IT IS ORDERED as set forth below:

Date: September 16, 2014

W. Homer Drake
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	**CASE NUMBER**
DAN L. DUNSON AND NANCY M. DUNSON, DANNY DUNSON AND ANDREA DUNSON, DAVID M. DUNSON, AND EMD, LLC.,	:	13-10604-WHD 13-10605-WHD 13-10606-WHD 13-10607-WHD (Jointly Administered)
Debtors.	:	
EMD, LLC.,	:	CONTESTED MATTER
Movant.	:	
v.	:	
STABILIS FUND II, LLC,	:	IN PROCEEDINGS UNDER CHAPTER 11 OF THE BANKRUPTCY CODE
Respondents.	:	

ORDER REGARDING SUPPLEMENTATION OF THE RECORD

The above-styled bankruptcy case comes before the Court on the matter of confirmation of the Chapter 11 Plan of Reorganization of EMD, LLC (hereinafter the

"Plan"). The Plan is opposed by Stabilis Fund II, LLC (hereinafter "Stabilis"). This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 157(b)(1) as a core proceeding defined under 28 U.S.C. §§ 157(b)(2)(A) & (L); 1334.

Background

As a Chapter 11 debtor-in-possession, EMD, LLC (hereinafter the "Debtor") operates two multi-family apartment complexes in Griffin, Georgia. Stabilis is the primary creditor, holding security interests on the Debtor's primary assets.

The Court held a hearing on confirmation on July 30, 2014. At that time, the parties reduced the issues before the Court to (1) a determination of the appropriate rate of interest to be paid on Stabilis' secured claim, and (2) the feasibility of the Plan.[1] Upon conclusion of evidence, the Court took the matter under advisement and permitted the parties an opportunity to file post-trial briefs by August 11, 2014 and reply briefs by August 18, 2014.

In its August 18 reply brief, the Debtor asserts that it recently negotiated "across the board increases in rents for all EMD tenants, such that, effective October 1, 2014, EMD will enjoy at least an additional $3,000/month or $36,000/year in rents." Unsurprisingly, in the reply brief the Debtor also offers, at the Court's direction, to supplement the record with evidence of the increased rents, subject to Stabilis' opportunity to respond.

On August 20, 2014, Stabilis filed a Motion to Strike (hereinafter "Stabilis' Motion"), requesting that the Court strike, as both improperly before the Court and prejudicial to

[1] Feasibility may depend on what the Court decides is the appropriate rate of interest.

Stabilis, those portions of the Debtor's reply brief which reference the increased rents and asking that the Court not consider said remarks in its deliberations. Stabilis notes that the procedure for reopening testimony can be found in Rule 9023 of the Federal Rules of Bankruptcy Procedure, but advanced its motion both because the Debtor had not made a proper request, and, in any event, Stabilis believes there are insufficient grounds to grant such relief.

Subsequently, on September 3, 2014, the Debtor responded by filing a Motion to Supplement the Record Pursuant to F.R.B.P. 9023, with an accompanying affidavit (hereinafter "Debtor's Motion"). Likewise, the Debtor filed a response to Stabilis' Motion, in which the Debtor seeks to have Stabilis' Motion declared moot in light of its formal request to supplement the record. Stabilis filed a response to the Debtor's Motion on September 5, 2014.

Conclusions of Law

The issue before the Court is whether to reopen evidence to permit the Debtor an opportunity to present subsequently developed evidence as to an increase in rents recently negotiated by EMD, LLC. The Court disposes of the issue as follows.

Rule 52 of the Federal Rules of Civil Procedure (made applicable by its incorporation into Rule 7052 of the Federal Rules of Bankruptcy Procedure) limits a court's findings of fact and conclusions of law to a discussion of evidence admitted at trial. See FED. R. BANKR. P. 7052; See also United States v. Forness, 125 F.2d 928, 942 (2d Cir. 1942), *cert*

denied, 316 U.S. 694 (1942). Both parties believe that any reopening of evidence in these circumstances is governed by the precepts of Rule 59 of the Federal Rules of Civil Procedure (incorporated into Federal Bankruptcy Rule 9023), which provides that "[a]fter a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment." FED. R. CIV. P. 59(a)(2); see also FED. R. BANKR. P. 9023. Although the authority to reopen evidence prior to the entry of judgment is more than likely derivative of the authority conferred in Rule 59,[2] a contextual reading of the rule ostensibly presumes that a court previously entered a judgment,[3] whereas, here, the Debtor seeks to reopen evidence prior to the Court's rendering judgment. See id.; see also 12 MOORE'S FEDERAL PRACTICE § 59.13(3)(c) (Matthew Bender 3d ed. 2002) ("A Rule 59 motion is distinct from a motion to reopen to take additional testimony. A Rule 59 motion is made only after the entry of a judgment, whereas a motion to reopen is most

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[2] See Hatfield-Smith v. Hershock (In re Hatfield-Smith), Case No. 98-30182-KJC, Adv. No. 00-863-KJC, slip op., 9 (Bankr. E.D. Pa. Apr. 14, 2003) ("There exists no express authority under the Federal Rules of Civil Procedure to reopen a record, but reopening the record of a case 'appears to be a cannibalization of those qualities found in Rules 59 and 60 . . . .'" (quoting Carracci v. Brother Int'l Sewing Mach. Corp. of La., 222 F. Supp 769, 771 (E.D.La. 1963), aff'd, 341 F.2d 377 (5th Cir. 1965)).

[3] Rule 59(a)(2) states that the court may reopen testimony on "motion for a new trial;" grounds for granting a new bench trial are governed by Rule 59(a)(1)(B); the other actions authorized in Rule 59(a)(2) are (1) opening the judgment, (2) amending findings of fact and conclusions of law or making new findings and conclusions, and (3) directing the entry of a new judgment, all of which imply a previous court adjudication. See FED. R. CIV. P. 59(a)(2); FED. R. CIV. P. 59(a)(1)(B).

commonly made . . . while the judge has the case under advisement. . . ."); Danielson Air Serv., Inc. v. Montierth, 119 Idaho 967 (1991) (interpreting Idaho's Rule 59, which is more comprehensive than the Federal Rule, and determining that "[r]eopening a case to admit additional evidence is not analogous to granting a new trial").

Unhelpful, though, is the fact that no other part of the Federal Rules specifically addresses reopening evidence prior to the Court's announcing a decision. Nevertheless, while it may not be clear which Federal Rule of Civil Procedure authorizes a court to reopen an evidentiary record prior to judgment, it is clear that this Court has the ability to do so and that the decision to reopen an evidentiary record prior to judgment is "committed to the sound discretion of the [] court." Romeo v. Sherry, 308 F. Supp. 2d 128, 138-39 (E.D.N.Y. 2004) (citing Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 331–32, *reh'g denied*, 401 U.S. 1015 (1971); Matthew Bender & Co., Inc. v. West Publ'g Co., 158 F.3d 674, 679 (2d Cir. 1998); Dow Chem. Pac., Ltd. v. Rascator Mar. S.A., 782 F.2d 329 (2d Cir. 1986); Caracci v. Brother Int'l Sewing Mach. Corp., 222 F.Supp. 769, 771 (E.D. La.1963), *aff'd*., 341 F.2d 377 (5th Cir.1965)).[4]

A motion to reopen evidence may serve one of many purposes. It may update a trial court with "significant post-trial developments." Hatfield-Smith v. Hershock (In re Hatfield-Smith), Case No. 98-30182-KJC, Adv. No. 00-863-KJC, slip op. at 10 (Bankr. E.D. Pa. Apr.

[4] It also follows that if the Court can reopen evidence to take additional testimony in the post-judgment context, see FED. R. BANKR. P. 9023, then it must be able to reopen evidence to take additional testimony prior to rendering a judgment.

14, 2003) (citing Orfa Corp. of Am. v. Copello, 115 B.R. 799, 807 (Bankr. E.D. Pa. 1990)). A court may find the evidence necessary to come to an accurate disposition of the case. Id. (citing Labrum & Doak v. Brown, 226 B.R. 161, 166-167 (Bankr. E.D. Pa. 1998)). Or, a court may find that new evidence could likely change the outcome of a case. Id. (citing Slone v. Integra Bank/Pittsurgh, 161 B.R. 764, 768 (Bankr. W.D. Pa. 1993)).

Although the Court could not find any direction from the Eleventh Circuit for when it is appropriate to reopen a hearing prejudgment for additional evidence, the Second Circuit did articulate that the reopening of a hearing for additional or supplemental evidence was justified so long as (1) the additional evidence was material; (2) the opposing party had an opportunity for cross-examination; and (3) the opposing party suffered no prejudice. Matthew Bender & Co., Inc. v. West Publ'g Co., 158 F.3d 674, 679 (2d Cir.1998). Additionally, in such circumstances, courts are advised to keep in mind whether the failure originally to introduce the evidence reflected a lack of diligence or other "chicanery" on the part of the moving party. See Garcia v. Woman's Hosp., 97 F.3d 810, 814 (5th Cir. 1996).

In this case, there is no doubt that the evidence to be offered is material. A feasibility analysis requires the Court to conduct a forward-looking review into the Debtor's reasonable ability to fulfill the terms of the Plan, and the Debtor's ability to do so depends largely upon the Debtor's post-confirmation monthly cash flow. Unlike a deliberation into the truth of past events, where future events have no bearing on the act certain, the Court, here, is being asked to prognosticate the outcome of the Debtor's business operations going forward. To

accomplish this task effectively, the actual projected revenues of the business operations, based on the most up-to-date information,[5] are both relevant and material to the Court's deliberation.

One of the objections to the Debtor's Motion derives from the fact that the Motion and accompanying affidavit, as they are now, are nothing more than hearsay, inadmissible under the Federal Rules of Evidence. See generally FED. R. EVID. 802-803. As stated in Stabilis' response to Debtor's Motion, one of the principle reasons that hearsay is disfavored is the opponent's inability to develop the truth through cross-examination. See Stabilis' Resp. to Debtor's Mot. to Supplement 3, ECF No. 706. The Court agrees, in so much that it would not accept the evidence as presented, over objections, without providing Stabilis the opportunity to cross-examine the relevant witnesses and offer rebuttal. Accordingly, the Court believes that in order to permit the Debtor to supplement the record, in this instance, a supplemental hearing must be held. Such an approach conforms with the minimum requirements laid down by the Second Circuit, discussed above.

Stabilis also argues that granting this motion will prejudice it. The Court disagrees. The relevant inquiry is not solely whether Stabilis will be prejudiced, but whether granting the motion "unduly" prejudices the nonmoving party. Garcia v. Woman's Hosp., 97 F.3d

[5] The Court acknowledges the Debtor's revenue cannot indefinitely be a moving target. However, it is not being asked to wait an indefinite period of time. The Court is observing a one time event that occurred on the heels of trial. Because the elapsed time between the conclusion of evidence and the subsequent event was so short, and because of the potential effect the event may have on the outcome of the matter, the Court believes that its materiality outweighs other concerns the Court may have.

810, 814 (5th Cir. 1996). Stabilis contends that had the information found in Debtor's accompanying affidavit been revealed during the evidentiary hearing, it may have approached the hearing differently. For example, Stabilis indicates that, based on Debtor's exhibit to the affidavit revealing certain vacancies, it may have inquired with the experts into the specific risks associated with loss resulting from vacancies or tenants' inabilities to fulfill rent obligations in multi-family rental property. However, these inquiries pertain more to the risks associated with determining the appropriate interest rate than it does with the impact that increased rents have on feasibility. These questions could have been raised, and would have been just as applicable, prior to any admission of the proposed testimony. Introduction of across-the-board rent increases should not have impacted the way that Stabilis approached the interest rate question. Stabilis offers no other instances of which it will be unduly prejudiced. Additionally, if the Court permits introduction of evidence only through a supplemental evidentiary hearing, thus according Stabilis every opportunity to cross-examine and present rebuttal evidence, the Court fails to see any undue prejudice bestowed upon Stabilis, especially in light of the Court's not having reached a determination on confirmation.

The Court finds no "chicanery" or lack of due diligence in the actions of the Debtor. The evidence in question could not have been presented at the time of trial because it did not exist. Though there was testimony as to the prospect of rent increases, nothing concrete had been formalized as of the hearing date, and, consequently, the Debtor could not ethically

present the same. Likewise, nothing in the record, and Stabilis has not asserted otherwise, suggests dishonesty or disreputable conduct on behalf of the Debtor or its counsel.

Moreover, a decision by this Court to reopen evidence for the purpose of taking additional testimony does not conflict with the case law cited by Stabilis. Stabilis cites to the cases of In re Kellogg, 197 F.3d 1116 (11th Cir. 1999), In re Alexander SRP Apartments, LLC, 2012 WL 1910095 (Bankr. S.D. Ga. 2012) (Davis, B.J.), In re W.M. Hall's Farm, Inc., 2010 WL 2836826 (Bankr. M.D. Ga. 2010) (Laney, B.J.), and In re Green, 2013 WL 1724924 (Bankr. E.D. Va. 2013), among others, for the purpose of showing that grounds do not exist to permit this evidence into the record. Those cases provide that a motion pursuant to Rule 9023 to reconsider a judgment, to alter or amend a judgment, or to request a new trial must rely on one of three grounds: (1) intervening change in the law; (2) availability of newly discovered evidence; or (3) manifest error of law or fact. See In re Kellogg, 197 F.3d at 1120, In re Alexander SRP Apartments, LLC, 2012 WL 1910095, at *1, In re W.M. Hall's Farm, Inc., 2010 WL 2836826, at *2, and In re Green, 2013 WL 1724924, at *2, *11, *14. To satisfy the "newly discovered" option, the "newly discovered" facts must have existed at the time of the trial, but remained undiscovered despite the reasonable exercise of due diligence. In re Alexander SRP Apartments, LLC, 2012 WL 1910095, at *2. Stabilis argues that, because the evidence was still developing at the time of the trial, it could not have existed, and to permit its admission now would only encourage litigants "to try [a] case with a certain body of evidence hoping for success" but hold out the

possibility of relitigating the issue by bringing in evidence that proves more favorable. See Stabilis' Resp. to Debtor's Mot. to Supplement 1-3, ECF No. 706.

Stabilis, however, disregards the context of those opinions. In every one of those cases, the court already issued rulings, opinions, or orders. The movants filed motions under Rule 9023, in light of "new evidence," but the motions were filed under subsection (e) or (a), which permits a party to amend or alter a "judgment" or seek a new trial after judment. See FED. R. CIV. P. 59(a) & (e). Consequently, the movants in these cases were quite literally asking the courts to relitigate issues, by the introduction of new evidence, after the courts rendered their respective opinions. At present, this Court has not rendered an opinion, and, accordingly, is not being asked to reconsider, amend, or alter its judgment, nor is the issue effectively being relitigated pursuant to a new trial, only supplemented. Rather the Court is being asked to take additional testimony prejudgment, which is distinct from the requirements for Rule 59. Correspondingly, the grounds for relief under Rule 59 do not translate into such a context. 12 MOORE'S FEDERAL PRACTICE § 59.13(3)(c) (Matthew Bender 3d ed. 2002) ("Although similar to a Rule 59 or Rule 60(b) motion based on newly discovered evidence, a motion to reopen does not require that the evidence be newly discovered or that it could have been discovered during the pendency of the trial by a party acting with due diligence."); 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE, § 2804, at 68 (3d ed. 2012) ("The restrictions on granting a new trial do not apply, however, to a motion to take additional testimony made

before a decision has been given in the case."). A bench trial was conducted and the proof taken under advisement, yet the Court continues to evaluate, and maintains discretion to reopen the record and take additional testimony as discussed above.

Conclusion

Based on the above, the Court believes that it is in the best interest of justice that the Court appropriately evaluate the proposed evidence. Accordingly, it is hereby

ORDERED that Debtor's Motion to Supplement the Record is **GRANTED** on the conditions stated herein**.** The proof in this matter shall be reopened to allow the Debtor to present evidence as to increased rental income derived from across-the-board rental increases in its properties. A supplemental evidentiary hearing will be held to develop fully the evidence.

FURTHER ORDERED that Stabilis shall have every right to cross-examine the Debtor's witness(es) and/or present meaningful and necessary rebuttal evidence.

FURTHER ORDERED that the parties shall confer with each other and with the Court's staff on determining a date for holding this supplemental hearing that is mutually convenient to all involved.

FURTHER ORDERED that Stabilis' Motion to Strike is **GRANTED** to the extent that the Court shall refuse to consider any supplementary evidence mentioned in the Debtor's Motion and other briefs until and unless admitted at a supplementary evidentiary hearing. Stabilis' Motion to Strike is **DENIED** in any other respect.

The Clerk is **DIRECTED** to serve this Order on the Debtor, Stabilis, and respective counsel.

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