

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

MOHAMMAD HAMED, by his) CIVIL NO. SX-12-CV-370
authorized agent WALEED HAMED,)
)
Plaintiff/Counterclaim Defendant,) ACTION FOR DAMAGES,
) INJUNCTIVE RELIEF
) AND DECLARATORY RELIEF
v.)
)
) **JURY TRIAL DEMANDED**
FATHI YUSUF and UNITED CORPORATION,))
)
Defendants/Counterclaimants,))
)
v.))
)
WALEED HAMED, WAHEED HAMED,))
MUFEEED HAMED, HISHAM HAMED, and))
PLESSEN ENTERPRISES, INC.,))
)
Additional Counterclaim Defendants.))
_____))

SUPERIOR COURT
THE VIRGIN ISLANDS
ST. CROIX, VI

14 APR -7 P5:00

NOTICE OF FILING

DEFENDANTS/COUNTERCLAIMANTS' OPPOSITION TO MOTION TO DISMISS FIRST AMENDED COUNTERCLAIM AS TO WAHEED HAMED

COMES NOW Defendants by and through their undersigned Counsels, Dudley, Topper and Feuerzeig, LLP, by Gregory H. Hodges, Esq. and The DeWood Law Firm, by Nizar A. DeWood, Esq., and respectfully gives notice of filing the attached **Defendants/Counterclaimants' Opposition To Motion To Dismiss First Amended Counterclaim As To Waheed Hamed.**

DUDLEY, TOPPER and FEUERZEIG, LLP

Dated: April 7, 2014

By:



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CERTIFICATE OF SERVICE

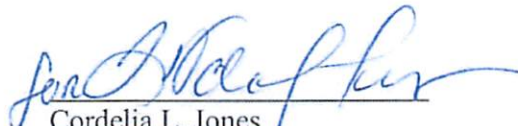
IT IS HEREBY CERTIFIED THAT a true and exact copy of the foregoing *Notice of Filing Defendants/Counterclaimants' Motion to Dismiss First Amended Counterclaim as to Waheed Hamed* was serve on the 7th day of April 2014, as specified below:

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SUPERIOR COURT
THE VIRGIN ISLANDS
ST. CROIX, V.I.

to the capacity in which a party is sued “determines both the course and nature of the damages award”). Here, throughout the Complaint and First Amended Complaint (the “Complaint”), Hamed repeatedly contends that a partnership existed between Hamed and Yusuf. See Complaint ¶¶9-12. To explain how such a partnership could continue after Hamed retired, Hamed alleges that Waleed Hamed (“Waleed”), along with Hamed’s other sons, Waheed, Mufeed Hamed (“Mufeed”) and Hisham Hamed (“Hisham”)(Waleed, Waheed, Mufeed and Hisham are referred to collectively as the “Hamed Sons”) acted as “agents”¹ for their father, Hamed, carrying out his partnership duties and responsibilities. See Complaint ¶¶13,16 and 19. While Yusuf and United have contested whether a partner can delegate partnership responsibilities in this manner or otherwise, if so, then Waheed is liable to Yusuf (as a partner) for the actions taken in his capacity as agent for Hamed. Likewise, Hamed is liable to Yusuf for the improper actions of his agent, Waheed, who was allegedly acting on Hamed’s behalf. The same holds true for the other Hamed Sons.

By contrast, in the suit² (the “Employee Suit”) which Waheed claims is duplicative, Waheed was sued in his capacity as an *employee of United*, not as an *agent of Hamed, a partner*. As an employee serving in a managerial role, Waheed had certain duties to United relating to its property. In this suit, his duties as agent of Hamed would be to the alleged partnership and to the other partner, Yusuf. As an agent for Hamed purportedly carrying out Hamed’s partnership

¹ As all of the Hamed Sons were alleged agents of Hamed to whom he had delegated his partnership responsibilities, each of the Hamed Sons have been sued by Yusuf in their capacity as agents for Hamed. Each have sought dismissal either on the same grounds that these claims by Yusuf as agents of Hamed are allegedly duplicative of the claims brought against them by United as employees or that references to them are not specific to be sufficient to state a claim.

² United v. Waheed Hamed, Superior Court of the Virgin Islands, Division of St. Croix, Civil Action No. SX-13-CV-101.

responsibilities, Waleed is liable to Yusuf (as opposed to United) for his actions in breach of the fiduciary duties owed to the partnership. Therefore, this suit is not duplicative of the Employee Suit.

II. Hamed and Waleed Have Exposed the Hamed Sons to Multiple Suits.

Both Hamed and Waleed have exposed the Hamed Sons to suits on multiple fronts. Because Hamed and Waleed have taken inconsistent positions as to the roles of the Hamed Sons as either as employees of United or agents of Hamed, they have prompted the multiple claims against the Hamed Sons. Waleed as well as the other Hamed Sons put on or take off their "agent" or "employee" hat depending upon the prevailing circumstances. In the criminal case³, the Hamed Sons were quick to hide under the "employee" hat and made no mention that their father, Hamed, (who had not been indicted) was an alleged partner in the business facing criminal charges or that they had been acting as Hamed's agents for many years with a hand in major business decisions. Likewise, whenever United was sued by a third party, the Hamed Sons were quick to testify as store managers wearing the "employee" hat rather than as an "authorized agent" of a partner for which personal liability may attach. Even in the Employee Suit, which Waheed now contends is duplicative, he did not claim the suit should be incorporated into this suit (which was already pending) but implicitly acknowledged that he was being sued in a different role. By contrast, now, in this case, when the Hamed Sons believe they stand to gain, Hamed and Waleed (as alleged "authorized agent") contend that the Hamed Sons acted as agents of Hamed with equal authority to make partnership decisions on behalf of their

³ U.S. v. United Corporation et al., Case No. 15-cr-2005 (D.V.I.).

father. Hence, the shifting positions have now exposed the Hamed Sons to different claims by different parties.

III. Waheed Has Liability In His Capacity As Agent For Hamed.

Virgin Islands law is not well developed on the issue of an agent's personal liability for the commission of a tort in a business setting. In the absence of contrary local law, V.I. Code Ann. tit.1, §4 provides that the Restatement is the law of the Virgin Islands. However, the V.I. Supreme Court has found that the Restatement is not to be applied automatically or mechanistically. Banks v. Internat'l Rental and Leasing Corp., 55 V.I. 967, 976-77 (V.I. 2011). Instead, the Court is to engage in the following three-part Banks test to determine the Virgin Islands' common law by considering: 1) whether the Virgin Islands has previously adopted a particular rule; 2) the position taken by a majority of courts from other jurisdictions; and, 3) what would be the best rule for the Virgin Islands. In Addie v. Kjaer, 2009 U.S. Dist. LEXIS 36110, 6-7 (D.V.I. 2009)(rev'd in part, 737 F.3d 854 (2013) on other grounds), the district court undertook an analysis of the Restatement of Agency and its application to the Virgin Islands with regard to tortious actions of an agent, including actions for conversion.

In Addie, the Court explained that the Restatement (Third) of Agency provides that an agent is subject to liability to a third party harmed by the agent's tortious conduct. Unless an applicable statute provides otherwise, an actor remains subject to liability although the actor acts as an agent or an employee, with actual or apparent authority, or within the scope of employment. Restatement (Third) of Agency § 7.01 (2006). The comments to that section of the Restatement explain that “[h]olding a position as an officer or director of a corporation or other organization does not insulate a person from liability for the person's own tortious conduct.”

Thus, an organizational officer is subject to liability when the officer directly participates in conduct that constitutes a tort. *Id.* § 7.01 cmt. d (emphasis supplied).

Under the Restatement, “[a]n agent whose conduct is tortious is subject to liability... whether or not the agent acted with actual authority, with apparent authority, or within the scope of employment.” Restatement (Third) of Agency 7.01 cmt. b (2006). The Restatement explains that “[t]he justification for this basic rule is that a person is responsible for the legal consequences of torts committed by that person.” *Id.* Furthermore, “[a] tort committed by an agent constitutes a wrong to the tort's victim independently of the capacity in which the agent committed the tort.” *Id.* (emphasis supplied). The Restatement illustrates these principles in a scenario that is similar to the facts of this case: A is the Chief Financial Officer of P Corporation, engaged in the manufacture of bulk pharmaceuticals. To finance an acquisition, P Corporation enters into a loan agreement with T Bank that requires P Corporation to place all payments from its customers into a special “blocked” bank account to be held in trust for T Bank. Instead, A diverts payments received from P Corporation's customers into other bank accounts for P Corporation's general use. Under applicable law, A's diversion of the payments constitutes conversion of T Bank's property. A is subject to liability to T for the conversion, although A did not derive a direct personal benefit from the converted funds. Addie v. Kjaer, 2009 U.S. Dist. LEXIS 36110, 15-16 (D.V.I. 2009), citing, Restatement (Third) of Agency 7.01 cmt. b, illus. 5.

Here, Waheed's actions which constitute misappropriation of funds, conversion, civil conspiracy, and breach of fiduciary duty to Yusuf, stem from Waheed's actions as an agent for Hamed, an alleged partner. Both Waheed and Hamed are liable to Yusuf (as a partner) for such actions under the agency theories described above. Hence, the claims in the FAC and the

Employee Suit are not duplicative as they involve different parties, which gives rise to different duties and, thus, different claims.

In the Employee Suit, Waheed was sued for breach of his fiduciary duty to United as an employee and manager of United, e.g. “*As an agent and employee of Plaintiff United, a corporate entity, Defendant Waheed Hamed owes fiduciary duties to the entity....*” See Complaint in Employee Suit, ¶22. United brought claims against Waheed for breach of contract contending that Waheed was an “at-will employee of Plaintiff United” and “as an at-will employee of Plaintiff United...had a contractual duty to act in good faith, and to properly manage the business affairs...for the benefit of Plaintiff United” and that he “has breached his contractual duties to Plaintiff United, causing [United] substantial economic and financial harm.” See Complaint in Employee Suit, ¶¶23-33. United also sought an accounting against Waheed alleging “as an agent and employee of Plaintiff United, Defendant Hamed was under full contractual obligation and other fiduciary duties to perform his functions as manager with competence, integrity, and honesty to Plaintiff United Corporation and its shareholders.” See Complaint in Employee Suit, ¶35. United requested relief that would prohibit Waheed from conducting any business on behalf of United relating to the Plaza Extra Stores.

However, if a partnership is deemed to exist for which Waheed was acting, not as an at-will employee of United but, instead, as an agent of Hamed, one of the partners, then his duties, responsibilities and potential liability would be different and would not be owed to United but rather to Yusuf or the partnership generally. Hence, the FAC has pled in the alternative if a partnership is deemed to exist.

Various allegations were made against Waheed as one of the Hamed Sons, as a result of Hamed Sons' actions as agents for Hamed to wit:

1. Yusuf contended that "Hamed and his agents have obtained in excess of \$7 million of the Plaza Extra Stores' monies" and "the Hamed Sons participated and aided and abetted in this conduct by accepting funds from the Plaza Extra Stores and, among other things, using them to purchase and improve properties for their own benefits." See FAC at ¶ 155.
2. Count XIII of the FAC for Civil Conspiracy alleges "Hamed and the Hamed Sons agreed to perform the wrongful acts and accomplish wrongful ends alleged in this Counterclaim, and they aided and abetted each other and acted on that agreement." Id. at ¶186.
3. The relief sought is for "a full accounting of all funds taken by Hamed or his agents from the Plaza Extra Stores" without authorization. Id. at ¶ 191(ii).
4. In addition, a judgment was sought "declaring that Hamed and the Hamed Sons hold any assets purchased with funds improperly taken from the Plaza Extra Stores as constructive trustees" and "imposing a constructive trust or equitable lien...over all funds taken without authorization by Hamed or his agents..." Id. at ¶ 191(iii).

These claims are unique to Waheed's⁴ capacity as an agent of Hamed and his liability is to Yusuf, if a partnership is found to exist. Hence, these claims are different from the claims alleged by United against Waheed as an employee of United in the Employee Suit.

IV. There Is No Claims Splitting As These Are Different Claims by Different Parties.

The prohibition against claims splitting is to prevent two actions against the same parties for the same claims. Frederick Banks v. State Farm, 2013 U.S. Dist. LEXIS 164410, 5-8 (W.D. Pa. Oct. 28, 2013). The Court must consider whether the new claims were filed "for the purpose of circumventing the rules pertaining to the amendment of complaints." McKenna v. City of Philadelphia, 304 Fed. Appx. 89, 91-92 (3d Cir. 2008). Here, the claims are made by different parties arising out of different duties. No amendment could have been alleged in the Employee Suit to set out the claims made in this case as the claims here relate to duties owed by Waheed, not as an employee of United, but rather, as an agent of his father, Hamed, an alleged partner. United, the plaintiff in the Employee Suit would not have had standing to sue Waheed as an agent for his father, Hamed. Rather, United's claims in the Employee Suit were limited to those claims arising out of his actions as an employee for United. Hence, there is no attempt to circumvent a pleading requirement and there is no attempt to split claims made by the same parties against the same defendants.

⁴ The same holds true for the other Hamed Sons, who also allegedly acted as agents for Hamed.

V. Conclusion

As the claims in this case are against Waheed in a different capacity, which give rise to different duties and are being made by a different party than the Employee Suit, the claims are not duplicative nor is there any claims splitting. Hamed and Waheed, by their own doing, have created the circumstances which give rise to claims against the Hamed Sons on multiple fronts. As a result of Hamed's contention that he has acted as a partner and delegated his partnership responsibilities to the Hamed Sons as agents, Waheed, as one of those agents is subject to liability for his actions in that capacity, separate and independent of his roles as employee of United. There is no other suit pending against Waheed by Yusuf in Waheed's capacity as an agent of Hamed and, therefore, this suit must be allowed to proceed.

Dated: April __, 2014

Respectfully Submitted,



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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT a true and exact copy of the foregoing
OPPOSITION TO MOTION TO DISMISS FIRST AMENDED COUNTERCLAIM AS TO WAHEED
HAMED was served via U.S. Mail, postage prepaid, fax, electronic mail or hand delivery on this
the ___th day of April, 2014 to wit:

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14 APR -7 PM 3:00

SUPERIOR COURT
THE VIRGINIA
ST. CROIX, VI