

No. _____

IN THE
Supreme Court of the United States

IN RE KENNY G. ENTERPRISES, LLC,

Debtor,

KENNETH GHARIB,

Petitioner,

v.

THOMAS H. CASEY, CHAPTER 7 TRUSTEE,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT**

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* *Counsel of Record*

To the Honorable Anthony M. Kennedy, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Petitioner Kenneth Gharib prays for a 30-day extension of time to file his petition for certiorari in this Court to and including September 5, 2018. The petition will address three separate, but closely related judgments, pursuant to Rule 12.4. The final judgment of the Ninth Circuit in the first-decided case was entered on May 8, 2018, and petitioner's time to petition for certiorari in this Court expires August 6, 2018. This application is being filed more than 10 days before that date. The final judgments of the Ninth Circuit in the second- and third-decided cases were entered on June 12, 2018.

Copies of the memorandum opinions below are attached hereto. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

As shown by the opinions below, this case involves the questionable validity of a continuing civil contempt order issued by a U.S. Bankruptcy Court, ordering Mr. Gharib's incarceration as well as monetary fines. Mr. Gharib has presented evidence that compliance with the bankruptcy court's order is impossible. Nevertheless, he has now been incarcerated for more than three years. The case presents important questions under the Constitution of the United States that were determined adversely to the petitioner by the court below.

The Office of the Federal Public Defender (FPD) was appointed on January 30, 2018, after a significant period during which Mr. Gharib lacked counsel. The FPD did not participate in the prior litigation in these matters. The record on

appeal from all three cases is extensive, totaling 4,753 pages. Accordingly, undersigned counsel needs additional time to familiarize herself with the voluminous record and to perform the legal research necessary so that the questions may be properly framed and argued to this Court.

Wherefore, petitioner respectfully requests that an order be entered extending his time to petition for certiorari to and including September 5, 2018.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: July 26, 2018

By: 

TRACY CASADIO*
Deputy Federal Public Defender
Attorneys for Petitioner
**Counsel of Record*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAY 8 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

In re: KENNY G ENTERPRISES, LLC,

Debtor,

KENNETH GHARIB,

Appellant,

v.

THOMAS H. CASEY, Chapter 7 Trustee,

Appellee.

No. 16-55007

D.C. No. 8:15-cv-00551-GW
Central District of California,
Santa Ana

ORDER

In re: KENNY G ENTERPRISES, LLC,

Debtor,

THOMAS H. CASEY, Chapter 7 Trustee,

Appellant,

v.

KENNETH GHARIB,

Appellee.

No. 16-55008

D.C. No. 8:15-cv-00551-GW

Before: WARDLAW and CALLAHAN, Circuit Judges, and KENDALL,* District Judge.

The panel has voted unanimously to deny the petition for rehearing. Judges Wardlaw and Callahan voted to deny the petition for rehearing en banc, and Judge Kendall so recommended. The full court was advised of the suggestion for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the suggestion for rehearing en banc are **DENIED**. No further petitions for panel or en banc rehearing will be entertained. The motion for judicial notice is **DENIED**.

* The Honorable Virginia M. Kendall, United States District Judge for the Northern District of Illinois, sitting by designation.

FILED

JUL 28 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: KENNY G ENTERPRISES, LLC,

Debtor,

KENNETH GHARIB,

Appellant,

v.

THOMAS H. CASEY, Chapter 7 Trustee,

Appellee.

No. 16-55007

D.C. No. 8:15-cv-00551-GW

MEMORANDUM*

In re: KENNY G ENTERPRISES, LLC,

Debtor,

THOMAS H. CASEY, Chapter 7 Trustee,

Appellant,

v.

No. 16-55008

D.C. No. 8:15-cv-00551-GW

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

KENNETH GHARIB,

Appellee.

Appeal from the United States District Court
for the Central District of California
George H. Wu, District Judge, Presiding

Argued and Submitted April 3, 2017
Pasadena, California

Before: WARDLAW and CALLAHAN, Circuit Judges, and KENDALL,**
District Judge.

Kenneth Gharib (“Gharib”) appeals the district court’s decision affirming in part and vacating in part the bankruptcy court’s order finding him in contempt of court in the bankruptcy proceedings of Kenny G Enterprises, LLC (“the Debtor”). The district court affirmed the portion of the bankruptcy court’s contempt order fining Gharib \$1,420,043.70, but vacated the portion of the order imposing \$1,000 in daily sanctions. Thomas H. Casey cross-appeals. We have jurisdiction under 28 U.S.C. § 158(d). We affirm in part and reverse in part.

1. The district court properly affirmed the bankruptcy court’s \$1,420,043.70 sanction against Gharib. The bankruptcy court may hold Gharib in

** The Honorable Virginia M. Kendall, United States District Judge for the Northern District of Illinois, sitting by designation.

civil contempt for failing to comply with his statutory turnover obligations. *See* 11 U.S.C. § 105(a) (“The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”). The record supports the bankruptcy court’s decision to hold Gharib in contempt. The bankruptcy court found that on August 14, 2013, Dana Douglas, representing the Debtor, notified Gharib that the Debtor’s bankruptcy case was converted from one under Chapter 11 to one under Chapter 7. The conversion triggered Gharib’s obligations under 11 U.S.C. § 542(a) and Central District of California Local Bankruptcy Rule (“LBR”) 3020-1(b)(5) to turn over to the trustee of the Debtor’s estate all of the Debtor’s assets that were in Gharib’s possession, which amounted to \$1,420,043.70. Gharib failed to do so. A year and a half later, after extensive briefing, discovery, and an evidentiary hearing to determine the precise scope of Gharib’s turnover obligations and to discover where the assets had gone, the bankruptcy court concluded that “in all likelihood the alleged Iran transaction is entirely fiction and the Hillsborough proceeds [amounting to \$1,420,043.70] (or what is left of them) are still here and under Gharib’s control.” Based on the record before us, we cannot conclude that the bankruptcy court’s finding was clearly erroneous. *See Atlanta Corp. v. Allen (In re Allen)*, 300 F.3d 1055, 1058 (9th Cir. 2002).

Because complying with the bankruptcy court's order will cure his contempt, Gharib's contempt is civil, not criminal. *See Shillitani v. United States*, 384 U.S. 364, 368 (1966) (holding that when an incarcerated contemnor "carr[ies] the keys of [his] prison in [his] own pockets" (internal quotation marks omitted), his contempt is civil in nature). Accordingly, the bankruptcy court acted within its 11 U.S.C. § 105(a) civil contempt powers when it sanctioned Gharib in the amount of \$1,420,043.70, and did so again when it ordered Gharib incarcerated for his continued failure to comply. *See Cal. Emp't Dev. Dep't v. Taxel (In re Del Mission Ltd.)*, 98 F.3d 1147, 1151–52 (9th Cir. 1996) (where an entity failed to perform its § 542(a) obligations, § 105 authorized the bankruptcy court's coercive fines); *see also Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 828 (1994) ("The paradigmatic coercive, civil contempt sanction . . . involves confining a contemnor indefinitely until he complies with an affirmative command such as an order to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance." (internal quotation marks omitted)). Therefore, the district court did not err in affirming the bankruptcy court's \$1,420,043.70 sanction against Gharib, and the bankruptcy court acted within its civil contempt authority in detaining Gharib for his continued failure to pay the sanction.

2. However, the district court erred by vacating the portion of the bankruptcy court's order imposing daily sanctions on Gharib for failure to pay the contempt fine. The district court reviewed the bankruptcy court's contempt order only with reference to the language of § 542, which mandates the turnover of "property or the value of such property." 11 U.S.C. § 542(a). From this, the district court erroneously concluded that the amount of the bankruptcy court's sanctions against Gharib had to be cabined to "the value of" the assets Gharib was required to turn over, or \$1,420,043.70 only. But in the face of a § 542 violation the bankruptcy court may invoke its contempt power under § 105, which allows the court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). *See In re Del Mission*, 98 F.3d at 1151–52 (9th Cir. 1996) (noting that § 105(a) provides the remedy for a § 542(a) violation). As long as the sanctions are coercive in nature and not punitive, § 105(a) articulates no specific monetary limit on the scope of contempt sanctions available to the court. To the contrary, the Supreme Court has noted that "a per diem fine imposed for each day a contemnor fails to comply with an affirmative court order . . . exert[s] a constant coercive pressure, and once the jural command is obeyed, the future, indefinite, daily fines are purged." *Int'l Union*, 512 U.S. at 829. Therefore, where per diem fines can be prospectively

purged “through full, timely compliance” with the court’s order, then daily fines “operate[] as a coercive imposition upon the defendant . . . to compel [his] obedience.” *Id.* at 830 (internal quotation mark omitted). Because this precisely describes the nature of the \$1,000 daily sanctions the bankruptcy court imposed, the court acted within its § 105(a) civil contempt authority when it imposed them.

3. Because the monetary sanctions imposed and Gharib’s ensuing incarceration for noncompliance with those sanctions are properly coercive, they are not punitive. However, we are mindful that Gharib has remained incarcerated for civil contempt since May 2015. At some point, due process considerations will require the bankruptcy court to conclude that Gharib’s continued detention and the daily \$1,000 sanctions have ceased to be coercive and instead have become punitive. When that occurs, Gharib must be released from custody.

4. In light of our disposition, we decline to reach Gharib’s claim that he lacked notice of the bankruptcy court’s August 14, 2013 oral temporary restraining order.

AFFIRMED IN PART; REVERSED IN PART.

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUN 21 2018

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

In re: KENNY G ENTERPRISES, LLC,

No. 18-55027

Debtor.

D.C. Nos. 8:16-cv-01946-GW
8:17-cv-00389-GW

KENNETH GHARIB,

MEMORANDUM*

Appellant,

v.

THOMAS H. CASEY, Chapter 7 Trustee,

Appellee.

Appeal from the United States District Court
for the Central District of California
George H. Wu, District Judge, Presiding

Submitted June 12, 2018**

Before: RAWLINSON, CLIFTON, and NGUYEN, Circuit Judges.

Kenneth Gharib appeals pro se from the district court's order affirming two continuing civil contempt orders entered by the bankruptcy court on October 4,

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

2016 and February 16, 2017. We have jurisdiction under 28 U.S.C. § 158(d). We review de novo a district court's decision on appeal from a bankruptcy court, and apply the same standard of review the district court applied to the bankruptcy court's decision. *Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)*, 912 F.2d 1162, 1166 (9th Cir. 1990). We affirm.

The bankruptcy court did not clearly err by concluding that Gharib failed to satisfy his burden to show that he is unable to comply with the bankruptcy court's orders, and did not abuse its discretion by ordering continued sanctions for civil contempt, including incarceration. *See Kismet Acquisition, LLC v. Diaz-Barba (In re Icenhower)*, 755 F.3d 1130, 1138 (9th Cir. 2014) (standard of review); *see also Shell Offshore Inc. v. Greenpeace, Inc.*, 815 F.3d 623, 630 (9th Cir. 2016) (explaining that civil coercive contempt may change over time into criminal contempt depending on changing ability of the contemnor to comply with the contempt order); *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999) (“[T]he party asserting the impossibility defense must show categorically and in detail why he is unable to comply.” (citations and internal quotation marks omitted)). Because Gharib's continued incarceration for noncompliance with the bankruptcy court's monetary sanctions remained coercive at the time of enforcement, we reject as without merit Gharib's contention that his due process rights were violated.

We reject as without merit and unsupported by the record Gharib's contentions regarding notice and an opportunity to be heard orally when the district court changed the hearing date on its own motion.

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUN 21 2018

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

In re: KENNY G ENTERPRISES, LLC,

No. 18-55181

Debtor.

D.C. No. 8:15-cv-00551-GW

KENNETH GHARIB,

MEMORANDUM*

Appellant,

v.

THOMAS H. CASEY, Chapter 7 Trustee,

Appellee.

Appeal from the United States District Court
for the Central District of California
George H. Wu, District Judge, Presiding

Submitted June 12, 2018**

Before: RAWLINSON, CLIFTON, and NGUYEN, Circuit Judges.

Kenneth Gharib appeals pro se from the district court's judgment dismissing his appeal of the bankruptcy court's initial contempt order. We have jurisdiction

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

under 28 U.S.C. § 158(d). We affirm.

The district court properly dismissed Gharib's appeal of the bankruptcy court's initial contempt order after remand from this court. The district court addressed the bankruptcy court's enforcement of monetary sanctions and detention for Gharib's contempt in separate appeals from the bankruptcy court, and the record reflects that no issues remained that required further action from the district court.

We reject as without merit Gharib's contention that the district court should not have dismissed this appeal while his related appeals were still pending.

We do not consider documents not filed with the district court. *See United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990).

Gharib's motion to file a corrected opening brief (Docket Entry No. 14) is granted. The Clerk shall file the opening brief and exhibits submitted at Docket Entry No. 15, the answering brief and supplemental excerpts of record submitted at Docket Entry Nos. 9 and 10, and the reply brief and exhibits submitted at Docket Entry No. 13.

Gharib's request for clarification of the briefing schedule (Docket Entry No. 6) is denied as unnecessary.

AFFIRMED.

No. _____

IN THE
Supreme Court of the United States

IN RE KENNY G. ENTERPRISES, LLC,

Debtor,

KENNETH GHARIB,

Petitioner,

v.

THOMAS H. CASEY, CHAPTER 7 TRUSTEE,

Respondent.

CERTIFICATE OF SERVICE

I, Tracy Casadio, a member of the Bar of this Court, hereby certify pursuant to Sup. Ct. R. 29 that on this 26th day of July, 2018, a copy of Application for Extension of Time to File Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were mailed, postage-prepaid, to see attached.

Respectfully submitted,

s/Tracy Casadio

DATED: July 26, 2018

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