

FEB 17 2016

SUSAN M. SPRAUL, CLERK
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NOT FOR PUBLICATION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. | CC-15-1227-FCTa |
| | |) | | |
| 6 | CINEVISION INTERNATIONAL, |) | Bk. No. | 11-40813-TD |
| | INC., |) | | |
| 7 | |) | | |
| | Debtor. |) | | |
| 8 | _____ |) | | |
| | |) | | |
| 9 | FRANK MAYOR; CINDY GUNADI, |) | | |
| | |) | | |
| 10 | Appellants, |) | | |
| | |) | | |
| 11 | v. |) | MEMORANDUM* | |
| | |) | | |
| 12 | EDWARD M. WOLKOWITZ, |) | | |
| | Chapter 7 Trustee, |) | | |
| 13 | |) | | |
| | Appellee. |) | | |
| 14 | _____ |) | | |

Argued and Submitted on January 21, 2016
at Pasadena, California

Filed - February 17, 2016

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

Honorable Thomas B. Donovan, Bankruptcy Judge, Presiding

Appearances: Andrew Edward Smyth argued for Appellants Frank
Mayor and Cindy Gunadi; Daniel J. Yourist argued
for Appellee Edward M. Wolkowitz.

* 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.

1 Before: FARIS, CORBIT**, and TAYLOR, Bankruptcy Judges.

2 **INTRODUCTION**

3 Appellants Frank Mayor and Cindy Gunadi appeal from the
4 bankruptcy court's order sanctioning them \$99,745.24 for their
5 violation of the automatic stay and their failure to turn over
6 property belonging to the bankruptcy estate of Debtor Cinevision
7 International, Inc. ("Debtor" or "Cinevision"). They argue that
8 the court erred by disregarding evidence of their good faith and
9 subjective intent. The chapter 7¹ trustee, Appellee Edward M.
10 Wolkowitz, argues that Appellants knowingly tried to conceal the
11 property and circumvent the automatic stay. We hold that the
12 bankruptcy court did not err in sanctioning Appellants.
13 Accordingly, we AFFIRM.

14 **FACTUAL BACKGROUND²**

15 Cinevision was a film production company in the business of
16 acquiring films in DVD format and offering those DVDs for
17 distribution to various companies. Mr. Mayor and Ms. Gunadi (who
18 are husband and wife) are the stockholders and officers of
19

20 ** Honorable Frederick P. Corbit, Chief United States
21 Bankruptcy Judge for the Eastern District of Washington, sitting
22 by designation.

23 ¹ Unless specified otherwise, all chapter and section
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all
25 "Rule" references are to the Federal Rules of Bankruptcy
26 Procedure, Rules 1001-9037, and all "Civil Rule" references are
27 to the Federal Rules of Civil Procedure, Rules 1-86.

28 ² Appellants have failed to include all relevant documents
in their excerpts of record. We have exercised our discretion to
review the bankruptcy court's docket, as appropriate. See Woods
& Erickson, LLP v. Leonard (In re AVI, Inc.), 389 B.R. 721, 725
n.2 (9th Cir. BAP 2008).

1 Cinevision. Ms. Gunadi also owns the building housing
2 Cinevision's operations.³

3 Cinevision filed a chapter 11 petition on July 19, 2011.
4 The case was later converted to chapter 7, and the Trustee was
5 appointed to administer the estate.

6 In December 2010, a few months before Cinevision filed its
7 chapter 11 petition, Mr. Mayor formed a new company called
8 Cinevision Global, Inc. ("Cinevision Global"). He owns 100% of
9 its equity.

10 The Trustee conducted a site inspection of Mr. Mayor's
11 business premises at 410 Bamboo Lane. He found 10,156 DVDs
12 hidden in an unlighted space. The Trustee learned that Mr. Mayor
13 was selling the DVDs through Cinevision Global's online store.
14 He also found various pieces of post-production film equipment
15 and determined that the DVDs and equipment belonged to
16 Cinevision.

17 The Trustee's counsel informed Appellants that the DVDs and
18 equipment were property of the bankruptcy estate and demanded
19 that Appellants turn those items over to the Trustee. Counsel
20

21 ³ The bankruptcy court found that Ms. Gunadi owns real
22 property located at 424 Bamboo Lane in Los Angeles, where
23 Cinevision operated its business. The record is unclear whether
24 Ms. Gunadi also owns or controls the real property at 410 Bamboo
25 Lane, which is described as Mr. Mayor's office. At oral
26 argument, counsel for the Trustee stated that Ms. Gunadi owns the
27 real property at 410 and 424 Bamboo Lane, which is a single
28 building. Counsel for Appellants professed that he did not know
which, if any, of the properties Ms. Gunadi owns.

27 Additionally, Ms. Gunadi is an active member of the
28 California state bar. She represented herself and Mr. Mayor in
the adversary proceeding which gave rise to this appeal.

1 advised Appellants that they were violating the automatic stay
2 and subject to sanctions. When Appellants did not respond to the
3 Trustee's demand, the Trustee commenced an adversary proceeding
4 for turnover against Appellants.

5 The Trustee subsequently learned that Appellants were in
6 possession of \$10,500 in cash paid by DVD distributor MoMedia
7 International, Ltd., due to an account receivable owed to
8 Cinevision. The Trustee discovered that, after Cinevision filed
9 its bankruptcy petition, Mr. Mayor had instructed MoMedia to wire
10 the payment to his new company, Cinevision Global, and MoMedia
11 eventually complied.

12 The Trustee moved for summary judgment to recover the post-
13 production film equipment, the 10,156 DVDs, and the \$10,500 cash
14 proceeds of the MoMedia account receivable. He argued that
15 Appellants "intentionally secreted" estate property, failed to
16 list the property on Cinevision's schedules, and refused to turn
17 over the property to the Trustee upon demand.

18 Appellants argued that Cinevision fully disclosed the assets
19 on its Schedules. Appellants contended that the DVDs were
20 worthless; they claimed that the distributor in possession of the
21 DVDs on the petition date would have destroyed them at
22 Cinevision's expense had Mr. Mayor not paid to ship them to his
23 facility. Appellants argued that the post-production equipment
24 was leased by AIM Group LLC, Mr. Mayor's personal holding
25 company, not Cinevision, and that AIM Group or Mr. Mayor, not
26 Cinevision, had paid off the unpaid balances owed on the leases.
27 Moreover, they stated that the post-production film equipment had
28 little or no value. Finally, they argued that the MoMedia

1 account receivable belonged to Cinevision Global, rather than
2 Cinevision.

3 On March 12, 2015, the bankruptcy court granted summary
4 judgment in favor of the Trustee. It held that the DVDs, post-
5 production equipment, and \$10,500 account receivable proceeds
6 were property of the Debtor's estate pursuant to § 541 and that
7 Mr. Mayor, Ms. Gunadi, and Cinevision Global failed to turn over
8 those assets as required by § 542(a). The bankruptcy court
9 granted a partial summary judgment holding that (1) the
10 defendants were required to turn over the \$10,500; (2) genuine
11 issues of material fact exist as to the value of the DVDs and
12 post-production equipment; and (3) the court may order the
13 turnover of the DVDs and post-production equipment but not their
14 value.

15 On May 15, the Trustee filed an application in the main
16 bankruptcy case (not the adversary proceeding) requesting that
17 the court issue an Order to Show Cause ("OSC") why Appellants
18 should not be held in contempt for their willful violation of the
19 automatic stay. On June 1, the court issued the OSC, ordering
20 Appellants "to file a written explanation, if any, why they
21 should not be held in civil contempt for their knowing violation
22 of the automatic stay and turnover obligations (11 U.S.C.
23 § 105(a) and 11 USC § 542(a))."

24 Later that same day, and presumably before they realized
25 that the court had issued the OSC, Appellants filed an untimely
26 opposition to the issuance of the OSC. They largely repeated
27 their arguments in opposition to the motion for summary judgment
28 in the adversary proceeding.

1 On June 10, Appellants filed their opposition to the OSC, in
2 which they requested that the court consider the documents filed
3 previously with their opposition to the issuance of the OSC and
4 attached Mr. Mayor's supplemental declaration.

5 At the hearing on the OSC, the court acknowledged
6 Appellants' responses, but referred to the opposition to the OSC
7 as a "meaningless document," since it incorporated a late-filed
8 opposition to the issuance of the OSC. The court further stated
9 that "(a) they failed to disclose in their schedules; (b) they
10 physically hid assets; (c) when requested later by the Trustee's
11 representative to turn over the assets they declined to do so."
12 It considered the "detailed findings and conclusions" in the
13 adversary proceeding that "suggest[ed] to [the court] that the
14 sanctions sought for contempt are appropriate and reasonable
15 given the history of this case beginning back in 2011, converted
16 eight months later in 2012, hidden assets, informal requests
17 rejected, more formal written requests rejected, then litigated
18" The court also found that Ms. Gunadi, as a principal of
19 Cinevision, participated in the evasion and disobedience.

20 On July 8, the court issued its Order and Judgment finding
21 Appellants in contempt of court for violating the automatic stay
22 and awarding the Trustee \$99,745.24 in attorneys' fees.
23 Appellants timely appealed.

24 JURISDICTION

25 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
26 §§ 1334, 157(b)(1), and 157(b)(2)(E). We have jurisdiction under
27 28 U.S.C. § 158.

1 knowledge of the bankruptcy is a violation of **both** the automatic
2 stay and of the turnover requirements of the Bankruptcy Code.”
3 Mwangi v. Wells Fargo Bank, N.A. (In re Mwangi), 432 B.R. 812,
4 822 (9th Cir. BAP 2010), disapproved on other grounds in later
5 appeal, 473 B.R. 802 (D. Nev. 2012), aff’d, 764 F.3d 1168 (9th
6 Cir. 2014) (quoting Abrams v. Sw. Leasing & Rental, Inc.
7 (In re Abrams), 127 B.R. 239, 242-43 (9th Cir. BAP 1991))
8 (emphasis in original).

9 Section 542 governs turnover:

10 (a) Except as provided in subsection (c) or (d) of this
11 section, **an entity**, other than a custodian, **in**
12 **possession, custody, or control, during the case, of**
13 **property that the trustee may use, sell, or lease** under
14 section 363 of this title, or that the debtor may
exempt under section 522 of this title, **shall deliver**
to the trustee, and account for, such property or the
value of such property, unless such property is of
inconsequential value or benefit to the estate.

15 § 542(a) (emphases added). “[T]he turnover provisions of the
16 Bankruptcy Code are to be self-effectuating, subjecting to
17 sanctions a party that willfully fails to comply.” In re Mwangi,
18 432 B.R. at 823 (citing In re Abrams, 127 B.R. at 242-43).

19 The refusal to turn over property rightfully belonging to
20 the bankruptcy estate also violates the automatic stay under
21 § 362(a) (3), which provides:

22 (a) Except as provided in subsection (b) of this
23 section, a petition filed under section 301, 302, or
24 303 of this title, or an application filed under
section 5(a) (3) of the Securities Investor Protection
Act of 1970, operates as a stay, applicable to all
entities, of -

25 . . .

26 (3) any act to obtain possession of property of
27 the estate or of property from the estate or to
28 exercise control over property of the estate[.]

1 § 362(a)(3). “[T]he knowing retention of estate property
2 violates § 362(a)(3).” In re Mwangi, 432 B.R. at 823 (citing
3 In re Del Mission Ltd., 98 F.3d at 1151).

4 **2. The court properly sanctioned Appellants pursuant to**
5 **its civil contempt authority under § 105(a).**

6 Appellants argue that the bankruptcy court lacked authority
7 to sanction them.⁴ We disagree.

8 Appellants first contend that § 362(h)⁵ does not provide a
9 basis for the Trustee to recover actual damages, since the
10 Trustee is not an “individual.” But the Trustee never sought
11 sanctions under § 362(h). Rather, the Trustee contends that
12 “§ 542(a) provided the right of the return of estate property,
13 while 11 U.S.C. § 105(a) provided the remedy for the failure to
14 do so.” He also argues that the courts have the power to enter
15 civil contempt orders and impose civil contempt sanctions.

16 The Trustee is correct. In Knupfer v. Lindblade
17 (In re Dyer), 322 F.3d 1178 (9th Cir. 2003), the Ninth Circuit
18 stated that, even though a trustee may not recover under
19 § 362(h), “we have held that the Trustee may be entitled to
20 recovery for a violation of the automatic stay ‘under section
21

22 ⁴ They also argue that the bankruptcy court did not specify
23 the legal basis for its imposition of sanctions, but this is
24 patently false; the bankruptcy court cited §§ 105(a) and 542(a)
as the bases for the OSC.

25 ⁵ Following extensive revisions to the Bankruptcy Code in
26 2005, § 362(h) is now codified as § 362(k). It provides that “an
27 individual injured by any willful violation of a stay provided by
28 this section shall recover actual damages, including costs and
attorneys’ fees, and, in appropriate circumstances, may recover
punitive damages.”

1 105(a) as a sanction for ordinary civil contempt.'" Id. at 1189
2 (quoting Havelock v. Taxel (In re Pace), 67 F.3d 187, 193 (9th
3 Cir. 1995)). The court went on to state that "[t]he standard for
4 finding a party in civil contempt is well settled: The moving
5 party has the burden of showing by clear and convincing evidence
6 that the contemnors violated a specific and definite order of the
7 court." Id. at 1190-91 (quoting Renwick v. Bennett
8 (In re Bennett), 298 F.3d 1059, 1069 (9th Cir. 2002)). "[T]here
9 can be no doubt that the automatic stay qualifies as a specific
10 and definite court order." Id. at 1191.

11 The Ninth Circuit held that § 362(h) and § 105(a) require
12 the same mental state as a basis for sanctions. It stated:

13 Under both statutes, the threshold question regarding
14 the propriety of an award turns not on a finding of
15 "bad faith" or subjective intent, but rather on a
16 finding of "willfulness," where willfulness has a
17 particularized meaning in this context:

18 "[W]illful violation" does not require a
19 specific intent to violate the automatic
20 stay. Rather, the statute provides for
21 damages upon a finding that the defendant
22 knew of the automatic stay and that the
23 defendant's actions which violated the stay
24 were intentional.

25 Id. at 1191 (quoting In re Pace, 67 F.3d at 191).

26 In the present case, the bankruptcy court exercised its
27 civil contempt authority "to remedy a violation of a specific
28 order (including 'automatic' orders, such as the automatic stay
or discharge injunction)[,]" see id. at 1196, by sanctioning
Appellants for their violation of the automatic stay and awarding

1 the Trustee his attorneys' fees and costs.⁶ Appellants never
2 denied, and the court found, that (1) Appellants knew of the
3 automatic stay, and (2) Appellants' acts were intentional. As
4 such, the court did not err in concluding that Appellants were
5 liable for sanctions due to their "willful breach of the
6 automatic stay and knowing failure to turn over Property
7 belonging to the Bankruptcy Estate[.]"

8 Appellants argue that sanctions are impermissible in the
9 absence of an explicit finding of bad faith. Appellants are
10 incorrect. "[T]he propriety of an award turns not on a finding
11 of 'bad faith' or subjective intent, but rather on a finding of
12 'willfulness[.]'" In re Dyer, 322 F.3d at 1191; see McComb v.
13 Jacksonville Paper Co., 336 U.S. 187, 191 (1949) (because civil
14 contempt serves a remedial purpose, "it matters not with what
15 intent the defendant did the prohibited act"); In re Mwangi,
16 432 B.R. at 824 ("Whether the party believes in good faith that
17 it had a right to the property is not relevant to whether the act
18 was 'willful' or whether compensation must be awarded." (citation
19 omitted)). Appellants' good faith might be relevant if the court
20 had awarded sanctions pursuant to its inherent powers.⁷ But the

21
22 ⁶ Appellants do not seek review of the amount of the
sanctions.

23
24 ⁷ The Ninth Circuit has held that, unlike in the case of
sanctions pursuant to § 105(a), a finding of bad faith is
25 required for sanctions pursuant to a court's inherent power:

26 Before imposing sanctions under its inherent
27 sanctioning authority, a court must make an explicit
finding of bad faith or willful misconduct. In this
28 context, "willful misconduct" carries a different

(continued...)

1 bankruptcy court relied on § 105(a), not its inherent powers.
2 Therefore, the court did not have to make a finding of bad faith
3 or inquire into Appellants' intentions.

4 Appellants also argue that the Trustee cannot compel them to
5 turn over property until the court has determined that the
6 property must be turned over. Appellants again misinterpret
7 their duties regarding turnover. Section 362(a)(3) does not
8 require an order of the court. Rather, "to effectuate the
9 purpose of the automatic stay, 'the onus to return estate
10 property is placed upon the possessor[.]'" In re Mwangi,
11 432 B.R. at 823 (internal citation omitted). "It has long been
12 the determination of this panel that the turnover provisions of
13 the Bankruptcy Code are to be self-effectuating, subjecting to
14 sanctions a party that willfully fails to comply." Id. (citing
15 In re Abrams, 127 B.R. at 242-43). Appellants could have turned
16 to the bankruptcy court for guidance regarding the disposition of
17 the property, but they failed to do so. Instead, Appellants
18 willfully violated the automatic stay by unilaterally deciding
19 that they need not turn over the property. See id. at 823-24 (A
20 creditor declining to release funds to the debtor "could have
21 sought direction from the bankruptcy court, by way of a motion
22 for relief from stay or otherwise, regarding the account funds;
23 it did not. Instead, it chose to hold the funds until a demand

24 ⁷(...continued)

25 meaning than the meaning employed in the context of
26 determining whether an individual is entitled to
27 damages under § 362(h) or a contempt judgment under
§ 105(a) for an automatic stay violation.

28 In re Dyer, 322 F.3d at 1196 (internal citation omitted).

1 was made for payment that it alone deemed appropriate.").

2 The bankruptcy court did not err in sanctioning Appellants
3 for their willful violation of the automatic stay and their
4 failure to turn over property of the bankruptcy estate.

5 **3. The bankruptcy court did not ignore the facts and**
6 **arguments presented by Appellants in response to the**
7 **OSC.**

8 Appellants argue that the bankruptcy court erred by not
9 considering the arguments raised in response to the OSC. The
10 record does not support this contention.

11 Although the court characterized Mr. Mayor's declaration as
12 a "meaningless document," the court in its oral ruling addressed
13 the arguments raised by Appellants' counsel in his "papers":

14 And although as you say, Mr. Smyth, **as your papers** say,
15 that the -- that Mr. Mayor and Ms. Gunadi acted in good
16 faith to assert what they thought was the case, I find
17 nothing supporting that viewpoint in Judge Zurzolo's
18 findings or conclusions of law. I find the opposite,
19 that their claims were dismissed out of hand in
20 detailed findings and conclusions.

21 (Emphasis added.) The bankruptcy court did not disregard
22 Appellants' opposition to the OSC.

23 We also note that the court allowed Appellants' counsel to
24 argue at length during the hearing on the OSC. Counsel had ample
25 opportunity to raise relevant oral arguments before the court.

26 Moreover, even if the bankruptcy court erred in not
27 considering Mr. Mayor's declaration and other written
28 submissions, such error is harmless. Appellants contend that
29 Mr. Mayor's declaration would have established Appellants'
30 subjective belief that they were entitled to the property and did
31 not have to turn it over. However, as discussed above, a
32 creditor's good faith or subjective intent is not relevant to the

1 award of sanctions under § 105(a). See In re Dyer, 322 F.3d at
2 1191.

3 **4. The court did not err in sanctioning Ms. Gunadi.**

4 Appellants argue that the evidence does not support an award
5 of sanctions against Ms. Gunadi. We reject this argument.

6 The Trustee argues that the court decided in the adversary
7 proceeding that Ms. Gunadi was responsible and that the doctrines
8 of collateral estoppel and res judicata preclude relitigation of
9 that ruling. But the bankruptcy court never entered a final
10 judgment in the adversary proceeding that could have preclusive
11 effect. See Siegel v. Fed. Home Loan Mortg. Corp., 143 F.3d 525,
12 528 (9th Cir. 1998) ("The 'doctrine of res judicata bars a party
13 from bringing a claim if a court of competent jurisdiction has
14 rendered a final judgment on the merits of the claim in a
15 previous action involving the same parties or their privies.'" (citation omitted)); Fed. Deposit Ins. Corp. v. Jenson
16 (In re Jenson), 980 F.2d 1254, 1257 (9th Cir. 1992) ("To be given
17 preclusive effect, a judgment must be a final adjudication of the
18 rights of the parties and must dispose of the litigation on the
19 merits.").

21 The bankruptcy court entered both an order granting the
22 motion for summary judgment and a separate judgment. But both
23 documents speak of a "partial summary adjudication." The court
24 denied judgment for the value of the property "absent further
25 adjudication to determine the value of the Non-Monetary Estate
26 Property." The bankruptcy court never decided the issue of value
27 and did not formally dismiss the balance of the Trustee's
28 complaint. Because the judgment did not dispose of all claims as

1 to all parties, it is not a final judgment with preclusive
2 effect.

3 About a month after it entered the order and partial summary
4 judgment, the bankruptcy court entered a minute order stating
5 that "[t]he complaint filed in the above case has been disposed
6 of," and providing that "[s]ince it appears that no further
7 matters are pending that require this adversary proceeding [to]
8 remain open, it is ordered that this adversary proceeding is
9 closed." The "closing" of the adversary proceeding is an
10 administrative step, not a final judgment on the merits that
11 would have preclusive effect.

12 Even if the rulings in the adversary proceeding lack
13 preclusive effect, the bankruptcy court did not err in relying on
14 them. The bankruptcy court's holding in the adversary proceeding
15 that Mr. Mayor, Ms. Gunadi, and Cinevision failed to turn over
16 the DVDs, the post-production equipment, and the \$10,500 as
17 required by § 542(a) became law of the case. See United States
18 v. Lummi Nation, 763 F.3d 1180, 1185 (9th Cir. 2014) ("Under the
19 doctrine, a court is generally precluded from reconsidering an
20 issue previously decided by the same court, or a higher court in
21 the identical case." (internal citations omitted)).

22 Contrary to Appellants' contentions, the bankruptcy court
23 did not sanction Ms. Gunadi merely because she is an officer of
24 Cinevision. While the bankruptcy court did focus primarily on
25 Mr. Mayor's actions, the court also found that Ms. Gunadi was to
26 blame. The court stated at the hearing on the OSC:

27 So it seems to me somewhat inappropriate for a
28 principal of a debtor who filed a Chapter 11 bankruptcy
petition later converted to Chapter 7 to . . .

1 challenge the Trustee's right to turn over of assets,
2 as well as to fail to properly disclose assets. As I
3 understand it, Mr. Mayor was licensed at some point by
4 the - as a member of the California Bar and then
5 Ms. Gunadi's papers on Mr. Mayor's behalf were filed by
6 her as a member of the California Bar.

7 **That seems to me to be a violation of her**
8 **responsibility as a principal of the debtor to aid in**
9 **the turnover as opposed to resisting turnover and/or**
10 **concealing assets.** So it seems to me that the
11 responsibility is joint and several with respect to any
12 sanction to be awarded in this case and I don't see a
13 valid basis for excusing Ms. Gunadi from that
14 responsibility.

15 (Emphasis added.) The court concluded that the "record of
16 misconduct, non-cooperation, non-fulfillment of statutory duties
17 . . . which both Mr. Mayor and Ms. Gunadi share . . . indicate
18 that there should be a joint and several responsibility on the
19 part of Mr. Mayor and Ms. Gunadi with respect to defiance of a
20 court order, defiance of a statute." The record amply supports
21 these factual findings.

22 The court also had a basis to find that Ms. Gunadi actively
23 concealed the property, because the post-production film
24 equipment was under the custody and control of Ms. Gunadi. The
25 Trustee pointed out that the film equipment was located at the
26 Debtor's business address that was "owned and controlled by
27 Mr. Mayor's wife, Cindy Gunadi." The court subsequently found
28 that the equipment was located at Cinevision's offices at that
address. The bankruptcy court properly found that, when
Ms. Gunadi failed to turn over the property within her control,
she willfully violated §§ 362 and 542.

Thus, the bankruptcy court did not err in sanctioning
Ms. Gunadi.

1 **5. The court did not err in considering the findings made**
2 **in the adversary proceeding.**

3 Appellants argue that the bankruptcy court erred in relying
4 upon the factual findings from the motion for summary judgment in
5 the adversary proceeding, because the evidentiary standard
6 differs between a motion for summary judgment and a motion for
7 sanctions. We will not address this issue for two reasons.

8 First, Appellants first addressed this issue in their reply
9 brief. This is improper. See Smith v. Marsh, 194 F.3d 1045,
10 1052 (9th Cir. 1999) (“on appeal, arguments not raised by a party
11 in its opening brief are deemed waived”); Eberle v. City of
12 Anaheim, 901 F.2d 814, 818 (9th Cir. 1990) (“It is well
13 established in this circuit that [t]he general rule is that
14 appellants cannot raise a new issue for the first time in their
15 reply briefs.” (citation and internal quotation marks omitted));
16 Rule 8014(a)(8) (An appellant’s brief must include “the argument,
17 which must contain the appellant’s contentions and the reasons
18 for them, with citations to the authorities and parts of the
19 record on which the appellant relies.”).

20 Second, Appellants did not adequately present this issue to
21 the bankruptcy court. See Ezra v. Seror (In re Ezra), 537 B.R.
22 924, 932 (9th Cir. BAP 2015) (“[F]ederal appellate courts will
23 not consider issues not properly raised in the trial
24 courts. . . . An issue only is ‘properly raised’ if it is raised
25 sufficiently to permit the trial court to rule upon it.”
26 (internal citations omitted)).

27 Appellants’ papers mentioned the argument only in a garbled
28

1 and unfinished paragraph in their opposition to the OSC.⁸ At the
2 hearing on the OSC, Appellants' counsel mentioned the issue only
3 in a single sentence before the court ruled and again after the
4 judge had begun to render his oral ruling. Appellants never
5 offered any legal authority in support of their position. The
6 bankruptcy court did not err.

7 **B. The Trustee is not entitled to attorneys' fees on appeal.**

8 The Trustee requests that we award him his attorneys' fees
9 in defending against this appeal, claiming that a successful
10 party may be awarded fees when the opposing party has acted in
11 bad faith, vexatiously, wantonly, or oppressively. He argues
12 that Appellants have acted to vex and annoy, because the "appeal
13 is nothing other than a collateral attack on the Adversary
14 Action's Judgment."

15 We are unable to provide the Trustee the relief he seeks.
16 Section 105(a) does not authorize an award of attorneys' fees on
17 appeal, and "the only authority for awarding discretionary
18 appellate fees in bankruptcy appeals is [Civil] Rule 38."
19 In re Del Mission Ltd., 98 F.3d at 1154. Rule 8020(a), which

21 ⁸ The relevant portion of Appellants' incomplete objection
22 reads:

23 Plaintiff now is requesting an OSC re contempt on the
24 basis that the granting of the partial summary judgment
25 indicates that "clear and convincing evidence" supports
26 a finding of contempt of court for failure to turn over
27 assets of the estate. This, in spite of the fact, that
28 the standard for granting a summary judgment does not
require that the evidence be "clear and

Appellants did not mention or expand upon this argument in the
remainder of their opposition.

1 conforms to Civil Rule 38, states: "If the district court or BAP
2 determines that an appeal is frivolous, it may, **after a**
3 **separately filed motion** or notice from the court and reasonable
4 opportunity to respond, award just damages and single or double
5 costs to the appellee." Rule 8020(a) (emphasis added).

6 In the present case, the Trustee requests an award of
7 attorneys' fees on appeal in his answering brief, not in a
8 "separately filed motion." "A request made in an appellate brief
9 does not satisfy [Civil] Rule 38." In re Del Mission Ltd.,
10 98 F.3d at 1154 (citing Gabor v. Frazer, 78 F.3d 459, 459-60 (9th
11 Cir. 1996)). Thus, we deny the Trustee's request for attorneys'
12 fees on appeal.

13 **CONCLUSION**

14 For the reasons set forth above, we conclude that the
15 bankruptcy court did not err in sanctioning Appellants for their
16 refusal to turn over property of the bankruptcy estate.
17 Accordingly, we AFFIRM.