

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

MÖHAMMAD HAMED, by his
authorized agent, WALEED HAMED,

Plaintiffs,

v.

FATHI YUSUF and UNITED CORPORATION,

Defendants.

CIVIL NO. SX-12-CV-370

**DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO
DEEM PARTIAL SUMMARY JUDGMENT CONCEDED**

Defendants FATHI YUSUF and UNITED CORPORATION hereby file this response in opposition to the “Motion to Deem Plaintiff’s Partial Summary Judgment Motion Conceded and Reply to Defendant’s [sic] Rule 56 Request” dated December 24, 2012 (the “Motion to Deem Conceded”).¹

Plaintiffs’ Motion to Deem Conceded, which apparently has been brought under Virgin Islands Local Rule 56.1(d), is procedurally flawed. Local Rule 56.1(d) applies only upon a respondent’s “[f]ailure to respond to a movant’s statement of material facts” in a summary judgment motion. LRCi 56.1(d). No such failure to respond has occurred here, as Defendants filed a Federal

¹ Plaintiffs’ Motion to Deem Conceded improperly conflates two briefing papers: a “motion to deem . . . conceded”; and a “reply” in opposition to Defendants’ Rule 56(d) Motion, which in substance is a *response* in opposition. The instant response brief addresses Plaintiffs’ arguments directed at the “motion to deem . . . conceded” issues. Defendants have responded to the Rule 56(d) issues in a separate reply brief, filed concurrently herewith. Defendants’ arguments in this response brief and the separate reply brief are intended for the limited purpose of addressing Plaintiffs’ “motion to deem conceded” and opposition to the Rule 56(d) Motion, respectively. Defendants’ such arguments are *not* offered in response to Plaintiffs’ summary judgment motion, which response Defendants does not waive and expressly reserves pending a ruling regarding the Rule 56(d) Motion.

Rule of Civil Procedure 56(d) motion in response to Plaintiffs' summary judgment motion, and Local Rule 56.1(d) thus is inapposite. Plaintiffs' Motion to Deem Conceded is also substantively flawed, and simply seeks to deprive Defendants a full and fair resolution of this action on the merits.

Relevant Background

On November 12, 2012, prior to any meaningful discovery in this action, any scheduling order or any resolution of various pending substantive motions, Plaintiffs moved before the District Court for partial summary judgment regarding Count I of the First Amended Complaint. (D.V.I. Doc. # 36). The District Court remanded the action days later, on November 16, 2012. (D.V.I. Doc. # 39). On December 20, 2012, following the timely filing of two enlargement requests, based on the good cause set forth in the respective requests, Defendants timely filed their Rule 56(d) Motion and Alternative Motion for Enlargement of Time to Respond to Motion for Partial Summary Judgment (the "Rule 56(d) Motion").

As addressed in greater detail in the Rule 56(d) Motion, Defendants believe that it is simply too early in litigation for summary judgment to be properly briefed and opposed. (Rule 56(d) Motion at 1). No scheduling order has been entered yet, a dispositive motion to dismiss the operative complaint is pending, and several other substantive motions are fully-briefed, including Defendants' motion to strike Waleed Hamed as Mohammad Hamed's self-appointed representative or "authorized agent." (*Id.* at 2). Nor has any aspect of the substantive discovery process been completed yet. (*Id.* at 3).

Plainly, resolution of the threshold substantive motions will shape the nature and scope of discovery, as will this Court's forthcoming scheduling order. Defendants thus maintain that the underlying summary judgment motion is, at best, entirely premature and should be denied *without prejudice* under Rule 56(d) until the Court has had sufficient time to address the pending substantive

motions; and until the parties themselves have had a sufficient opportunity to conduct general discovery. (*Id.* at 4). Regardless, Defendants have served various parties, including Mohammad Hamed, with deposition notices for the limited purpose of addressing Plaintiffs' premature summary judgment motion without waiver of Defendants' rights to subsequently conduct discovery in the normal course of proceedings. (*Id.* at 7). The subject depositions are currently set to start on January 23, 2013. Alternatively, should this Court not grant the Rule 56(d) Motion, Defendants have moved for an enlargement of 14 days within which to file a substantive response in opposition to the summary judgment motion. (*Id.* at 7-8).

On December 24, 2012, notwithstanding Defendants' Rule 56(d) Motion, and rather than limiting any objections thereto to a response brief, as required by the procedural rules, Plaintiffs moved for the extraordinary relief that this Court deem conceded Plaintiffs' partial summary judgment motion. No authority is identified in the motion as a basis for bringing it. Instead, Plaintiffs rely on inaccurate or wrong factual statements in attempting to side-step a full and fair resolution of this action on the merits. As addressed below, Plaintiffs' Motion to Deem Conceded is procedurally and substantively flawed, and should be denied.

Discussion

A. The Motion to Deem Conceded Is Procedurally Flawed.

Plaintiffs do not cite to any authority or procedural basis for bringing the Motion to Deem Conceded. Presumably, Plaintiffs rely on Virgin Islands Local Rule 56.1(d), which provides that “[f]ailure to respond to a movant’s statement of material facts [in a summary judgment motion] . . . may result in a finding that the asserted facts are not disputed for the purposes of summary judgment.” LRCi 56.1(d) (emphasis added). However, Local Rule 56.1(d) is inapposite.

First, Plaintiffs do not ask this Court to possibly find that Plaintiffs' asserted facts in their summary judgment motion "may" be undisputed. LRCi 56.1(d). The reason is clear, *i.e.*, the parties clearly dispute genuine issues of material fact. (*See, e.g.*, Rule 56(d) Motion at 4 ("Plaintiffs' summary judgment motion [] fails on the merits, because the parties dispute genuine issues of material fact, and any claims regarding the existence of an alleged 'partnership' cannot be decided on the present record as a matter of law.")). Second, Local Rule 56.1(d) is inapposite because there has been no "[f]ailure to respond" under Local Rule 56.1(d), as Defendants clearly responded to Plaintiffs' summary judgment motion by (1) seeking relief under Federal Rule of Civil Procedure 56(d); (2) seeking, alternatively, an enlargement of time within which to file a substantive response in opposition to the summary judgment motion should this Court not grant the Rule 56(d) Motion; and (3) noticing depositions to address the factual issues raised in Plaintiffs' premature summary judgment motion.

Plaintiffs do not – and cannot – provide any proper procedural basis for their Motion to Deem Conceded, and the motion should be denied on this basis alone.²

B. The Motion to Deem Conceded Is Substantively Flawed.

Separately, the Motion to Deem Conceded should be denied because it relies on inaccurate factual statements and is otherwise substantively flawed. For example, Plaintiffs claim that Defendants, by filing the Rule 56(d) Motion, "conceded they could not file a meritorious response." (Motion to Deem Conceded at 2). The claim is absurd. In fact, as noted in the Rule 56(d) Motion, "Defendants intend to oppose Plaintiffs' Motion for Summary Judgment and plan to file their own

² Former Rule 6(i) of the District Court of the Virgin Islands provided, in relevant part, that, "[u]pon failure of respondent [to a summary judgment motion] to file a response and brief in opposition to the motion, the court may treat the motion as conceded and render whatever relief is asked for in the motion." This former Rule is plainly inapplicable, as, among other reasons, it has been abolished and is no longer in force.

summary judgment motion once discovery is complete. At bottom, however, Defendants do not believe that there is sufficient information or evidence available to reasonably respond to Plaintiffs' Motion for Partial Summary Judgment at this early stage." (Rule 56(d) Motion at 8). Defendants also have clearly expressed their position that "there is a fundamental dispute between the parties as to whether Mohammad Hamed . . . has [any] partnership rights whatsoever under the Virgin Islands Uniform Partnership Act or any other authority." (*Id.* at 3). Defendants' foregoing statements, among others, are hardly the supposed "conce[ssion]" that Plaintiffs portray.

Plaintiffs also claim that "the defendants have offered no evidence to rebut" Plaintiffs' argument that "receipt of a share of the profits raises the presumption of a partnership under 26 V.I.C. § 22." (Motion to Deem Conceded at 2). This claim too is entirely misplaced, as addressed in greater detail in Defendants' response in support of their Rule 56(d) Motion, filed concurrently herewith.

Accordingly, because Plaintiffs offer no other possible substantive basis supporting their Motion to Deem Conceded, the motion is meritless.

Conclusion

For the reasons in this response, in Defendants' Rule 56(d) Motion and reply in support thereof, Plaintiffs' Motion to Deem Conceded is procedurally and substantively flawed, and should be denied in full.

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Respectfully submitted,



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Dated: January 8, 2013

CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2013, a true and accurate copy of the foregoing was forwarded via email to the following: *Joel H. Holt, Esq.*, 2132 Company St., St. Croix, VI 00820, holtvi@aol.com; and *Carl J. Hartmann III, Esq.*, 5000 Estate Coakley Bay, L-6, Christiansted, VI 00820, carl@carlhartmann.com.



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