

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

UNITED CORPORATION,

Plaintiff,

v.

WALEED HAMED,
(a/k/a Wally Hamed),

Defendant.

Case No. 2013-CV-3

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

**WALEED HAMED'S REPLY TO PLAINTIFF'S OPPOSITION TO
WALEED HAMED'S MOTION FOR JUDGMENT ON THE PLEADINGS**

The complaint in this case was filed in 2013 and seeks relief for acts that all occurred prior to 2003 when the Government allegedly seized certain records and began an investigation of the parties.¹ Indeed, some acts allegedly occurred in 1992 and 1993. By any calculation of time under 5 V.I.C. §31, the statute of limitations expired years ago as to both.² Because the complaint is barred by the statute of limitations on its face, defendant Waleed Hamed moved for judgment on the pleadings pursuant to *Fed. R. Civ. P. 12(c)*.³

Without citation to any case or law, the plaintiff asserts that the statute of limitations did not run as to these acts because it did not discover these claims existed until October of 2011 when it reviewed certain records released by the Government involving an investigation that started nine years earlier, stating as follows on page 2 of its opposition memorandum:

¹ The plaintiff alleges it discovered these claim in 2011, nine years after the records were seized.

² There are five counts in the complaint seeking relief for breach of fiduciary duty, constructive trust/recoupment, breach of contract, conversion and accounting. Pursuant to 5 V.I.C. §31, the statute of limitations for the torts claims is two years and six years for contract claims.

³ Plaintiff's original certificate of service stated its opposition was served some time ago, but the opposition was not received after counsel became aware of the filing and asked defense counsel for a copy, which he then sent on May 21st. **See Exhibit 1**. Thus, this reply is timely.

5. As fully averred in Plaintiffs Complaint, the funds in question were discovered in October of 2011. Plaintiff's Complaint states the following facts:

"During nine years of criminal proceedings, the U.S. Department of Justice and federal law enforcement (collectively the "U.S. Government"), gathered *significant financial documents*, including but not limited to tax returns, financial ledgers, accounting records, and various other documents concerning the parties herein. Prior to the release of the documents in October of 2011 to Plaintiff United, none of the officers of Plaintiff United had any actual or constructive knowledge of Defendant Hamed's conduct."

Complaint ¶17

In October of 2011, a review of the U.S. Government records and files further revealed the following defalcation of funds:

- i. Loans totaling \$430,500.00. approved by Defendant Hamed, presumably repaid to Defendant Hamed.
- ii. Payments made with respect to the construction of Defendant Hamed's home amounting to \$481,000.00.

Complaint ¶27

This response is significant, as the plaintiff concedes (and defendant agrees) this issue can be resolved solely by reference to the facts set forth on the face of the complaint—as the basis for its assertion that it just discovered the facts giving rise to this claim is set forth in paragraphs 17 and 27.

Courts in this jurisdiction have repeatedly held that a motion to dismiss based on the statute of limitations defense can be addressed on the face of the complaint if the essential facts are clearly stated. *Burton v. First Bank of Puerto Rico*, Civ. No. 554/2005, 2007 WL 2332084 at *3 (V.I. Super, July 19, 2007), *citing Vitalo v. Cabot Corp.*, 399 F.3d 536, 543 (3d Cir. 2005)

("where the facts are so clear that reasonable minds cannot differ, the commencement period may be determined as a matter of law").

Thus, the only question actually before this Court is whether the plaintiff's claims are time barred. While plaintiff does not direct this Court to any law to support its argument that its claims should be tolled, application of the 'discovery' issue in the Virgin Islands was discussed in detail in *In re Equivest St. Thomas, Inc.*, 53 Bankr. Ct. Dec. 260, 2010 WL 4343616, at *5-6 (Bankr. D.V.I. Nov. 1, 2010).

Generally, "a statute of limitations begins to run upon the occurrence of the essential facts which constitute the cause of action." *Simmons v. Ocean*, 544 F. Supp. 841, 843 (D.Vi.1982) (quoting *Wilcox v. Plummer's Executors*, (1830)). Under the law of the Virgin Islands, "application of the equitable 'discovery rule' tolls the statute of limitation[s] when the injury or its cause is not immediately evident to the victim." *Joseph v. Hess Oil*, 867 F.2d179, 182 (3d Cir.1989). Thus, the discovery rule provides that the statute of limitations period begins to run when the "plaintiff has discovered, or by exercising reasonable diligence, should have discovered (1) that she has been injured, and (2) that this injury has been caused by another party's conduct." *Boehm v. Chase Manhattan Bank*, 2002 U.S. Dist. LEXIS 25238, *9, 2002 WL 31986128 (citing *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1124 (3d Cir.1997)).

The Court went on to explain that this is an "objective test":

The discovery rule is to be applied using an objective reasonable person standard. *Charleswell v. Chase Manhattan Bank, N.A.*, 2009 U.S. Dist. LEXIS 54519, *35, 2009 WL 1850650 (D.V.I.2009) (citing *In re Tutu Wells Contamination Litigation*, 909 F.Supp. 980, 984 (D.Vi.1995)). The Court of Appeals for the Third Circuit explained the requisite "reasonable diligence" in *D.D. v. Idant Laboratories*, 2010 U.S.App. LEXIS 6815, *8-9, 2010 WL 1257705 (3d Cir.2010):

Reasonable diligence is an objective test, but it is also "sufficiently flexible ... to take into account the difference[s] between persons

and their capacity to meet certain situations and the circumstances confronting them at the time in question.” *Fine v. Checcio*, 582 Pa. 253, 870 A.2d 850, 858 (Pa.2005) (citations omitted). Demonstrating reasonable diligence requires a plaintiff to establish that she displayed “those qualities of attention, knowledge, intelligence, and judgment which society requires of its members for the protection of their own interests and the interests of others.” *Wilson [v. El-Daief]*, 600 Pa. 161, 964 A.2d [354], 363 n. 6 [(Pa.2009)] (citation omitted).

This is well-established, black letter law. *See, e.g. Vitalo*, 399 F.3d at 543 (discovery rule requires qualities of attention, knowledge, intelligence and judgment which society requires of its members--subject knowledge is not sufficient to invoke the rule); *Burton*, 2007 WL 2332084 (applying an objective, rather than a subjective, standard when determining whether an individual demonstrated reasonable diligence in ascertaining the source of his injury).⁴

Plaintiff clearly did not apply reasonable diligence, under the “objective standard,” regarding a 2013 discovery of its claims arising before 2003, as the 2011 'discovery' involved the records seized from the company. *Plaintiff offered no explanation as to why it "objectively" could not have discovered these losses from its own business records as the losses occurred.*

Burton v. First Bank of Puerto Rico is directly on point here. Plaintiff claimed she did not *realize* her bank had not cashed a check she had deposited to pay off her mortgage, but the

⁴ *Equivest* also addressed the doctrine of “equitable tolling” but the plaintiff has not argued that doctrine is applicable here, as it only argued that it did not 'discover' the facts giving rise to this claim until 2011. Equitable tolling involves factors not alleged by the plaintiff to have occurred here (which are applied pursuant to the same standards as tolling under the “discovery rule“), described in *Equivest, supra* at *6:

Equitable tolling may be appropriate if (1) the defendant has actively misled the plaintiff, (2) if the plaintiff has ‘in some extraordinary way’ been prevented from asserting his rights, or (3) if the plaintiff has timely asserted his rights mistakenly in the wrong forum.

Court held that where all of the information was in her possession, the failure to consider or understand the implications of the documents did not warrant the application of the discovery rule to toll the statute of limitations on her breach of contract and negligence claims against the bank. In reaching this conclusion, the court held that the plaintiff had not exercised reasonable diligence in recognizing that funds were still in the account, using an “objective” standard in making this determination. The identical reasoning applies here, as *plaintiff certainly had its records available to it before the government seized these records.*

In short, the plaintiff has failed to satisfy the burden placed on a party seeking such tolling. Clearly a plaintiff has to present a sufficient factual basis for justifying suspending the statute of limitations under the relevant “objective test,” other than simply asserting it subjectively 'just learned' about an alleged claim. Otherwise any plaintiff could force any case to trial by just claiming ignorance, which is what the statute of limitations is intended to guard against.

As there is no “objective basis” for concluding that the plaintiff acted diligently in determining the alleged losses from its business, it is not entitled to the benefit of the “discovery rule” in pursuing these alleged claims (that occurred before 2003) for the first time in 2013. The same analysis would apply under the “equitable tolling” rule as well, had the plaintiff raised it.

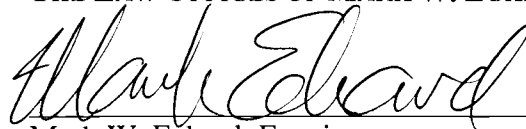
Thus, this 2013 complaint seeking relief for acts before 2003 is time barred under the statute of limitations defense on its face. It should be dismissed.

WHEREFORE, for the reasons set forth herein and in the Motion, Defendant Waleed Hamed respectfully requests that the Court (i) enter an order in substantially the same form as attached to the Motion and (ii) grant to Mr. Hamed such other and further relief as is just and proper.

THE LAW OFFICES OF MARK W. ECKARD, P.C.

Dated: June 4, 2013

By:



Mark W. Eckard, Esquire

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June, 2013, I caused a copy of the foregoing Reply to be served upon Nizar A. DeWood, Esquire, (i) by hand delivery at 2006 Eastern Suburb, Suite 101, Christiansted, VI, 00820 and (ii) by email, pursuant to the agreement of counsel, at dewoodlaw@gmail.com and, further, that I caused a copy of the foregoing Reply to be served upon Joseph A. DiRuzzo, III via email at jdiruzzo@fuerstlaw.com.

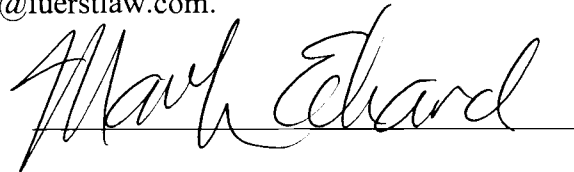


EXHIBIT 1

Plaintiff Opposition to 12C Motion - Waleed Hamed

From: **Nizar A. DeWood, Esq.** (dewoodlaw@gmail.com)

Sent: Tue 5/21/13 2:03 PM

To: mark@markeckard.com

1 attachment

05-01-2013 Response to Defendant Waleed 12c Motion.pdf (58.7 KB)

Hello Mark,

See attached Motion. I am trying to find out why you did not receive it by mail.

I will send an Amended Certificate of Service.

Thanks.

Nizar A. DeWood, Esq.

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