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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

5	In re:	)	BAP No.	NC-15-1331-TaJuKi
6	CHARLES HENRY UTZMAN and	)	Bk. No.	3:14-bk-31828
7	ANNA KATHRYN UTZMAN,	)		
	Debtors.	)		
8		)		
9	CHARLES HENRY UTZMAN; ANNA	)		
10	KATHRYN UTZMAN,	)		
	Appellants,	)		
11	v.	)	<b>MEMORANDUM*</b>	
12	SUNTRUST MORTGAGE, INC.,	)		
13	Appellee.	)		
14		)		

Argued and Submitted on July 28, 2016  
at San Francisco, California

Filed - August 9, 2016

Appeal from the United States Bankruptcy Court  
for the Northern District of California

Honorable Hannah L. Blumenstiel, Bankruptcy Judge, Presiding

Appearances: David N. Chandler, Jr. argued for Appellants;  
Dennis Peter Maio of Reed Smith LLP argued for  
Appellee.

Before: TAYLOR, JURY, and KIRSCHER, Bankruptcy Judges.

\* This disposition is not appropriate for publication.  
Although it may be cited for whatever persuasive value it may  
have (see Fed. R. App. P. 32.1), it has no precedential value.  
See 9th Cir. BAP Rule 8024-1(c)(2).

1 **INTRODUCTION**

2 Chapter 11<sup>1</sup> debtors Charles Henry Utzman and Anna Kathryn  
3 Utzman appeal from an order denying their motion for  
4 reconsideration of an order granting stay relief under  
5 § 362(d)(1).

6 We AFFIRM the bankruptcy court.

7 **FACTS**

8 In 2007, the Debtors borrowed \$1,365,000 from SunTrust  
9 Mortgage, Inc. for the construction of a residence on real  
10 property located in Mill Valley, California (the "Property").  
11 The obligation owed to SunTrust was secured by a deed of trust  
12 against the Property.

13 Despite the Suntrust loan, the Debtors failed to pay all  
14 obligations owed for construction services, so various state  
15 statutory liens were recorded against the Property. They also  
16 failed to pay all real property taxes in relation to the  
17 Property and to pay for all required real property related  
18 insurance. Eventually, they also defaulted on their payments  
19 under the Suntrust note.

20 On the eve of Suntrust's foreclosure, they filed a  
21 chapter 11 petition. Their schedule A listed the Property with  
22 a then current value of \$1,300,000 and stated that it was  
23 encumbered by secured claims in the amount of \$1,978,493.29.  
24 Their schedule D listed SunTrust's secured claim in the amount

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25  
26 <sup>1</sup> Unless otherwise indicated, all chapter and section  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.  
28 All "Rule" references are to the Federal Rules of Bankruptcy  
Procedure. All "Civil Rule" references are to the Federal Rules  
of Civil Procedure.

1 of \$1,897,262.29. The record shows that construction of the  
2 residence remained incomplete, but the Debtors, nonetheless,  
3 occupied the home.

4 Five months after the bankruptcy filing, SunTrust filed its  
5 second motion for relief from stay seeking relief pursuant to  
6 § 362(d)(1) and (d)(2). SunTrust argued that cause existed for  
7 § 362(d)(1) relief based primarily on a lack of adequate  
8 protection of its interest in the Property. Their adequate  
9 protection argument did not focus exclusively on the lack of  
10 payments on the undersecured Suntrust note. They also argued  
11 that the failure to pay taxes, the existence of liens, the lack  
12 of a certificate of occupancy, the lack of a sewer easement over  
13 other debtor-owned real property, and the existence of a  
14 landslide jeopardizing the pool created risks that the Debtors  
15 were not addressing.

16 The Debtors opposed. They argued that, despite a lack of  
17 equity, SunTrust was adequately protected by the value of the  
18 Property. They asserted generally that real estate values in  
19 the Bay Area were rising and that progress in the construction  
20 of their residence resulted in enhancement of the Property's  
21 value.

22 At the hearing, the bankruptcy court noted that the Debtors  
23 conceded that there was no equity in the Property,  
24 notwithstanding SunTrust's recent appraisal valuing the Property  
25 at \$1.95 million dollars, and that SunTrust held an allowed  
26 claim in excess of \$1.8 million dollars. It also noted the  
27 Debtors' concession that they had failed both to make any  
28

1 postpetition payments to SunTrust and to pay property taxes.<sup>2</sup>

2 The bankruptcy court stated:

3 I'm having a hard time finding that this creditor is  
4 adequately protected when your clients are not  
5 servicing this debt post-petition, and you believe the  
6 property is not worth enough to cover the amount of  
7 their claim. Why isn't that cause to grant this  
8 motion?

9 Hr'g Tr. (June 4, 2015) at 4:14-19.

10 While this comment clearly focused on the lack of either equity  
11 or debt service, the bankruptcy court also referenced the other  
12 problems creating risk for Suntrust including construction  
13 issues and liens. After the parties presented their arguments,  
14 the matter was taken under submission.

15 The bankruptcy court subsequently entered an order granting  
16 stay relief on June 9, 2015. It found that cause existed to  
17 grant the request for relief under § 362(d)(1)<sup>3</sup> based on the  
18 Debtors' concession that they were not making postpetition  
19 payments to SunTrust and that there was no equity in the  
20 Property. The bankruptcy court determined that the Debtors had  
21 failed to offer any evidence on the anticipated completion date  
22 of the construction project and that they had failed to address  
23 the substantial administrative and zoning hurdles necessary to  
24 complete the project. And it found that,

25 More importantly, Debtors offer no evidence as to the  
26 amount by which the [P]roperty's value will be  
27 enhanced by completion of the construction project, if

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28 <sup>2</sup> The Debtors subsequently paid real property taxes  
accruing postpetition.

<sup>3</sup> The bankruptcy court denied SunTrust's request for  
relief under § 362(d)(2).

1 and when that occurs. The fact that there is  
2 generally a rising real estate market in the Bay Area  
3 does not mean this property, with its unfinished,  
4 long-delayed construction project, has risen in value  
5 as the Debtors suggest. Ultimately, Debtors offer no  
6 evidence that the completion of the construction  
7 project will actually enhance the [P]roperty's value  
8 in any meaningful way.

9 Dkt. No. 73 at 2.

10 The bankruptcy court's statements on the record at the hearing  
11 and in its order, thus, make clear that in determining that  
12 cause existed, it appropriately emphasized the lack of value in  
13 the Property necessary to protect SunTrust against reasonably  
14 feared potential harms.

15 The bankruptcy court's stay relief, however, was  
16 conditional. Its order provided that the Debtors could stay  
17 termination of the stay by making monthly payments to SunTrust  
18 in the amount of \$9,100 beginning with payment that same month.  
19 If the Debtors failed to timely make the monthly payments,  
20 SunTrust was entitled to advise the bankruptcy court, which  
21 would then enter an order dissolving the stay without further  
22 notice or hearing.

23 The Debtors did not appeal from the stay relief order, and  
24 it became final and nonappealable on June 23, 2015.

25 Instead, on August 12, 2015, the Debtors moved for  
26 reconsideration of the stay relief order. The record as a  
27 whole, including documents and argument on appeal, makes clear  
28 that they moved for relief under Civil Rule 60(b)(2) - newly  
discovered evidence. They argued that the value of the Property  
had increased during the pendency of the case and, thus, that  
there was no diminution of value and no failure of adequate

1 protection. In doing so, they repeated a factual assertion  
2 generally made in connection with the stay relief motion, but  
3 they now provided more specific evidence.

4 The Debtors also, however, more directly attacked the  
5 bankruptcy court's legal basis for the stay relief order and  
6 argued that the condition in the stay relief order was directly  
7 at odds with United Savings Association of Texas v. Timbers of  
8 Inwood Forest Associates, Ltd., 484 U.S. 365 (1988), because  
9 SunTrust was not entitled to interest payments as an  
10 undersecured creditor.

11 Finally, in the alternative, they alleged error in the  
12 calculation of the stay relief order payment and requested as  
13 alternative relief that the bankruptcy court recalculate the  
14 payment it required as a condition to continuing the stay. The  
15 Debtors argued that the bankruptcy court used the wrong interest  
16 rate in calculating the stay relief order payment. Thus, they  
17 asserted that the correct monthly payment amount was \$4,834.38,  
18 rather than the \$9,100 imposed by the stay relief order.

19 To support their reconsideration motion, the Debtors  
20 attached the declaration of Steven Roulac, a CPA and consultant  
21 retained to give an opinion on postpetition changes in Property  
22 value. Roulac opined that the Property's value was higher in  
23 July 2015 than it was in December 2014; Roulac, however, did not  
24 assign a precise value to the Property. Further, he expressly  
25 stated that he did not undertake an independent investigation of  
26 the intangible factors that might have an impact on value;  
27 instead, he relied on the Debtor-husband who told him that:  
28 "[H]e had no information that the [P]roperty had become either

1 more or less valuable as a consequence of any change in  
2 intangible factors.” Dkt. No. 100 at 19.

3 At the hearing, the bankruptcy court ruled that the Debtors  
4 had not met their burden of showing that new evidence existed  
5 such that relief from the stay relief order was warranted under  
6 Civil Rule 60(b)(2). It, thus, denied their motion for  
7 reconsideration as to the appropriateness of stay relief itself  
8 but agreed to the Debtors’ alternate request and reduced the  
9 conditional monthly payment amount to \$4,834.38.

10 Following the bankruptcy court’s entry of an order granting  
11 in part and denying in part the Debtors’ motion for  
12 reconsideration, the Debtors’ filed a notice of appeal, stating  
13 that they were appealing from both the stay relief order and the  
14 reconsideration order.

#### 15 JURISDICTION

16 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
17 §§ 1334 and 157(b)(2)(A) and (G). We have jurisdiction under  
18 28 U.S.C. § 158.

#### 19 ISSUE

20 Whether the bankruptcy court abused its discretion in  
21 denying in part the Debtors’ motion for reconsideration.

#### 22 STANDARD OF REVIEW

23 We review the bankruptcy court’s denial of a motion for  
24 reconsideration for an abuse of discretion. Weiner v. Perry,  
25 Settles & Lawson, Inc. (In re Weiner), 161 F.3d 1216, 1217 (9th  
26 Cir. 1998). A bankruptcy court abuses its discretion if it  
27 applies the wrong legal standard, misapplies the correct legal  
28 standard, or if its factual findings are illogical, implausible,

1 or without support in inferences that may be drawn from the  
2 facts in the record. See TrafficSchool.com, Inc. v. Edriver  
3 Inc., 653 F.3d 820, 832 (9th Cir. 2011) (citing United States v.  
4 Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)).

5 We may affirm the decision of the bankruptcy court on any  
6 basis supported by the record. See Hooks v. Kitsap Tenant  
7 Support Servs., Inc., 816 F.3d 550, 554 (9th Cir. 2016).

## 8 **DISCUSSION<sup>4</sup>**

### 9 **A. Scope of Appeal**

10 After the filing of the notice of appeal, Judge Taylor  
11 issued an order stating that it appeared, based on the timing,  
12 that the scope of appeal was limited to the reconsideration  
13 order. The order invited the parties to discuss the issue in  
14 SunTrust's responsive brief and the Debtors' reply brief.

15 SunTrust argues that Rule 8002(b)(1)(D) limits review only  
16 to the reconsideration order. It contends that the notice of  
17 appeal was effective both as to the stay relief order and the  
18 reconsideration order only if the Debtors filed their motion for  
19 reconsideration within 14 days of entry of the stay relief  
20 order. SunTrust points out that they did not do so. Nor did  
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23 <sup>4</sup> The BAP Clerk of Court previously issued an order  
24 regarding potential mootness based on the continuing conditional  
25 requirement in the stay relief order that the Debtors make  
26 monthly payments to SunTrust. Judge Faris then issued an order  
27 deeming the mootness inquiry satisfied. As of the date of this  
28 decision, SunTrust has not advised the Panel of any payment  
default under the stay relief order and, thus, we presume that  
the Debtors have continued to make the requisite monthly  
payments.

1 they file a motion for extension pursuant to Rule 8002(d).<sup>5</sup>

2 The Debtors do not disagree with SunTrust; they assert that  
3 the finality of the stay relief order "is of little practical  
4 significance to the resolution of this appeal." Instead, the  
5 Debtors contend that because the issues on appeal are legal in  
6 nature, the Panel's review of the reconsideration order is de  
7 novo, the same "as would be involved if the [stay relief] order  
8 were reviewed."

9 We agree that only the reconsideration order is properly  
10 before us on appeal. Rule 8002 requires that an appellant file  
11 a notice of appeal within 14 days of entry of the order being  
12 appealed. A motion to reconsider under Civil Rule 60(b) may  
13 toll the time to appeal, but only if it is filed within the  
14 14-day period.

15 Here, 65 days passed between the time that the bankruptcy  
16 court entered the stay relief order and the Debtors filed the  
17 motion for reconsideration. The motion, thus, did not toll the  
18 time for appeal as to the stay relief order. As even the  
19 Debtors concede, the only issue on appeal is whether the  
20 bankruptcy court abused its discretion in denying, in part,  
21 their motion for reconsideration.

22 **B. The bankruptcy court did not abuse its discretion in**  
23 **denying, in part, the Debtors' motion for reconsideration.**

24 Civil Rule 60(b), made applicable through Rule 9024,  
25 provides that the bankruptcy court may relieve a party from an

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27 <sup>5</sup> The bankruptcy court could not grant such an extension  
28 as the rule expressly excludes extensions with respect to orders  
granting stay relief. See Fed. R. Bankr. P. 8002(d)(2)(A).

1 order for the following reasons:

- 2 (1) mistake, inadvertence, surprise, or excusable  
neglect;
- 3 (2) newly discovered evidence that, with reasonable  
4 diligence, could not have been discovered in time  
to move for a new trial under [Civil] Rule 59(b);
- 5 (3) fraud (whether previously called intrinsic or  
extrinsic), misrepresentation, or misconduct by  
an opposing party;
- 6 (4) the judgment is void;
- 7 (5) the judgment has been satisfied, released or  
discharged; it is based on an earlier judgment  
8 that has been reversed or vacated; or applying it  
prospectively is no longer equitable; or
- 9 (6) any other reason that justifies relief.

10 On appeal, the Debtors first argue that the bankruptcy  
11 court deprived them of the opportunity to present evidence in  
12 opposition to SunTrust's motion for stay relief. They then  
13 argue that the bankruptcy court abused its discretion in  
14 granting stay relief. As the stay relief order is final and  
15 nonappealable, we do not consider these arguments.

16 We note, however, that contrary to the Debtors' argument,  
17 neither the stay relief motion nor the stay relief order were  
18 inconsistent with Local Rule 4001-1. That rule provides for a  
19 preliminary hearing in relation to motions for relief from stay.  
20 As the Debtors point out, it also provides that a debtor is not  
21 required to, but may, file a declaration for a preliminary  
22 hearing for stay relief. LBR 4001-1(f) (Bankr. N.D. Cal.).

23 Nothing in this rule, however, mandates that the bankruptcy  
24 court hold an evidentiary hearing. Indeed, such an  
25 interpretation would contravene the rule that a stay relief  
26 hearing is intended to be a summary proceeding. See Veal v. Am.  
27 Home Mortg. Servicing, Inc. (In re Veal), 450 B.R. 897, 914-15  
28 (9th Cir. BAP 2011). The bankruptcy court determined that an

1 evidentiary hearing was not necessary. Nothing in the record  
2 suggests an error in this regard, but if one existed it was  
3 waived when the Debtors failed to appeal from the stay relief  
4 order.

5 Save for one or two references in the facts section and in  
6 the conclusion section of their brief, the Debtors do not  
7 reference their motion for reconsideration or Civil Rule 60(b)  
8 directly, let alone discuss why the bankruptcy court abused its  
9 discretion in denying, in part, that motion. The Debtors, thus,  
10 waived review of the bankruptcy court's Civil Rule 60(b)  
11 determination. As that is the only issue on appeal, we may  
12 affirm on that basis alone.

13 Further, if we undertake a review, we discern no basis for  
14 reversal.

15 At the outset, we note that the bankruptcy court, in  
16 effect, granted the relief requested by the Debtors in their  
17 motion for reconsideration. The motion requested that the  
18 bankruptcy court vacate the stay relief order and **either**  
19 (1) deny SunTrust's stay relief motion or schedule an  
20 evidentiary hearing; or (2) "enter a new order predicating  
21 continuance of the [] [s]tay on periodic payments of \$4,834.38,  
22 although doing so would be inconsistent with the Supreme Court's  
23 decision in Timbers." The bankruptcy court, in fact, employed  
24 the second option and decreased the monthly payment amount to  
25 \$4,834.38. The condition of payment has the effect of keeping  
26 the stay in place so long as the condition continues to be met.

27 As to the merits, it is improper for a party seeking relief  
28 from an order under Civil Rule 60(b) to raise legal arguments or

1 allege new facts that could have been raised at the prior  
2 hearing or to rehash arguments already presented to the  
3 bankruptcy court. See Fadel v. DCB United LLC (In re Fadel),  
4 492 B.R. 1, 18 (9th Cir. BAP 2013). Here, the bankruptcy court  
5 determined that the motion to reconsider improperly rehashed the  
6 same arguments made by the Debtors in opposing the stay relief  
7 motion. The record confirms that this was true as to the  
8 adequate protection issue.

9 The Debtors argued in their opposition to the stay relief  
10 motion that SunTrust was adequately protected by the value of  
11 the Property in spite of the lack of equity as a result of the  
12 rising real estate market in the Bay Area and anticipated  
13 completion of the construction on the Property. They reiterated  
14 this argument at the hearing for stay relief. The Debtors then  
15 repeated this argument in their motion for reconsideration and  
16 supported it with evidence that the market was generally rising  
17 and that it was reasonable to assume that the value of the  
18 Property was also rising. On this record, the bankruptcy court  
19 correctly determined that the Debtors simply sought to rehash  
20 the same arguments made in connection with the stay relief  
21 motion.

22 We further note that the allegedly new evidence was far  
23 from definitive. The expert noted that intangible factors  
24 related to the Property could impact its value and then  
25 acknowledged that he had not independently investigated whether  
26 such intangible factors existed. Instead, he relied on the  
27 Debtor-husband's representations. In substance, as a result,  
28 this evidence essentially duplicated the generalized assertion

1 of a rising market made at trial and found wanting by the  
2 bankruptcy court at that time.

3 The Debtors also argue, briefly, that the reconsideration  
4 order, like the stay relief order, is directly at odds with the  
5 Bankruptcy Code and United Savings Association of Texas v.  
6 Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365 (1988).  
7 They then attack the bankruptcy court's finding of cause to  
8 grant stay relief under § 362(d)(1). As stated, the stay relief  
9 order is not properly before us on appeal, and the Debtors have  
10 not placed their argument within the framework of Civil  
11 Rule 60(b). Thus, we do not address this issue except to note  
12 that in granting stay relief "for cause," the bankruptcy court  
13 stated multiple concerns and in no way limited itself to an  
14 analysis based on the increase of debt through interest accrual  
15 on an undersecured claim - the issue addressed in Timbers.

16 **CONCLUSION**

17 Based on the foregoing, we AFFIRM.  
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