*, 191 B.R. 320, 327 (Bankr. E.D. Va. 1996)). In enacting § 362(d)(3), Congress was "concerned about the delay in the bankruptcy process and the resulting unfairness to secured lenders when single asset real estate projects were involved." *NationsBank, N.A. v. LDN Corp. (In re LDN Corp.)*, 191 B.R. 320, 326 (Bankr. E.D. Va. 1996). The purpose of § 362(d)(3) is "to avoid the usual delays experienced in Chapter 11 in single asset real estate cases, which historically have been filed to avoid a foreclosure and in the hope that the debtor can come up with some form of a miracle in order to formulate an acceptable plan." *Id.* Congress amended § 362 "to provide a means to expedite the potential for relief" to secured creditors "unless certain conditions are met." *Id.*

The Debtor cannot defeat stay relief under § 362(d)(3)(B) because it has failed to pay Hankey the full amount of monthly interest owed under that section. The Debtor argues that for purposes of determining whether it has made the monthly payments required under § 362(d)(3)(B)(ii), it should receive credit for $192,865 in interest payments made to Hankey prior to entry of the order finding that the Debtor was subject to the "single asset real estate" provisions of the Bankruptcy Code. The Debtor makes this argument because the average

monthly cash flow generated by the Property falls far short of the Debtor's monthly § 362(d)(3)(B)(ii) payment obligation, such that it would be impossible for the Debtor to comply with § 362(d)(3)(B)(ii), unless the Court were to counterfactually deem interest payments made prior to the single-asset real estate determination to have been made subsequent to that determination. The bottom line is that going forward, the Property does not generate sufficient cash to satisfy the Debtor's § 362(d)(3)(B)(ii) payment obligation. The Debtor is not entitled to reconsideration of the RFS Order on the ground that it has satisfied § 362(d)(3)(B)(ii).[3]

The Debtor cannot defeat stay relief under § 362(d)(3)(A) because there is not a reasonable possibility that the Plan will be confirmed within a reasonable time. The Debtor estimates that the effective date of the Plan will be July 1, 2023. That date is approximately one year subsequent to the Petition Date. This is a simple case where the majority of the debt is held by only one secured creditor. It is not reasonable for the Debtor to take nearly one year to confirm a Plan.

Even if the Court were to disregard the fact that the Debtor has failed to demonstrate that the Plan can be confirmed within a reasonable time, the Plan itself suffers from serious defects, making it unlikely that confirmation would even be possible. The Plan treats Hankey's $9.8 million claim[4] as fully secured. It proposes to make interest-only payments for five years at the rate of 9.5% on $6.8 million of the claim. The $3.05 million balance of the claim will be paid through an $11.1 million balloon payment coming due after five years; however, this portion of the claim will bear interest at only 7.5%. Bifurcating payment on the fully secured claim in this manner is necessary because the cash flow generated by the Property is not sufficient to make monthly 9.5% interest payments on the full $9.8 million amount of the claim.

The Plan's acknowledgment that the Property fails to generate sufficient cash flow to make even interest-only payments on the full amount of Hankey's claim strongly suggests that the Plan is not feasible. Further, it is doubtful that the Plan could be confirmed over Hankey's opposition. The Debtor would face an uphill battle in demonstrating that the treatment of Hankey's claim satisfies the present-value requirement of § 1129(b)(2)(A)(i)(II).

In sum, the Debtor has failed to demonstrate a reasonable possibility of confirming the Plan within a reasonable time, and more seriously, has failed to demonstrate a reasonable possibility that the Plan could be confirmed at all. For these reasons, the Debtor is not entitled to reconsideration of the RFS Order on the ground that it has satisfied § 362(d)(3)(A).

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[3] The nondefault contract rate of interest under the Note is the Prime Rate (as published by the *Wall Street Journal*) plus 3.25 percentage points. As of January 24, 2023, that rate was 10.75% (7.50% plus 3.25%). The payoff demand on the Note, as of December 15, 2022, was $9,835,871.34 (a more recent payoff amount is not reflected in the record). *See* Bankr. Doc. No. 111, Ex. 1. The Debtor's § 362(d)(3)(B)(ii) payment obligation for January 2023 is approximately $88,113.01. The monthly cash flow generated by the Property varies significantly. During the approximately six months that the case has been pending, the Debtor has paid Hankey $312,108 in interest from the Property's cash flow. Kashani Decl. [Bankr. Doc. No. 111] at ¶ 9. On average, then, the Property generates $52,018 in net cash per month—significantly less than the approximately $88,000 per month required to continue to meet the § 362(d)(3)(B)(ii) payment obligation. (The Court acknowledges that these figures are not exact; the point is to illustrate that the Debtor lacks sufficient cash going forward to make the payments required by § 362(d)(3)(B)(ii).)

[4] The Court uses round figures to simplify the discussion.

III. Conclusion

Based upon the foregoing, the Second Motion for Reconsideration is **DENIED**. The Court will enter an order consistent with this Memorandum of Decision.

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Date: January 26, 2023

Ernest M. Robles
United States Bankruptcy Judge