

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

MOHAMMED HAMED, by his authorized
agent WALEED HAMED,

Plaintiff,

v.

FATHI YUSUF and UNITED
CORPORATION,

Defendants.

CIVIL NO. SX-12-CV-370

ACTION FOR DAMAGES,
INJUNCTIVE AND
DECLARATORY RELIEF

JURY TRIAL DEMANDED

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HODA FATHI YUSUF HAMED'S MOTION FOR LEAVE TO INTERVENE

COMES NOW Proposed Intervenor Hoda Fathi Yusuf Hamed (hereinafter "Hoda Hamed" or "Mrs. Hamed"), by and through her undersigned counsel, and hereby files this Motion to Intervene for the *limited* purpose of objecting to the posting of Plot 100 Eliza's Retreat to secure the bond requirement issued against the Plaintiff in the above-captioned action. *See, Mountain Top Condominium Assoc. v. Dave Stabber Master Builder, Inc.*, 72 F.3d 361, 368 (3d Cir. 1995)(stating "[p]roposed intervenors need not have an interest in every aspect of the litigation. They are entitled to intervene as to specific issues so long as their interest in those issues is significantly protectable."). Mrs. Hamed contends that she has an interest in Plot 100 as it is marital property subject to distribution by the divorce court and that Plot 100 was posted as a bond in this matter without her knowledge or consent. As such, Mrs. Hamed submits that, as a matter of law, her interest in Plot 100 is sufficient to support intervention as a matter of right under Federal Rule of Civil Procedure 24(a)(2), which is applicable to this Court



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EXHIBIT

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through Superior Court Rule 7. See generally, *Anthony v. Independent Insurance Advisors, Inc.*, S.Ct. Civ. No. 2010-0002, 2012 WL 1313413 (V.I. 2012). In the alternative, Mrs. Hamed seeks permissible intervention under Rule 24(b)(1). See, *American Farm Bureau Federation v. U.S. EPA*, 278 F.R.D. 98, 111 (M.D.Pa. 2011)(stating, “[e]ven if the Movants were not entitled to intervene as of right, the court is satisfied that permissive intervention would be warranted”). Mrs. Hamed cites the following points and authorities in support of this motion.

BACKGROUND

Mohamed Hamed v. Fathi Yusuf, et. al., SX-12-CV-370

Plaintiff initiated the current action on September 17, 2012. Exhibit “1”, Docket Sheet. On April 25, 2013, this Court granted Plaintiff’s motion for preliminary injunction and set bond at \$25,000.00, which Defendants ultimately appealed to the Supreme Court.

On December 5, 2013 this Court, acting on remand from the Supreme Court, increased the amount of the bond associated with the preliminary injunction and ordered the Plaintiff to post \$1,200,000.00 less credit for the \$25,000.00 previously posted as security to pay costs and damages sustained by Defendants in the event they are found to have been wrongfully enjoined. Plaintiff attempted to satisfy the revised bond requirement by posting an assignment of cash receivables in ByOrder Investments, LLC, an assignment of interest in Plessen Enterprises, Inc. and other funds outside the control of Plaintiff and this Court. The Defendants successfully challenged Plaintiff’s attempt to satisfy the bond requirement. See, Order dated January 15, 2014.

On January 30, 2014, Plaintiff filed a notice with the Court pledging real property, of which Mrs. Hamed has an interest, to satisfy the bond requirement. See, Notice of Posting Additional Bond dated January 30, 2014. The property is mischaracterized in the notice as "unencumbered Real Property by Hisham M. Hamed, pledging Plot No. 100 Eliza's Retreat." *Id.* The property is not unencumbered as described by the Plaintiff and Hisham Hamed, but rather is marital property of which Mrs. Hamed has an interest and as evidenced by the documents on file with the Recorder of Deeds and the pending divorce action between Hisham and Hoda Hamed.

Marriage of Hisham and Hoda Hamed

Hisham Hamed married Hoda Hamed during a formal Islamic ceremony before their Mosque leader on May 7, 1999. Exhibit "2", Affidavit of Hoda Hamed dated June 7, 2013, at ¶3. The marriage was performed in accordance with Islamic law, and a marriage certificate was issued by the Mosque, in its role as part of the Virgin Islands International Islamic Society, Inc. *Id.* The marriage certificate was witnessed by Waleed Hamed and Mohammed Hannun, and signed by Hisham and Hoda Hamed as husband and wife. *Id.*, at ¶ 4. Another ceremony was held on July 18, 1999. *Id.* The second ceremony was attended by the Arabic community and the couple's family and friends. *Id.*

At the signing of the Marriage Certificate in 1999, Hoda Hamed's father, Fathi Yusuf, congratulated Hisham Hamed and informed him that he was now responsible for protecting Hoda Hamed and looking after her welfare. Exhibit "2", at ¶ 6.

The couple had four children and lived together as husband and wife for almost fourteen years until Hisham Hamed moved out of the parties' marital home in

November, 2012. **Exhibit "3"**, Affidavit of Hoda Hamed dated September 30, 2013, at ¶ 4.

History of Plot 100, Eliza's Retreat

Approximately ten years after the couple's marriage ceremony, Hisham Hamed negotiated and executed the purchase of Plots 65 and 100 Eliza's Retreat (hereinafter "marital property") from the Richard L. Davis Trust as evidenced by the Warranty Deeds dated July 12, 2010. **Exhibits "4" and "5"**, respectively. The structure comprising the marital home is located on Plot 65, which is immediately adjacent to the northern boundary of Plot 100. The purchase of the marital property was financed by a mortgage from Banco Popular in the amount of \$860,000.00. **Exhibit "6"**, Mortgage documents regarding Plots 65 and 100 Eliza's Retreat dated July 23, 2010 and recorded with the Recorder of Deeds on July 23, 2010. The mortgage was secured by the marital property and both Hisham and Hoda Hamed are the borrowers. *Id.*, at p. 1. The mortgage required Hisham and Hoda Hamed to occupy both Plots 65 and 100 as their primary residence, which the Hameds did up until November, 2012 when Hisham Hamed moved out of the marital home. *Id.*, at ¶ 6. Hisham Hamed executed the mortgage documents on his behalf and on behalf of Hoda Hamed pursuant to a power of attorney executed by Hoda Hamed in which she states in relevant part that she "appoint my husband, Hisham M. Hamed . . . as my true and lawful attorney in fact, to represent and act for me in my name, place and stead in the matters and affairs described herein." **Exhibit "7"**, Power of Attorney executed by Hoda Hamed dated July 22, 2010 and recorded with the Recorder of Deeds on July 23, 2010. The Power of Attorney executed by Mrs. Hamed allowed for Hisham Hamed to purchase Plots 65 and

100 in his name at the sale price of \$995,000.00 and \$100,000.00 and to use title to both plots to secure the mortgage. *Id.*

Approximately a year later, on or about July 1, 2011, the parents of Hoda Hamed, Fahti and Fawzia Yusuf, gifted Hisham and Hamed \$1.5 million. The gift was made as a result of Hisham Hamed's marriage to Hoda Hamed and the proceeds of the gift were used to pay off the mortgage, which encumbered the marital property and to make renovations to the marital home. The mortgage was paid in full in 2011 and the release of the mortgage was recorded on September 21, 2011. **Exhibit "8"**, Release of mortgage dated September 21, 2011. Although the mortgage, power of attorney, and release were all recorded with the Recorder of Deeds at or near the time they were executed, none of these documents appear in the title report attached to Plaintiff's Notice of Posting Additional Bond nor did Plaintiff or Hisham Hamed disclose the existence of these documents to the Court.

Hoda Fathi Yusuf Hamed v. Hisham Mohammed Hamed, SX-13-DI-42

Hisham Hamed moved out of the marital home he shared with his wife and four children in or about November, 2012. **Exhibit "3"**, Affidavit of Hoda Hamed dated September 30, 2013, at ¶ 4. After much back and forth and Mrs. Hamed's repeated attempts to save the couple's marriage, she filed for divorce on March 21, 2013. See, Complaint in *Hamed v. Hamed*, SX-13-DI-42. Mrs. Hamed advised her attorney at the time that the marital home was located on Plot 65, but neglected to inform her counsel that Plot 100 was also part of the marital estate as Hisham Hamed possessed all of the family business records and was charged with executing the purchase of both Plots 65 and 100. **Exhibit "9"**, Affidavit of Hoda Hamed dated February 27, 2014, at ¶ 5. In the

Islamic culture, it is customary for the husband to handle the family's business affairs; therefore, Mrs. Hamed gave Hisham Hamed power of attorney to negotiate the purchase of Plots 65 and 100 and Mr. and Mrs. Fathi Yusuf gifted the funds used to purchase the marital home to Hisham Hamed for the benefit of both Hisham and their daughter. *Id.*, at ¶ 6. As a result of being far removed from the family's business affairs, Mrs. Hamed neglected to list Plot 100 as marital property when she filed her Complaint for divorce as she did not have copies of the warranty deeds, mortgage documents or powers of attorney when she met with her counsel. *Id.* After filing the action for divorce, counsel for Mrs. Hamed recorded a Notice of *Lis Pendens* against Plot 65, but did not, at that time, record a similar notice against Plot 100. **Exhibit "10"**, *Lis Pendens* regarding Plot 65 dated March 22, 2013 and recorded March 22, 2013.

Hisham Hamed responded to the divorce complaint by filing a Motion to Dismiss in which he asserts that the divorce court lacked subject matter jurisdiction because the parties never executed a marriage license and were therefore never married in accordance with Virgin Islands law. *See*, Motion to Dismiss in *Hamed v. Hamed*, SX-13-DI-42, dated April 18, 2013. Hisham Hamed requested dismissal of the divorce claim and cancellation of the *Lis Pendens* filed against Plot 65. *Id.* Hisham Hamed further requested that the divorce action be allowed to proceed to address matters of child custody only. *Id.* Mrs. Hamed opposed the Motion to Dismiss. *See*, Opposition to Motion to Dismiss Complaint and Cross Motion for Partial Summary Judgment, in *Hamed v. Hamed*, SX-13-DI-42.

On January 31, 2014, the Family Division granted Hisham Hamed's Motion to Dismiss, but declined to grant the relief requested in his motion. *See*, Order in *Hamed*

v. Hamed, SX-13-DI-42, dated January 31, 2014. Rather, the Family Court dismissed the divorce action in its entirety thereby allowing the immediate appeal of the dismissal. Mrs. Hamed appealed the dismissal of the divorce action on February 4, 2014. See, Notice of Appeal in *Hamed v. Hamed*, SX-13-DI-42, dated February 4, 2014. On February 25, 2014, Mrs. Hamed learned that the appeal was dismissed for failure to pay the docketing fee. See, Order in *Hamed v. Hamed*, S. Ct. 2014-0008, dated February 25, 2014. Upon realizing that her counsel's courier had not deliver the check for the docketing fee to the Court, Mrs. Hamed immediately filed a Motion to Set Aside the Dismissal Order and delivered a check for the docketing fee, which was accepted by the Court and deposited into its account. Both the motion to set aside the order of dismissal and the payment of the docketing fee occurred within the thirty (30) day period for appealing the lower court's dismissal of the divorce action. The Hameds are now awaiting the Supreme Court's decision on the motion to set aside the appeal.

On or about February 5, 2014, after she had appealed the dismissal of the divorce action, Mrs. Hamed learned of Plaintiff's intent to post Plot 100 as part of the bond in the above-captioned case and immediately recorded a *Lis Pendens* against Plot 100 to alert potential purchasers of Mrs. Hamed's interest in Plot 100. **Exhibit "11"**, *Lis Pendens* dated and recorded February 5, 2014.

Mrs. Hamed now seeks to protect her interest in Plot 100 by filing a Motion to Intervene for the limited purposes of objecting to the posting of a portion of her marital property to satisfy the bond in the matter *sub judice*.

DISCUSSION

Federal Rule of Civil Procedure 24 governs motions to intervene. A movant may

intervene as of right pursuant to Rule 24(a) or if granted permission under Rule 24(b). In this instance, Mrs. Hamed is entitled to intervene under either section of Rule 24.

I. Mrs. Hamed May Intervene As of Right.

The Supreme Court of the Virgin Islands adopted the Third Circuit's four pronged standard for determining a motion to intervene as of right. *Anthony*, at *4 (citing *Harris v. Pernsley*, 820 F.2d 592, 596 (3d Cir. 1987)). Mrs. Hamed bears the burden of persuading this Court that: 1) her motion to intervene is timely; 2) she has sufficient interest in the litigation; 3) her interest may be affected or impaired, as a practical matter by the disposition of the action; and 4) her interest is not adequately represented by an existing party in the litigation. *Id.* Mrs. Hamed easily meets all four requirements of the standard. *Mountain Top Condo*, at 366.

A. The motion to intervene is timely.

The timeliness of a motion to intervene is determined from all the circumstances. *Mountain Top*, at 396 (citing *In re Fine Paper Antitrust Litig.*, 695 F.2d 494, 500 (3d Cir. 1982)). To determine whether the motion is timely, this Court must consider: 1) the stage of the proceeding; 2) the prejudice that delay may cause; and 3) the reason for the delay. *Id.* The passage of time does not render a motion to intervene untimely. *Anthony*, at *5. Rather, the Court must look to the stage of the proceeding as it relates to the question of prejudice caused by a delay in intervention. *Id.*, (citing *Mountain Top*, at 370). This Court should be reluctant to deny the motion to intervene solely due to untimeliness given the otherwise important interest a proposed intervenor by right would be denied. *Anthony*, at *5.

The docket sheet in this matter indicates that this action was initiated on

September 17, 2012 and that the case is in the discovery stage of litigation. The docket sheet also shows that over 300 documents have been filed and/or issued in this matter. While the docket sheet reflects that substantial litigation has already occurred, the Court must remain cognizant of the limited purpose for which Mrs. Hamed seeks to intervene.

In this instance, Mrs. Hamed motion to intervene is timely because it is filed for the limited purpose of objecting to the Plaintiff's posting of her marital property as a bond in this case. The specific issue concerning the posting of Plot 100 just recently became an issue when Plaintiff posted the marital property less than a month ago. In addition, the issues concerning the propriety of using Plot 100 to secure the bond does not require the exchange of discovery as all documents relevant to Mrs. Hamed's interest in Plot 100 is on record with the Recorder of Deeds office and is otherwise attached as exhibits to this motion. The issue raised by Mrs. Hamed's objection is a legal one, which requires limited factual inquiry. Moreover, when considering a motion to intervene, the Court must accept the movant's well-pleaded allegations as true, making no determination as to the merits of the issues in dispute. *See, Oneida Indian Nation of Wisc. v. New York*, 732 F.2d 261, 265 (2d Cir. 1984). Therefore, there has been no delay with the filing of the motion to intervene and Plaintiff does not suffer any prejudice with regards to his underlying claims as a result of Mrs. Hamed's request to intervene. *See, Sackman v. Liggett Group, Inc.*, 167 F.R.D. 6, 20 (E.D.N.Y. 1996)(explaining, "[w]hile the plaintiffs may argue that the putative intervenors may have unnecessarily delayed their efforts to enter this lawsuit, the Court finds that because these Rule 24 motions are for the limited purpose of objecting the Judge Boyle's March 19, 1996 decision (sic), any delay is negligible."); *see also, Swann v. City of Dallas*, 172

F.R.D. 211, 213 (N.D. Tex. 1997)(filing of motion to intervene for purposes of modifying supersedeas bond five months after bond is filed was timely.

B. Mrs. Hamed has a sufficient interest in the litigation.

Rule 24(a)(2) generally requires a proposed intervenor to demonstrate “an interest relating to the property . . . that is the subject of the action” The Third Circuit has held that “proposed intervenors need not have an interest in every aspect of the litigation. They are entitled to intervene as to specific issues so long as their interest in those issues is significantly protectable.” *Mountain Top*, 72 F.3d at 368. The interest must be “a legal interest as distinguished from interests of a general and indefinite character”. *Donaldson v. United States*, 400 U.S. 517 (1971). Therefore, there must be a “tangible threat to a legally cognizable interest to have the right to intervene.” *Id.*; see also, *Mountain Top*, 72 F.3d at 366.

Mrs. Hamed’s interest in Plot 100 is a legal one that is significantly protectable. In the Virgin Islands, a “marital homestead” is defined as any homestead in which a husband and wife both reside during the marriage that is owned by one or both of the spouses. V.I. CODE ANN. tit. 33, § 2305(a). Mr. and Mrs. Hamed resided at Plots 65 and 100 as husband and wife during their marriage as evidenced by Mrs. Hamed’s sworn statements and the mortgage documents in which they agreed to occupy both Plots 65 and 100 as their principal residence. Exhibit “6”, at ¶ 6. Mrs. Hamed is currently seeking to protect her interest in the marital property in the Superior and Supreme Courts of the Virgin Islands.

The issue raised by Hisham Hamed in the divorce court – whether the Hameds’ union is recognized as a marriage under law in the absence of a marriage license –

does not diminish Mrs. Hamed's interest in Plot 100 as the property is still subject to distribution in a separate civil action if the Supreme Court finds that the Family Division lacks jurisdiction to distribute the property. *Armstrong v. Armstrong*, 266 F.Supp.2d 385, 393 (D.V.I. 2003); *see also, Fuentes v. Fuentes*, CIV. NO. 089/1995, 1997 WL 889532, at *4 (Sup. Ct. May 12, 1997)(stating, "[r]eal property owned by the couple, other than the marital homestead is divided by way of a civil partition action.").

This Court should conclude that Mrs. Hamed has a significantly protectable interest in Plot No. 100.

C. Mrs. Hamed's interest may be affected by the disposition of the action.

Mrs. Hamed is further required to show that her interest in Plot 100 might be affected or impaired by the disposition of the current action. FED. R. CIV. P. 24(a)(2); *see also, Mountain top*, at 368.

Plaintiff posted Plot 100 as security for the preliminary injunction issued by this Court on April 25, 2013. The purpose of the security is to reimburse the Defendants for costs and damages they may sustain if they were found to have been wrongfully enjoined or restrained. FED. R. CIV. P. 65(c). This Court has already determined that Defendants stand to lose considerable sums in monetary damages, which far exceeds the value of Plot 100. Therefore, the posting of Plot 100 necessarily means that Mrs. Hamed stands to lose her interest in the property as a result of an action to which she is not a party and through no fault of her own.

D. Mrs. Hamed's interest is not adequately represented by an existing party in the litigation.

The United States Supreme Court has held that a movant's burden of showing

her interest is not adequately represented by an existing party to this litigation should be treated as minimal. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972). The Court must look to how the interest of the proposed intervenor compares with the interest of the present parties. 7C WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE § 1909 (cited in *Mountain Top*, at 368-369). If the interest of the proposed intervenor is not represented at all, then she is not adequately represented. *Id.*

Neither of the parties' interests in this litigation is consistent with Mrs. Hamed's interest in protecting and preserving her marital property. As such, the fourth factor weighs in favor of granting Mrs. Hamed leave to intervene in this action.

II. In the Alternative, Mrs. Hamed Should be Permitted to Intervene.

Permissive intervention should be allowed when a movant's claim has a question of law or fact in common with the main action. FED. R. CIV. P. 24(b)(2). The Court has a responsibility to ensure that the property being posted to secure the preliminary injunction is sufficient to cover any damages to Defendants if they are later found to have been wrongfully enjoined. In this instance, Mrs. Hamed's interest in her marital property and objection to the posting of any portion of that property to secure the preliminary injunction is consistent with the Court's obligation to make sure the preliminary injunction in the main action is properly secured. Therefore, Mrs. Hamed's claim shares a common question of law or fact with the main action.

CONCLUSION

Mrs. Hamed's request to intervene satisfies all four prongs of the intervention of right standard. In the alternative, her claim of interest in Plot 100 shares a common question of law or fact with the main action as the Court has an obligation to ensure that

the property posted to secure the preliminary injunction is unencumbered and otherwise sufficient to compensate the Defendants for any damages incurred as a result of being wrongfully enjoined.

WHEREFORE, and for the foregoing reasons, Proposed Intervenor, Hoda Fathi Yusuf Hamed, respectfully requests that her Motion for Leave to Intervene be **GRANTED**.

Respectfully Submitted,

THE WALKER LEGAL GROUP
Counsel for Intervenor

DATED: March 12, 2014

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 12, 2014, a true and correct copy of **HODA FATHI YUSUF HAMED'S MOTION FOR LEAVE TO INTERVENE** was served upon the following parties or their counsel as noted below:

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