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FILED VIA ECF

Honorable Raymond T. Lyons, U.S.B.J.
United States Bankruptcy Court
Clarkson S. Fisher U.S. Courthouse
402 E. State Street
Trenton, New Jersey 08608

Re: In re Kathleen A. McGuire
Chapter 7; Case No.: 09-19497 (RTL)

Liggero Architecture, LLC, et als. vs. Kathleen A. McGuire, et als.
Adv. Pro. No.: 09-02666 (RTL)

Plaintiffs' Motion for Order Declaring McGuire Defendants in Civil Contempt
Hearing Date: April 25, 2011

Dear Judge Lyons:

My firm represents the plaintiffs in the captioned adversary action. In connection with this Monday's hearing on plaintiffs' motion for civil contempt, I respectfully submit this letter memorandum summarizing the law of contempt for the purpose of assisting the Court.

I sincerely apologize to the Court and opposing counsel for not initially filing a brief with the motion. The emergent circumstances presented by the defendants' contumacious conduct coupled with the need to get the motion filed quickly did not permit me the opportunity to research and prepare a thorough brief summarizing the law on contempt.

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A. Subject Matter Jurisdiction & Governing Rules

This Court has subject matter jurisdiction under 28 U.S.C. §§ 1334(b), 151, and 157(a). This contempt proceeding constitutes a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A), (E), H), and (O). See e.g., In re Baker, 195 B.R. 309 (Bankr. D.N.J. 1996).

Pursuant to Fed. R. Bankr. P. 9020, contempt proceedings are governed by Fed. R. Bankr. P. 9014.

B. Court's Inherent Contempt Powers

A person who takes and conceals intentionally, property of the bankrupt in his possession at the time of the adjudication, having no title, lien or colorable claim thereto, will since the bankruptcy proceeding is injunctive in character, be guilty of unlawful interference with assets in the legal custody of the court, which constitutes a contempt. See e.g., Baker, supra, 195 B.R. 309 (Court held that contemnor must reimburse the debtor's bankruptcy estate for items he misappropriated from an asset sale conducted by the Chapter 7 bankruptcy trustee, as well as pay the estate's attorney's fees and expenses incurred as a result of his misconduct).

"The power to punish for contempts is inherent in all courts." Chambers v. NASCO, Inc., 501 U.S. 32, 44, 111 S.Ct. 2123, 115 L.Ed. 2d 27 (1991) (alteration and internal quotation marks omitted) (quoting Ex parte Robinson, 86 U.S. 505, 510, 22 L.Ed. 205, 19 Wall. 505 (1874)). A bankruptcy court is vested with the power "to enforce its subpoenas and orders by the power of civil contempt." New Falls Corporation v. Faiella, Bankr. Adv. Pro. No.: 07-1470 (RTL) (Bankr. D.N.J. 2008) (Hon. Raymond T. Lyons, U.S.B.J.) (quoting Riley v. Sciaba (In re Sciaba), 334 B.R.

524, 526 (Bankr. D. Mass. 2005) (citing 11 U.S.C. § 105(a); Fed. R. Civ. P. 54(e); Fed. R. Bankr. P. 9016, 9020)).

A number of courts have linked the bankruptcy court contempt power to 11 U.S.C. §105. See, e.g., In re Pace, 67 F.3d 187, 193 (9th Cir. 1995); In re Ragar, 3 F.3d 1174, 1177 (8th Cir. 1993); In re Skinner, 917 F.2d 444, 447 (10th Cir. 1990); In re Walters, 868 F.2d 665, 669-70 (4th Cir. 1989). Accord In re Baker, *supra*; Cochran v. Reath, Adv. Pro. No.: 06-1531 (JHW)(Bankr. D.N.J. 2006)(Hon. Judith H. Wizmur).

The federal court's contempt powers include imposing fines, conditional incarceration, and compensating a party for losses sustained as a result of another's non-compliance. See Hicks v. Feiock, 485 U.S. 624, 108 S.Ct. 1423, 99 L.Ed. 2d 721 (1988); United States v. Rylander 462 U.S. 103 S.Ct. 2466, 77 L.Ed.2d 1342 (1983). Compensation may include not only damages resulting directly from the contemptuous conduct, McDonald's Corp. v. Victory Investments, 727 F.2d 82, 87 (3rd Cir. 1984), but also expenses incurred in prosecuting a civil contempt action, including reasonable attorney's fees. Perry v. O'Donnell, 759 F.2d 702, 704-705 (9th Cir. 1985)(a court may award attorney's fees and expenses to the prevailing party in civil contempt actions without a showing of willfulness); Zizzler Family Steak Houses v. Western Sizzlin Steak House, Inc., 793 F.2d 1529, 1534 (11th Cir. 1986)(compensation awarded, including costs an attorney's fees, and prospective fines ordered); CFTC v. Premex, Inc., 655 F.2d 779, 785-786 (7th Cir. 1984)(award of legal fees and costs to CFTC in contempt proceeding). See also International Brotherhood of Teamsters, Local 249 v. Western Pennsylvania Motor Carriers Ass'n, 660 F.2d 76, 84 (3rd Cir. 1981)(award of legal fees may be authorized when a civil contempt action is based on willful disobedience of a court order).

C. Distinction Between Direct vs. Indirect Contempt

A distinction has also been drawn between contempt that is “direct” and contempt that is “indirect.” Contempt is direct when it occurs in the immediate presence of the judge—under the court’s own eye and within its own hearing. See, e.g., In re Heathcock, 696 F.2d 1362, 1365 (11th Cir. 1983) (“Direct contempt is committed in the ‘actual presence of the court.’”(internal quotation marks omitted); United States v. Peterson, 456 F.2d 1135, 1139 (10th Cir. 1972) (holding that criminal contempt is direct and punishable summarily without notice and opportunity to prepare only if committed in the actual presence of the judge and known to him). Direct contempt for conduct in the court’s presence may be punished summarily, i.e., no separate notice or hearing is required. See Id. at 1139.

Indirect” contempts, by contrast, generally involve disobedience to court orders, and can occur anywhere. See International Union, United Mine Workers of America v. Bagwell, 512 U.S. 821, 827 n. 2, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994 (noting the procedural differences between direct and indirect contempts). While indirect contempt proceedings often involve challenges to judicial authority, they do not necessarily implicate courtroom decorum. Summary adjudication of indirect contempts is prohibited, and indirect contemnors are entitled to all the procedural protections of Fed. R. Crim. P. 42(a).

D. Civil vs. Criminal Contempt

Although the distinction between civil contempt and criminal contempt is often cloudy, the important tests in determining the character of a contempt are the nature and purpose of the punishment. Shillitani v. United States, 384 U.S. 364, 369-370, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966); Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 441. 31 S.Ct. 492, 55 L.Ed. 797

(1911); Donato v. United States, 48 F.2d 142 (3rd Cir. 1931). Although the same conduct may result in both civil and criminal contempt charges, International Union, United Mine Workers of America, supra, however if both civil and criminal relief are imposed in the same proceeding then the criminal feature of the order is dominant and fixes its character for purposes of appellate review. Hicks v. Feiock, supra.

i. Standards for Civil Contempt

Unlike criminal contempt proceedings, the party petitioning the court for civil contempt does not have to establish that the respondent intended to violate, or willfully violated, the order. See McComb v. Jacksonville Paper Co., 336 U.S. 188, 191, 69 S.Ct. 497, 93 L.Ed. 599 (1949).

Civil contempt is "wholly remedial," serves only the purpose of a party litigant, and is intended to coerce compliance with an order of the court or to compensate for damage caused by noncompliance. McComb v. Jacksonville Paper Co., 336 U.S. at 191; Penfield Co. of Cal. v. SEC, 330 U.S. 585, 590, 67 S.Ct. 918, 91 L.Ed. 1117 (1947); McCrone v. United States, 307 U.S. 61, 64, 59 S.Ct. 685, 83 L.Ed. 1108 (1939); Southern Ry. Co. v. Lanham, 403 F.2d 119, 124 (5th Cir. 1968). In other words, civil contempt has two purposes: one coercive and the other compensatory. International Union, United Mine Workers of America, supra. The paradigmatic civil contempt order is one that allows the contemnor to purge the contempt by committing an affirmative act and who thus, as it were, "carries the keys of his prison in his own pocket." Id., a5 828 (internal citations omitted).

In order to establish civil contempt, a plaintiff must prove the following three (3) elements by clear and convincing evidence: “(1) a valid order of the court existed;¹ (2) that the defendants had knowledge of the order; and (3) that defendants disobeyed the order.” Harris v. City of Philadelphia, 47 F.3d 1311, 1326 (3d Cir. 1995); Roe v. Operation Rescue, 54 F.3d 133, 137 (3rd Cir. 1995); Robin Woods, Inc. v. Woods, 28 F.3d 396, 399 (3rd Cir. 1994); Quinter v. Volkswagon of America, 676 F.2d 969, 974 (3rd Cir. 1982); In re Swanson, 207 B.R. 76, 80 (Bankr. D.N.J. 1997). A showing of willfulness is not required in the Third Circuit and good faith is not a defense to civil contempt. See Robin Woods, Inc., supra. Willfulness and intent are relevant only to determine the extent and nature of the sanctions. Square D. Co. v. Scott Elect. Co., 2007 U.S. Dist. LEXIS 84297, at * 16 (W.D.Pa. November 14, 2007(citation omitted)).

The sanction in a civil contempt proceeding must give the contemnor an opportunity to purge himself, and must terminate once he complies. Lance v. Plummer, 353 F.2d 585 (5th Cir. 1965), cert. den., 384 U.S. 929, 86 S.Ct. 1885, 16 L.Ed.2d 532 (1965). If the sanction will not compel compliance, it becomes punishment and violates due process. In re Grand Jury Proceedings, 877 F.2d 849 (11th Cir. 1989).

Once the petitioner makes out a *prima facie* case of civil contempt, the burden shifts to the contemnor to come forward with evidence to show a present inability to comply. See United States v. Rylander, 460 U.S. 752, 756 (1983). Where the respondent fails to put forth a sufficient defense, the court may grant whatever remedial relief it deems necessary to effect compliance with its order. See McComb, 336 U.S. 1193. The contemnor’s burden is

¹ A valid order exists if the terms are “specific and definite.” In re Alan Baker, 195 B.R. 315, 318 (Bankr. D.N.J.1996)(citing In re Village Craftsman, Inc., 160 B.R. 740 (Bankr. D.N.J. 1993). Accord In re Rubin, 378 F.2d 104 (3rd Cir. 1967)((holding that an order claimed to be violated must be specific and definite).

substantial, however, and cannot be met with mere assertions or inability to comply. See Rylander, 103 S.Ct. at 1552. Rather, the contemnor must present evidence that shows “categorically and in detail” the reason for the inability to comply. FTC v. Affordable Media, LLC, 179 F.3d 1228, 1241 (9th Cir. 1999)(internal citation omitted).

ii. **Criminal Contempt**

Because criminal contempt matters arise under 18 U.S.C. §401(3) and Fed. R. Crim. P. 42, they must be tried by the District Court. See Griffith v. Oles (In re Hipp, Inc.), 895 F.2d 1503 (5th Cir. 1990. In fact, “[M]ost courts have determined that bankruptcy courts do not have criminal contempt powers, at least as to contempts not committed in their presence.” Cochran v. Reath, Adv. Pro. No.: 06-1531 (JHW)(Bankr. D.N.J. 2006), Opinion at p. 16, n. 7 (citing In re Hipp, supra).

Criminal contempt is primarily punitive rather than remedial, serves to vindicate the authority of the court, and cannot be ended by any act of the contemnor. Nye v. United States, 313 U.S. 33, 42-43, 61 S.Ct. 810, 85 L.Ed. 1172 (1941); Fox v. Capital Co., 299 U.S. 105, 57 S.Ct. 57, 81 L.Ed. 67 (1936); Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 442, 31 S.Ct. 492, 55 L.Ed. 797 (1911); Southern Ry. Co. v. Lanham, 403 F.2d 119, 124-125 (5th Cir. 1968).

In an early seminal case dealing with contempt imprisonment, Gompers v. Buck's Stove & Range Co., supra, the Supreme Court distinguished between imprisonment for punitive purposes and imprisonment for coercive purposes, a distinction that is honored to this day. See, e.g., Commodity Futures Trading Comm'n v. Armstrong, 284 F.3d 404, 406 (2nd Cir. 2002) (“In distinguishing criminal and civil contempt sanctions, we inquire whether the sanction’s purpose was to coerce compliance and whether the contemnor was given the opportunity to

cure his contempt and thereby end the sanction.” (alteration and internal quotation marks omitted)). Courts recognize, however, that “most sanctions contain both coercive and punitive elements.” United States v. Lippitt, 180 F.3d 873, 877 (7th Cir. 1999). Courts also recognize that “what starts as coercive can over time become punitive,” Lippitt, 180 F.3d at 877 (citing In re Grand Jury Proceedings of Dec., 1989, 903 F.2d 1167, 1169 (7th Cir. 1990); In re Crededio, 759 F.2d 589, 590 (7th Cir. 1985); Simkin v. United States, 715 F.2d 34, 36 (2nd Cir. 1983)), because a contempt order may lose its coercive effect during the course of the contemnor’s confinement, “leaving punishment as the sole justification for its maintenance.” Id.

Thank you for Your Honor’s careful consideration of this matter.

Respectfully submitted,

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