22A457 11/18/2022

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Pro Se

IN THE SUPREME COURT OF THE UNITED STATES

RAUL MENDEZ,

Petitioner,

Vs.

COMMUNITY HEALTH CLINICS, INC.
dba TERRY REILLY HEALTH SERVICES

Respondents.

Supreme Court No.
9th Circuit No. 21-35179
District Court No. 1:16-cv-00425-DCN

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI PER RULE 13 (5) AND MOTION REQUESTING RULES, APPLICATION TO PROCEED IN FORMA PAUPERIS PER RULE 21

Pro Se Petitioner Raul Mendez, respectfully requests a 60 day extension to file a Petition for Writ of Certiorari. The attached Order denying rehearing was filed on September 28, 2022 and the 90 day deadline to file the petition is on 12/27/2022. Mendez requests a 60 day extension from 12/27/2022 but he will diligently work to file the petition before then. In addition, Mendez would like a copy of the IFP application and pertinent rules.

Mendez has good cause to request an extension since he is a pro se party and needs additional time to conduct research in support of his Petition for writ of Certiorari. Mendez would briefly

summarize why he has good cause as follow:

1) The Motion for Summary Affirmance

On September 17, 2021 a 9th Circuit Motions Panel issued a decision denying TRHS motion for Summary Affirmance. The motion panel indicated it was denying the Motion because:

'The arguments raised in the opening brief are sufficiently substantial to warrant further consideration by a merits panel." **United States v. Hooton, 693 F.2d 857, 858 (9th Cir. 1982)**

The Ninth circuit held in Hooton that a motion to affirm a final judgment should be filed only where "it is manifest that the questions on which the decisions of the cause depends are so unsubstantial as not to need further argument." **Page v. United States, 356 F.2d at 339.** The Ninth circuit further held that Motions to Affirm should be confined to appeals obviously controlled by precedent and cases in which the insubstantiality is manifest from the face of appellant's brief.....we will not therefore, ordinarily entertain a motion to affirm where an extensive review of the record of the district court proceedings is required.

2) The decision affirming the dismissal sanction

On June 29, 2022 a Merits Panel issued a Memorandum affirming the district's court judgment. However, the decision makes no reference to any of the issues and substantial arguments raised on Mendez appellant brief. Instead, it affirms TRHS argument on the Motion for Summary Affirmance to dismiss the appeal because of the district court's dismissal as a discovery sanction. The US District Court of Idaho did not follow the Federal Rules of Civil Procedure and never warned a pro se party like Mendez about the possibility of dismissing the case. We have reviewed the record in this case including the transcript of the hearing on the motion for sanctions and have found no indication that the district judge discussed the feasibility of less drastic sanctions or explained why alternative sanctions would be inadequate. The district court was at fault for not explicitly weighing alternatives before entering its order. **U.S. for Use and**

Ben. of Wiltec Guam, Inc. v. Kahaluu..., 857 F.2d 600 (1988). The imposition of discovery sanctions pursuant to FRCP 37 is reviewed in all aspects for abuse of discretion under Rule 11. **Adriana Intern. Corp. v. Thoeren, 913 F.2d 1406 (1990)** and a Rule 11 sanction is not a judgment on the actions merits. Rather, it requires the determination of a collateral issue; such as abuse of judicial process and if so what sanction would be appropriate. **Cooter & Gell v. Hartmarx Corp. 496 U.S. 384 (1990).**

In other words, the merits of Mendez case were never reviewed. The 9th circuit acted inconsistently when it denied the Motion for Summary Affirmance because of the issues raised on the Opening Brief.....only to affirm a year later the dismissal as a discovery sanction without addressing the legal merits of an employment discrimination case. Mendez question for the US Supreme court: 1) *is a dismissal sanction a decision on the legal merits of the case? And 2) does res judicata and the finality rule apply to cases dismissed as a discovery sanction?* I believe these are questions that warrant further discussion by the US Supreme Court.

CONCLUSION

Mendez has good cause to request an extension. However, Mendez also asks the Supreme Court consider whether accept this filing as the actual Petition for Writ of Certiorari without additional delay and more briefing. The question of whether a dismissal sanction is a decision on the merits is substantial and following the decision on Cooter it doesn't appear to be. Therefore, Mendez does not believe his discrimination/civil rights claims are barred by res judicata as a dismissal sanction is not a legal merits decision. Mendez asks his filing be **GRANTED.**

DATED: November 18, 2022

Raul Mendez

NOT FOR PUBLICATION

FILED

JUN 29 2022

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAUL MENDEZ, Plaintiff-Appellant, v. COMMUNITY HEALTH CLINICS, INC., doing business as Terry Reilly Health Services, Defendant-Appellee.	No. 21-35179 D.C. No. 1:16-cv-00425-DCN MEMORANDUM*

Appeal from the United States District Court
for the District of Idaho
David C. Nye, District Judge, Presiding

Submitted June 15, 2022**

Before: SILVERMAN, WATFORD, and FORREST, Circuit Judges.

Raul Mendez appeals pro se from the district court's judgment dismissing his employment discrimination action as a discovery sanction under Federal Rule of Civil Procedure 37(b). We have jurisdiction under 28 U.S.C. § 1291. We

* 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).

review for an abuse of discretion. *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1022 (9th Cir. 2002). We affirm.

The district court did not abuse its discretion in dismissing Mendez's action after Mendez twice failed to appear for his deposition and the court found that Mendez's behavior was willful and in bad faith. *See* Fed. R. Civ. P. 37(b)(2); *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1233 (9th Cir. 2006) ("Rule 37 sanctions, including dismissal, may be imposed where the violation is due to willfulness, bad faith, *or* fault of the party." (citation and internal quotation marks omitted)); *Rio Props.*, 284 F.3d at 1022 (discussing five factors courts must weigh in determining whether to dismiss a case for failure to comply with a court order).

We reject as meritless Mendez's contentions that in dismissing this action as a sanction the district court was biased against him, failed to construe his pro se filings liberally, or failed to comply with the Federal Rules of Civil Procedure and the district court's local rules.

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).

In light of our disposition, we do not consider Mendez's challenge to the district court's interlocutory orders. *See Al-Torki v. Kaempen*, 78 F.3d 1381, 1386

(9th Cir. 1996) ("[I]nterlocutory orders, generally appealable after final judgment, are not appealable after a dismissal for failure to prosecute, whether the failure to prosecute is purposeful or is a result of negligence or mistake." (citation and internal quotation marks omitted)).

Community Health Clinics, Inc.'s request for sanctions, set forth in the answering brief, is denied.

AFFIRMED.

FILED

SEP 28 2022 - 7 days 10/5/22
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS
12/27/22

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAUL MENDEZ, Plaintiff-Appellant, v. COMMUNITY HEALTH CLINICS, INC., doing business as Terry Reilly Health Services, Defendant-Appellee.	No. 21-35179 D.C. No. 1:16-cv-00425-DCN District of Idaho, Boise ORDER

Before: SILVERMAN, WATFORD, and FORREST, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Mendez's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 22) are denied.

No further filings will be entertained in this closed case.

CERTIFICATE OF SERVICE

I certify that on November 18, 2022 I served a copy to:

Julie Fischer

332 N. Broadmore Way, Ste. 102

Nampa, ID 83687

- By United States mail
- By personal delivery
- By fax @ 208-475-2201

Raul Mendez
Typed/printed name

Signature