

02/09/2015

VERONICA HANDY, ESQUIRE
CLERK OF THE COURT

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

FATHI YUSUF,)	
)	S. CT. CIV. NO. 2015-0001
Appellant,)	
)	
v.)	Re: Super. Ct. Civ. No. SX-12-CV-370
)	
MOHAMMAD HAMED, WALEED)	
HAMED, WAHEED HAMED, MUFEED)	
HAMED, HISHAM HAMED, and)	
PLESSEN ENTERPRISES, INC.,)	
)	
Appellees.)	

APPELLANT'S REPLY BRIEF IN SUPPORT OF MOTION TO CONSOLIDATE

The Hamed Appellees oppose Fathi Yusuf's ("Yusuf") Motion to Consolidate this appeal with a later appeal (S.Ct. Civ. No. 2015-0009) on the grounds that "there is no appellate jurisdiction over either appeal pursuant to 4 V.I.C. § 33." (Opposition at 1). The Opposition's cursory arguments regarding the claimed lack of appellate jurisdiction over either of the two appeals have nothing to do with whether they should be consolidated. Consolidation of two appeals is appropriate when the two appeals raise common legal or factual issues or involve the same parties. *See, e.g., Public Employees Relations Board v. United Industrial Workers-Seafarers International Union*, January 13, 2011 Order in S. Ct. Civ. No. 2010-0099, p. 2 (ordering consolidation of two appeals on the basis of the "apparent overlap in parties and the factual and legal issues"). The practice in this Court and all of the federal circuit courts is that jurisdictional issues regarding one or more appeals that have been consolidated are taken up after consolidation. *See, e.g., Anthony v. Independent Insurance Advisors, Inc.*, 2012 V.I. Supreme LEXIS 30, *10 (V.I. 2012) (ordering two appeals consolidated early in case and then addressing existence of appellate jurisdiction over each of two appeals in opinion issued some two years later); *Bates v. 84 Lumber Company, L.P.*, 2006 U.S. App. LEXIS 23640, *13-*14, *28 (6th Cir.

DUDLEY, TOPPER
AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S.V.I. 00804-0756
(340) 774-4422

02/09/2015

VERONICA HANDY, ESQUIRE
CLERK OF THE COURT

2006) (ordering three appeals consolidated early in case and concluding later in an opinion that it had appellate jurisdiction over one of the appeals but lacked jurisdiction over the other two); *Harter v. Harter*, 1998 U.S. App. LEXIS 38813, *2-*3 (7th Cir. 1998) (ordering four appeals consolidated, and concluding in its opinion on the merits that it had no jurisdiction over two of the appeals but did have jurisdiction over the other two, which it then decided).

The arguments for consolidation of Yusuf's two appeals are straightforward. The parties to the two appeals are identical and the factual and legal issues are inextricably intertwined. This appeal is of a July 22, 2014 Order denying a motion (and a December 5, 2014 Order denying a motion for reconsideration) seeking, *inter alia*, to nullify, void and enjoin implementation of a corporate board resolution to place a 30-year lease on the property of Plessen Enterprises, Inc. ("Plessen"), where the Plaza Extra-West supermarket is located (the "Lease").¹ Although Plessen is owned 50-50 by Mohammad Hamed ("Hamed") and Yusuf and their respective families, the board of that corporation is ostensibly controlled by the Hamed family.² The lessee on the Lease, KAC357, Inc., is a Hamed-owned entity, and the lease is set to become effective as soon as the Hamed-Yusuf partnership is wound up as to that store. This self-dealing Lease, which was approved on April 30, 2014, at the first Plessen board of directors meeting since the formation of the corporation in 1989, held on two days notice, is intrinsically unfair to Plessen and to the Yusuf shareholders, and is unlawful under the legal standards governing self-dealing transactions

¹As the Court may recall from a prior appeal and decision in this case, reported at 2013 V.I. Supreme LEXIS 67 (V.I. Sept. 30, 2013), there are three Plaza Extra supermarkets that have been owned and operated by the Hamed-Yusuf partnership for many years. They are Plaza Extra-West and Plaza Extra-East, both located in St. Croix, and Plaza Extra-Tutu Park, located in St. Thomas.

² The composition of the Plessen Board of Directors was a hotly disputed issue that was outcome determinative, since the Lease clearly would not have been approved if Maher Yusuf was a Director as claimed by Yusuf. Nevertheless, the Superior Court found, without conducting any evidentiary hearing, that "for the limited purpose of this Motion . . . Plessen has three directors: Mohammad Hamed, Waleed Hamed, and Fathi Yusuf." *Hamed v. Yusuf*, 2014 V.I. LEXIS 52, *2-3 n. 2 (V.I. Super. Ct. July 22, 2014).

02/09/2015

VERONICA HANDY, ESQUIRE
CLERK OF THE COURT

by a corporate board. The Superior Court's July 22, 2014 Order describes the Lease as the "lynchpin" of Hamed's liquidation plan as to Plaza Extra-West. *Hamed v. Yusuf*, 2014 V.I. LEXIS 52, * 12. The Lease is also central to the Superior Court's "Order Adopting Final Wind Up Plan" (the "Wind Up Order") that is the subject of the appeal in S. Ct. Civ. No. 2015-0009 because the purported validity of the Lease is the only reason that could explain why Hamed was given the exclusive right to purchase the inventory and equipment of Plaza Extra-West in the Wind Up Order and related Wind Up Plan. That Order effectively enables Hamed and his family to take over operation of a store that was built with millions of dollars of partnership monies, without payment of any consideration to the partnership. The Lease makes impossible the only fair and equitable means of winding up the partnership's interests in that store – and the one way which maximizes partnership value upon liquidation – which is to sell the right to operate the store in a closed auction between Hamed and Yusuf. This is precisely the method that the Wind Up Order provides for the liquidation of the partnership's interest in the Plaza Extra-Tutu Park store. Besides maximizing partnership value, which the case law makes clear is the goal of any partnership liquidation, this procedure ensures that these stores will remain open and continue to employ scores of residents of the islands.

Yusuf's second appeal (S. Ct. Civ. No. 2015-0009) challenges, *inter alia*, the Superior Court's Wind Up Order with respect to Plaza Extra-West, which is the ineluctable result of its July 22 Order approving Hamed's self-dealing lease and declining Yusuf's request to void and rescind it, and to appoint a receiver for Plessen. Instead of ordering a closed-auction sale of the right to operate that store along with ownership of the 16 acres of land and improvements, the Court's Wind Up Plan simply hands the store to Hamed's sons for the next 30 years, even though it was built with partnership monies, and pursuant to a lease which was forced on Yusuf and his

02/09/2015

VERONICA HANDY, ESQUIRE
CLERK OF THE COURT

family at the April 30, 2014 Plessen board meeting, over Yusuf's adamant opposition. The Lease compels the Yusuf family to continue to do business with the Hamed family (as 50% shareholders of Plessen, the landlord on the Lease), something which contravenes the entire purpose of the wind-up of this partnership. If this litigation has made one thing perfectly clear, it is that Hamed and Yusuf cannot coexist as owners of any business. The effect of the Court's liquidation order is to require them (or their families) to do business together for the next 30 years, the inevitable result of which will be more conflict and more litigation. The inter-relationship of Yusuf's two appeals is very clear, and indeed it will be impossible for Yusuf to get relief on the second appeal without the Court addressing and resolving the first appeal in his favor.

While Hamed's three page opposition does not seriously contest the grounds for consolidation, it does contain offhand remarks about the alleged lack of appellate jurisdiction, even though Hamed has not moved to dismiss either appeal for lack of jurisdiction. While Hamed's arguments are not developed, and are irrelevant to Yusuf's motion to consolidate, Yusuf will briefly elaborate on this Court's appellate jurisdiction over both appeals.

The Wind Up Order is appealable on several alternative grounds. First, insofar as the Order directs the sale of the inventory and equipment of Plaza Extra-West (but not the sale of the right to operate the store or the sale of the land which it occupies), it is a judicial sale of property and a final order from which an appeal may be taken. See *Citibank v. Data Lease Financial Corporation*, 645 F.2d 333, 337 (5th Cir. 1981) (“[a]n order confirming a judicial sale of property is a final order from which an appeal may be taken”). Moreover, even if the Wind Up Order were treated as an interlocutory rather than a final order,³ it is in practical terms a denial of

³While the general rule is that only final orders are appealable, “Congress recognized that rigid enforcement of the finality rule may in some cases cause grave injustice,” and “[i]t therefore created

02/09/2015

VERONICA HANDY, ESQUIRE
CLERK OF THE COURT

Yusuf's request for the equivalent of a mandatory injunction to dispose of the Plaza Extra-West store by means of a closed auction between Hamed and Yusuf, and a grant of Hamed's request for the equivalent of a mandatory injunction to sell the inventory and equipment to him and hand over the store to his sons, to operate under a lease for the next 30 years. Even though not styled as an order denying an injunction, the Wind Up Order is in practical terms an order granting an injunction to Hamed and denying one to Yusuf, and hence appealable. *See Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83 (1981) (holding that appellate jurisdiction existed over an order that "did not in terms refuse and injunction," but "had the practical effect of doing so") (internal marks omitted); *see also Jones-El v. Berge*, 374 F.3d 541, 544 (7th Cir. 2004) (for appeal purposes, an order "is properly characterized as an injunction when it substantially and obviously alters the parties' pre-existing legal relationship") (citation and internal quotation marks omitted); *Rolo v. General Development Corporation*, 949 F.2d 695, 702 (3d Cir. 1991) (appellate jurisdiction "extends to the review of orders that grant or deny injunctions and orders that have the practical effect of granting or denying injunctions and have serious perhaps irreparable, consequence," and noting "the label put on an order . . . does not prevent us from treating it as an injunction . . .") (citation and internal quotation marks omitted); *Westar Energy v. Lake*, 552 F.3d 1215, 1222 (10th Cir. 2009) (for purposes of appellate jurisdiction, "this court defines injunctive relief as all equitable decrees compelling obedience under the threat of contempt") (citation and internal quotation marks omitted).⁴

**DUDLEY, TOPPER
AND FEUERZEIG, LLP**

1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00604-0756
(340) 774-4422

certain exceptions by statute" in 28 U.S.C. § 1292. *United States v. Helmsley*, 864 F.2d 266, 268 (2d Cir. 1988). The exceptions in § 1292(a) and (b) have been adopted virtually verbatim by the Virgin Islands legislature in V.I. Code Ann. tit.4, §33 (b) and (c).

⁴28 U.S.C. §1292(a)(1), the provision giving the federal appellate courts appellate jurisdiction over orders granting, denying or modifying injunctive relief, is virtually identical to V.I. Code Ann. tit. 4, § 33(b)(1).

02/09/2015

VERONICA HANDY, ESQUIRE
CLERK OF THE COURT

The Wind Up Order is also appealable under V.I. Code Ann. tit. 4, § 33(b)(2), which creates appellate jurisdiction over interlocutory orders “appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales of other disposal of property.” This section of the V.I. Code is identical to 28 U.S.C. § 1292(a)(2), and the federal decisions interpreting that section offer guidance to, but are not binding on this Court’s construction of the Virgin Islands provision.⁵ While section 1291(a)(2) refers to the term “receivers,” the federal cases have construed this to mean a “receiver or the equivalent.” *In re Klein*, 940 F.2d 1075, 1077 (7th Cir. 1991) (emphasis added). *See also Sriram v. Preferred Income Fund III Limited Partnership*, 22 F.3d 498, 501 (2d Cir. 1994) (treating a “liquidating trustee” as a receiver for purposes of section 1292). Here, the Superior Court itself has essentially taken on the mantle of a receiver by adopting a plan “for sale or other disposal of [partnership] property,” and then designating Yusuf as liquidating partner (subject to oversight by a Special Master, the Honorable Edgar A. Ross) to carry out the provisions of the Wind Up Order. By adopting its own specific Wind Up Plan to dispose of the Plaza Extra stores, after reviewing competing plans submitted by the parties, the Superior Court has assumed the responsibilities that a receiver would ordinarily have in determining how to dispose of partnership assets. It would be anomalous to hold that a liquidation order like this Wind Up Order, but instead signed by a receiver, would be appealable, but that the same order signed by the trial judge would not be.

Finally, the *Cohen* collateral order doctrine and the pragmatic finality doctrine also offer alternative, solid grounds for appellate jurisdiction of the Wind Up Order. The *Cohen* doctrine, which was first recognized by the U.S. Supreme Court in *Cohen v. Beneficial Indus. Loan Corp.*,

⁵Neither the federal provision nor the Virgin Islands provision that copied it is a model of draftsmanship. What for instance is meant by “interlocutory orders . . . refusing orders . . .?”

02/09/2015

VERONICA HANDY, ESQUIRE
CLERK OF THE COURT

337 U.S. 541 (1949), allows appellate courts “to review a narrow class of decisions that do not terminate the litigation, but are sufficiently important and collateral to the merits that they should nonetheless be treated as final.” *Norwest Bank Wisconsin, N.A., v. Malachi Corporation*, 2007 U.S. App. LEXIS 19537, *7 (6th Cir. 2007). “Before the collateral order doctrine will apply, the order in question must: (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment.” *Id.* at *7 (citation omitted) (internal marks omitted). All three requirements are satisfied by the second appeal. Once the right to operate Plaza Extra-West is turned over to Hamed and his sons, they will enter contracts with vendors, enter insurance contracts, assume responsibility for paying gross receipts and income taxes, and for payroll obligations to its employees. They may make physical alterations to the store. Trying to unwind these actions at the end of this case will be next to impossible. If appellate review of the Wind Up Order is not undertaken now, it will become effectively unreviewable.

The pragmatic finality doctrine that has been adopted by some federal appellate courts offers yet another basis for appellate jurisdiction by this Court. Under this doctrine, a “court may assume jurisdiction where the danger of injustice by delaying appellate review outweighs the inconvenience and costs of piecemeal review.” *Albright v. UNUM Life Ins. Co. of Am.*, 59 F.3d 1089, 1093-94 (10th Cir. 1995). The pragmatic finality doctrine is “more subjective” than the *Cohen* collateral order doctrine, and involves “*ad hoc* adjustments to the final decision requirement” *Boughton v. Cotter Corp.*, 10 F.3d 746, 748 (10th Cir. 1993). It remains an important exception to the final order requirement, and gives appellate courts the flexibility needed to accept jurisdiction where serious injustice to a party could otherwise occur.

DUDLEY, TOPPER
AND FEUERZEIG, LLP
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422

02/09/2015

VERONICA HANDY, ESQUIRE
CLERK OF THE COURT

As for the Court's July 22 Order (and its December 5 Order denying reconsideration), that order is also appealable as an injunctive order which in practical terms denied a motion seeking to enjoin implementation of, among other things, the Plessen Board resolution authorizing the Lease of the Plaza Extra-West property to the start up company owned by Hamed's sons. And even it were not appealable as an order denying an injunction, the July 22 Order is also appealable under a different ground – pendent appellate jurisdiction. “When an ordinarily unappealable interlocutory order is inextricably entwined with an appealable . . . order, the former may be reviewed at the same time if, but only if, there are compelling reasons for not deferring the appeal of the former order to the end of the lawsuit” *People of the State of Illinois v. Peters*, 861 F.2d 164, 166 (7th Cir. 1988). Here, as the discussion above makes clear, there is no meaningful way for this Court to review the Wind Up Order without also reviewing the July 22 Order, which denied Yusuf's request to vacate the Lease. As such, at the very least, this Court has pendent appellate jurisdiction over the July 22 Order.

For all of the foregoing reasons, Yusuf's Motion to Consolidate should be granted.

Respectfully Submitted,

DUDLEY, TOPPER AND FEUERZEIG, LLP

DATED: February 9, 2015

By: /s/Gregory H. Hodges
Gregory H. Hodges (VI Bar No. 174)
Stefan B. Herpel (VI Bar No.1019)
Law House
1000 Frederiksberg Gade - P.O. Box 756
St. Thomas, VI 00804
Telephone: (340) 774-4422
Facsimile: (340) 715-4400
E-Mail: ghodges@dtflaw.com
sherpel@dtflaw.com

**DUDLEY, TOPPER
AND FEUERZEIG, LLP**

1000 Frederiksberg Gade

P.O. Box 756

St. Thomas, U.S. V.I. 00804-0756

(340) 774-4422

02/09/2015

VERONICA HANDY, ESQUIRE
CLERK OF THE COURT

and

Nizar A. DeWood, Esq. (V.I. Bar No. 1177)
The DeWood Law Firm
2006 Eastern Suburbs, Suite 101
Christiansted, VI 00830
Telephone: (340) 773-3444
Telefax: (888) 398-8428
Email: info@dewood-law.com

Attorneys for Defendant/Appellant Fathi Yusuf

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2015, I caused the foregoing **Appellant's Reply Brief In Support Of Motion To Consolidate** to be electronically filed with the Clerk of the Court using the V.I. Supreme Court e-filing system and that the attorneys listed below, who are Filing Users, will be e-served by the Notice of Electronic Filing:

Joel H. Holt, Esq.
Law Offices of Joel H. Holt
2132 Company Street
Christiansted, V.I. 00820
Email: holtvi@aol.com

Counsel for Plaintiff/Appellee
Mohammad Hamed

Mark W. Eckard, Esq.
Eckard, P.C.
P.O. Box 24849
Christiansted, VI 00824
Email: mark@markeckard.com

Counsel for Counterclaim Defendants/Appellees
Waleed Hamed, Mufeed Hamed, and Hisham
Hamed

Carl J. Hartmann, III, Esq.
5000 Estate Coakley Bay, #L-6
Christiansted, VI 00820
Email: carl@carlhartmann.com

Counsel for Counterclaim Defendant/Appellee
Waheed Hamed

Jeffrey B.C. Moorhead, Esq.
C.R.T. Building
1132 King Street
Christiansted, VI 00820
Email: jeffreymlaw@yahoo.com

Counsel for Counterclaim Defendant/Appellee
Plessen Enterprises, Inc.

/s/Gregory H. Hodges

DUDLEY, TOPPER
AND FEUERZEIG, LLP
1000 Frederiksborg Gade
P.O. Box 788
St. Thomas, U.S. VI. 00804-0788
(340) 774-4422