IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS/ST. JOHN

UNITED CORPORATION, **Plaintiff,** **v.** **WAHEED HAMED,** **(a/k/a Willy or Willie Hamed),** **Defendant.**	**Case No.:2013-CV-101** **ACTION FOR DAMAGES** **JURY TRIAL DEMANDED**

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

The complaint in this case was filed in 2013, but seeks relief for two acts in the 1990's. The first act allegedly occurred wholly in 1992 (involving a competing grocery business) and the second occurred and was completed in 1995 (involving a dispute over $70,000). By any calculation of time under 5 V.I.C. §31, the statute of limitations expired years ago as to both.[1] Because the complaint is barred by the statute of limitations on its face, defendant Hamed moved for judgment on the pleadings pursuant to *Fed. R. Civ. P. 12(c).*[2]

Without citation to authority, plaintiff filed an opposition asserting that the statute of limitations was tolled until 2013 as to the 1995 act. It asserts that plaintiff did not

[1] 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.

[2] Plaintiff's original certificate of service stated the opposition was served some time ago. However, a corrected certificate of service was filed. It states that the opposition was served on May 21, 2013. Thus, this reply is timely.

realize the meaning of its own accounting documents in its possession beginning in 1995. Without affidavits or other evidence, plaintiff's *counsel* argues plaintiff's 'discovery' of the meaning of records it had was somehow delayed because the federal government seized its accounting records between 2002 and 2011. In the opposition, plaintiff states:

> 5. As fully averred in Plaintiff's Complaint, the funds in question were discovered in late 2011. Plaintiff's Complaint states the following facts:
>
> > In October of 2011, upon information, a review of the U.S. Government records and files by the treasurer of Plaintiff United further revealed that without Plaintiff United's knowledge or consent, Defendant Waheed Hamed converted $70,000 in cash belonging to Plaintiff United by purchasing a Certified Check, dated October 7th, 1995, made payable to a third party unrelated to Plaintiff United, or any of Plaintiff's business operations.
> >
> > Complaint, ¶14.

This response is significant for two reasons.

First, 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 paragraph 14. 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").

Second, while the plaintiff asserts that it just realized it has a claim against the defendant for $70,000 based on funds accounted for in its 1995 records, it makes no similar claim as to the alleged 1992 act. Therefore, plaintiff concedes the limitation issue as to the 1992 act. The 1992 should be summarily dismissed.

Thus, the only question actually before this Court is whether the 1995 claim is time barred. While plaintiff does not direct this Court to any law to support its argument that the 1995 claim 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).[3]

---

[3] *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.

Plaintiff clearly did not apply reasonable diligence, under the "objective standard," regarding a 2013 discovery of the 1995 claim for $70,000 based on records in its possession beginning in 1995. The 2013 'discovery' involved the basic accounting records of a company from 1995. *Plaintiff offered no explanation as to why it "objectively" could not have discovered the loss of $70,000 from its business in 1995 through 2001—during the six years when it had access to the basic accounting records before they were seized by the government.* (The complaint alleges this seizure occurred 9 years before 2011.) The statute of limitations had run before the seizure. (Moreover, the complaint makes it clear that even more time—easily exceeding a total of 7 years—passed if one adds the time *after* the documents were returned, to the initial period before the seizure!)

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 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 for over 6 years to ascertain this alleged loss of $70,000 before the government seized*

the records. That time extends to over seven years if the time after return of the documents prior to 2013 is added.

In short, the plaintiff has failed to satisfy the burden on a party seeking such tolling. Clearly a plaintiff has to: (1) act within a total of 7+ years, and (2) present more facts to justify suspending the statute of limitations under the "objective test". Simply asserting it subjectively 'just learned' about an alleged claim is not enough. 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.[4]

As there is no "objective basis" for concluding that the plaintiff acted diligently in determining the loss of this $70,000 from its business, it is not entitled to the benefit of the "discovery rule" in pursuing these alleged claims (that occurred in 1992 and 1995) for the first time in 2013. The same analysis would apply under the "equitable tolling" rule as well, had the plaintiff raised it.

This 2013 complaint seeking relief for acts in 1992 and 1995 is time barred under the statute of limitations defense on its face. It should be dismissed.

---

[4] For example, while completely irrelevant to the issues raised in this motion, the $70,000 check in dispute was actually given as a donation to a private school in the Florida See **Exhibit 1**. As noted by the email from the lawyer who tracked this down, the school believes it was given by *one of the shareholders of the plaintiff*, Yusef Yusef. The point is that this information is now quite stale, which is one of the primary reasons for having a limitations period—to protect defendants from stale claims that are difficult to defend.

Dated: June 4, 2013

Carl J. Hartmann III, Esq. (Bar No. 48)
Counsel for the Defendant
5000 Estate Coakley Bay, L-6
Christiansted, VI 00820
(340) 719-8941
carl@carlhartmann.com

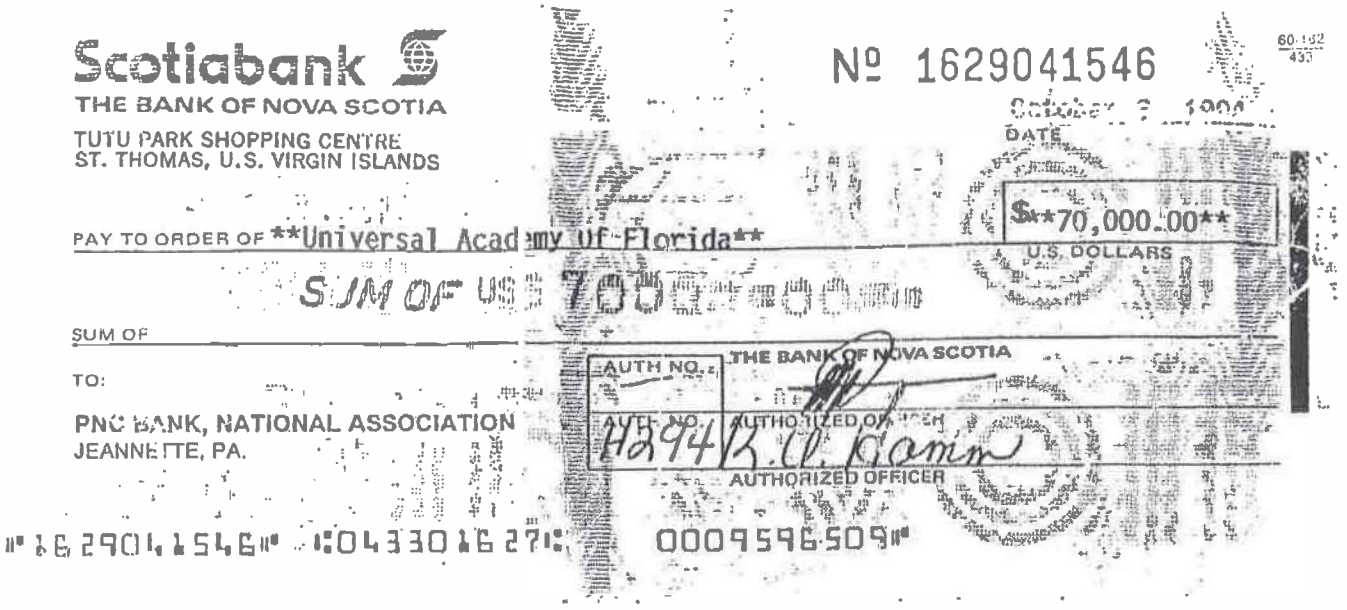
CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June 2013, I served a copy of the foregoing Motion by hand on:

Nizar A. DeWood
The DeWood Law Firm
2006 Eastern Suburb, Suite 101
Christiansted, VI 00820

and by Email on:

Joseph A. DiRuzzo, III
Fuerst Ittleman David & Joseph, PL
1001 Brickell Bay Drive, 32nd. Fl.
Miami, FL 33131
305-350-5690



Scotiabank
THE BANK OF NOVA SCOTIA
TUTU PARK SHOPPING CENTRE
ST. THOMAS, U.S. VIRGIN ISLANDS

№ 1629041546

60-152
431

DATE October 3 1994

PAY TO ORDER OF **Universal Academy Of Florida**

$**70,000.00**
U.S. DOLLARS

SUM OF US $70,000.00

SUM OF

THE BANK OF NOVA SCOTIA

TO:

AUTH NO.

PNC BANK, NATIONAL ASSOCIATION
JEANNETTE, PA.

AUTH NO. AUTHORIZED OFFICER
H2941 K. A. Damm
AUTHORIZED OFFICER

⑈1629041546⑈ ⑆043016271⑆ 0009596509⑈

EXHIBIT
A

Blumberg No. 5208

Willie Hamed

From: Randy Andreozzi <rpa@abfmwb.com>
Sent: Monday, July 02, 2012 12:26 PM
To: Nejeh Yusuf (nejeh27@earthlink.net) (nejeh27@earthlink.net); Mike Yusuf (mikefyusuf@yahoo.com); Joel Holt (Holtvi@aol.com); joel@holtvi.com; dewoodlaw@gmail.com; Gordon Rhea; Pamela Colon (pamelalcolon@msn.com); smock@islands.vi; Wally Hamed (wallyhstx@yahoo.com); Wally (wally@plazaextra.com); willie@plazaextra.com; howard.epstein@freedmaxick.com; ron.soluri@freedmaxick.com; Randy Andreozzi
Cc: Tracy Marien
Subject: FW: Donation inquiry

Hello Everyone;

I am forwarding an email we received today from the Universal Academy of Florida regarding the inquiry on the $70,000 payment to that institution. Mike or Nejeh, would you please forward to Mr. Yusuf? Please call if you have any questions. You may also contact Ms. Paula Nawawi, the bookkeeper for the institution who was our contact. Her contact information is below.

Thanks and best regards,

Randy

Randall P. Andreozzi
Partner
Andreozzi, Bluestein, Fickess, Muhlbauer Weber, Brown LLP
9145 Main Street
Clarence, New York 14031
Phone: (716) 565-1100
Fax: (716) 565-1920

contain information that is privileged and/or protected from disclosure by law. No addressee should forward, print, copy, or otherwise reproduce this message in any manner that would allow it to be viewed by any individual not originally listed as a recipient without the consent of the author. If you have received this message in error, please notify me by replying and then delete both my message and your reply and destroy any paper copies. Thank you.

From: Tracy Marien
Sent: Monday, July 02, 2012 12:15 PM
To: Randy Andreozzi
Subject: FW: Donation inquiry

From: Paula Nawawi [mailto:paulan@uaftampa.org]
Sent: Monday, July 02, 2012 11:12 AM
To: Tracy Marien
Subject: Donation inquiry

Hey Tracy,

Regarding that donation, our former Principal says that she believes the donation was made by Yusuf Yusuf. We were asking for donations for trailers for the school, the cost of the project was $270,000. and this man donated $70,000.

Take care,

Paula Nawawi
Bookkeeper
Universal Academy of Florida
Ph: (813)664-0695 x1511
Fax: (813)664-4506
Email: paulan@uaftampa.org