

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

MOHAMMED HAMED by his authorized agent)	
WALEED HAMED,)	
)	CIVIL NO. SX-12-CV-370
Plaintiff,)	
v.)	ACTION FOR DAMAGES, <i>et al.</i>
)	
FATHI YUSUF and UNITED CORPORATON,)	
)	
Defendants.)	

ORDER DENYING PARTIAL SUMMARY JUDGMENT

This matter is before the Court on Plaintiff’s Motion for Partial Summary Judgment; Plaintiff’s Memorandum in Support of his Motion for Partial Summary Judgment (jointly “Plaintiff’s Motion”); Plaintiff’s Rule 56.1 Statement of Undisputed Facts in Support of Plaintiff’s Motion for Partial Summary Judgment on Count I; (“Plaintiff’s Undisputed Facts”), all filed November 12, 2012; and Defendants’ Response in Opposition to Plaintiff’s Motion for Partial Summary Judgment (“Defendants’ Response”); Defendants’ Response to Plaintiff’s Statement of Material Facts & Defendants’ Statement of Additional Facts in Opposition to Plaintiff’s Motion for Partial Summary Judgment (“Defendants’ Additional Facts”), both filed September 16, 2013; Plaintiff’s Reply to Defendants’ Opposition to Plaintiff’s Motion for Partial Summary Judgment, filed September 26, 2013 (“Plaintiff’s Reply”); and Plaintiff’s Motion to Supplement the Partial Summary Judgment Record, filed October 18, 2013.

Plaintiff’s Motion to Supplement the Partial Summary Judgment Record will be granted. For the reasons that follow, Plaintiff’s Motion for Partial Summary Judgment will be denied.

PROCEDURAL HISTORY

The Court has previously made extensive findings of fact (see Memorandum Opinion, April 25, 2013) that will not be repeated or revisited here. The Parties have been actively engaged in

discovery, jointly submitted a Proposed Stipulated Discovery Order on August 5, 2013, approved by Scheduling Order entered August 15, 2013, which, among other things, set a December 15, 2013 deadline for the completion of factual discovery (including witness depositions). On November 27, 2013, Defendants filed an Emergency Motion to Extend Scheduling Order Deadlines (opposed by Plaintiff's Response, filed December 3, 2013), wherein Defendants cite copious amounts of untendered documents which need to be exchanged, including certain tax records which have not yet been completed.¹

In multiple voluminous filings relating to Plaintiff's Motion and otherwise, the Parties continue to dispute many facts at every turn, as well as the legal effect of the factual history of the Parties' relationship. By Plaintiff's Motion as to Count I of his First Amended Complaint, Plaintiff asserts a lack of dispute as to facts that he states establish the existence of a partnership and his entitlement to legal and equitable relief to enforce his partnership rights.

DISCUSSION

A moving party will prevail on a motion for summary judgment where the record shows that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986). The Court must determine whether there exists a dispute as to a material fact, the determination of which will affect the outcome of the action under the applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Such a dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* In analyzing the evidence, the Court must consider the pleadings and full factual record, drawing all justifiable inferences in favor of the nonmoving party, to determine whether the movant has met its burden of showing there is no genuine issue of material

¹ Defendants' motion is partially granted by separate Order entered this date, granting the Parties an additional three (3) months to complete discovery.

fact. *Matsushita Elec. Indus. Co., Ltd. V. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A party opposing a motion for summary judgment may not rest upon the allegations or denials within its pleadings, but must set forth specific facts showing there is a genuine issue for trial, such that the jury or judge as fact finder could reasonably find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248.

Pursuant to LRCi 56.1, Plaintiff has submitted Plaintiff's Undisputed Facts to which Defendants have submitted Defendants' Response and Defendant's Additional Facts. In order to prevail on Plaintiff's Motion, he must prove that there is no genuine dispute as to any material facts relative to the assertions contained within Count I and that Plaintiff is entitled to judgment as a matter of law.

Count I of Plaintiff's First Amended Complaint alleges that "A partnership was formed between the two parties" (First Amended Complaint, ¶35). Plaintiff claims, among other things, that he is entitled to 50% of the Partnership profits, joint management of the Plaza Extra supermarkets, and joint control over the Partnership funds. As such, Plaintiff asks this Court to award him "legal and equitable relief... to protect and preserve his partnership rights" as well as "compensatory damages for all financial losses inflicted by Yusuf on the Partnership" (First Amended Complaint, ¶¶ 35-38).

As to Count I, the Court finds that significant genuine issues of material fact exist that at this stage prevent granting the "drastic remedy" of summary judgment. "When reviewing the record, this Court must view the inferences to be drawn from the underlying facts in the light most favorable to the non-moving party, and we must take the non-moving party's conflicting allegations as true if supported by proper proofs." *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008), internal quotation omitted.

While the Parties do not dispute that Plaintiff and Defendant Hamed entered into an agreement whereby they would split 50% of the net proceeds from Plaza Extra Supermarkets, multiple factual disputes do exist, including whether net profits were ever actually distributed to Plaintiff. *See* Defendants' Additional Facts, at 5. Plaintiff cites Defendants' admission of an oral agreement that "called for Plaintiff Hamed to receive fifty percent (50%) of the net profits of the operations of the Plaza Extra supermarkets." *See* Plaintiff's Undisputed Facts, at 1.

However, Defendants claim that "Hamed has not provided any written evidence or documentation establishing that he received a share of the supermarket's profits at any time over the past 26 years." *See* Defendants' Additional Facts, at 5, 16. Plaintiff responds to this contention by reference to Defendants' Answer to Interrogatory No. 6 in another pending action (*United Corporation v. Waleed Hamed, et al.*, SX-13-CV-003), wherein Defendants stated that "Net Profits were not distributed. Net proceeds from the operations of Plaza Extra were used to make investments in Real Estate and other businesses in which the Hamed Family were given a 50% interest." *See* Plaintiff's Motion to Supplement the Partial Summary Judgment Record, at 2; Plaintiff's Reply, at 3.

Additionally, Defendants argue that "Plaintiff retired from the alleged partnership in or about 1996" and, as a result, is "an ordinary creditor." *See* Defendants' Response, at 6. Defendants claim that any previous right to profit sharing to which Plaintiff may have been entitled on account of his 1986 financial contributions was extinguished when Plaintiff later "retired from United Corporation d/b/a Plaza Extra – and thus from any alleged partnership interest therein." Defendants' Additional Facts, at 15. (See 26 V.I.C. §171(1)).

These disputed facts constitute a genuine issue of material fact concerning whether Plaintiff Hamed actually received "a share of the profits of a business," which would raise the presumption

that he was a partner, per 26 V.I.C. §22(c)(3).² Further, Defendants raise a genuine issue of fact disputing the continuation of the alleged partnership following Plaintiff Hamed's retirement.

The Court is obligated to "take the non-moving party's conflicting allegations as true if supported by proper proofs." *Williams*, 50 V.I. at 194. Defendants cite to testimony elicited at the preliminary injunction hearing which rendered multiple (conflicting) accounts of the alleged partnership's origins, structure, scope and longevity. *See, e.g.* Jan. 25, 2013 Hrg. Tr. 202:10-13; 207:4-5. The Court must consider the foregoing evidence as proper proofs that support the non-moving party's conflicting allegations. *See Williams*, 50 V.I. at 194. As such, regarding the issue of profit sharing, the Court finds that "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *See Anderson*, 477 U.S. at 248.

Plaintiff contends that "the existence of this partnership is further confirmed by the numerous eviction and rent notices sent by United – to Mohamed Hamed as Plaza Extra" (internal quotations omitted). *See Plaintiff's Motion*, at 10. However, Defendants submit evidence from Defendant United's controller, John Gaffney, stating that these rent notices were "intra company internal accounting transactions" whereby "income is offset by expenses" and "washed" in United Corporation's final tax return. *See Defendants' Additional Facts*, at 21. Defendants contend that this standard business practice does not amount to evidence of a partnership between Plaintiff and Defendants, but rather that Defendant United ultimately manages a joint supermarket venture between Plaintiff Hamed and Defendant Yusuf. This evidence presents additional sufficient factual

² The Court notes that Defendants have previously admitted that "Hamed received 50% of the net profits thereafter." *See Defendants' Renewed Motion to Dismiss*, and in the Alternative for a More Definite Statement, and Motion to Strike Pursuant to Rules 12(b)(6), 12(e), and 12(f) Respectively of the Federal Rules of Civil Procedure, at 3, filed November 5, 2012. However, this conclusory statement is contradicted by a variety of Defendants' other submissions, including Defendants' Additional Facts. There are multiple questions of fact which ultimately need to be decided by the ultimate fact finder as to the sharing of "partnership" profits and whether any profit sharing agreement was altered by the alleged withdrawal of Plaintiff Hamed in 1996. *See Defendants' Response*, at 6.

discrepancies which preclude at this juncture the entry of summary judgment on the issue of whether a partnership exists.

Furthermore, through Count I and in Plaintiff's Motion, Plaintiff seeks declaratory relief entitling him to "joint management" and "joint control" as part of his partnership rights pursuant to law and to the Parties' partnership agreement. *See* First Amended Complaint, ¶¶ 35-37. Defendants have put forward multiple factual assertions directly contradicting Plaintiff's claims that Hamed ever exercised joint management and control. For example, Defendants cite the February 26, 2010 Plea Agreement in the pending criminal action between the U.S. Government and United Corporation d/b/a Plaza Extra (including Waleed and Waheed Hamed) where all concerned parties adopted the position that the Hamed co-defendants were employees as opposed to individuals who exercise concurrent control with United. Defendants' Additional Facts, at 7.

Plaintiff Hamed himself testified at the preliminary injunction hearing that "Mr. Yusuf be in charge of everybody... [in] all the three stores." *See* Defendants' Additional Facts, at 7; Jan. 25, 2013 Hrg. Tr. 201:4; 210:22-23. Therefore, Defendants have offered proper proof that tends to rebut Plaintiff's assertions that Plaintiff has exercised joint control over Plaza Extra supermarkets.³

As set out above, there exist sufficient disputes as to material facts which at this stage of the proceedings preclude the award to Plaintiff of the drastic remedy of summary judgment on Count I of Plaintiff's First Amended Complaint.

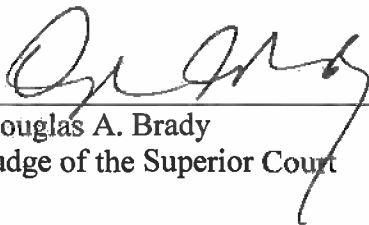
³ In addition to the genuine issues of material fact referenced above, the Parties present a litany of other factual disputes which may require further discovery and which, in the light most favorable to the non-moving party, may require determination by the finder of facts. These disputes include, among others: (1) what did Plaintiff and Defendant Yusuf mutually intend by the use of the term "partner" in reference to Defendant Hamed when they associated by their oral agreement to carry on the Plaza Extra business? *See* Defendants' Response, at 23; (2) did Plaintiff assume any personal liability as a partner, notwithstanding, for example, the fact that Defendant Yusuf solely guaranteed loans to the business? *Id.*; (3) what is the significance of the Hamed family's signatory authority on Plaza Extra bank accounts – did it originate from Plaintiff's 50% interest in the Partnership business or is it simply a feature of the managerial positions of Plaintiff's sons?; (4) did Plaintiff's sons become Plaza Extra store managers, as agents of their father, pursuant to his assertion of his partnership rights of joint control, or were they hired as managerial employees because they were nephews of Defendant Yusuf's wife? *Id.*, at 27.

On the basis of the foregoing, it is hereby

ORDERED Plaintiff's Motion to Supplement the Partial Summary Judgment Record is
GRANTED. It is further

ORDERED that Plaintiff's Motion for Partial Summary Judgment is DENIED.

December 5, 2013



Douglas A. Brady
Judge of the Superior Court

ATTEST:

VENETIA H. VELASQUEZ
Clerk of the Court

By:



Court Clerk Supervisor
12/5/13

CERTIFIED TO BE A TRUE COPY
This 5th day of Dec 20 13

VENETIA H. VELAZQUEZ, ESQ.
CLERK OF THE COURT

By  Court Clerk