

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

MOHAMMAD HAMED, by his)
authorized agent **WALEED HAMED**,)

Plaintiff/Counterclaim Defendant,)

vs.)

FATHI YUSUF and UNITED CORPORATION,)

Defendants/Counterclaimants,)

vs.)

**WALEED HAMED, WAHEED HAMED,
MUFEEED HAMED, HISHAM HAMED, and
PLESSEN ENTERPRISES**,)

Additional Counterclaim Defendants.)

CIVIL NO. SX-12-CV-370

ACTION FOR DAMAGES,
INJUNCTIVE RELIEF
AND DECLARATORY RELIEF

**OPPOSITION TO MOTION FOR RECONSIDERATION OF PORTION OF RENT
ORDER**

Defendants/counterclaimants Fathi Yusuf (“Yusuf”) and United Corporation (“United”) (collectively, the “Defendants”), through their undersigned counsel, respectfully submit this Opposition to the “Motion for Reconsideration of Portion of Rent Order” (the “Motion”) filed by plaintiff/counterclaim defendant Mohammad Hamed (“Hamed”). The Motion should be denied because Hamed has failed to establish the “need to correct clear error or prevent manifest in justice.” *See* LRCi 7.3(3)¹, made applicable to proceedings in this Court by Super. Ct. R. 7. Essentially, Hamed asks this Court to stay enforcement of its April 27, 2015 Order (the “Order”) requiring \$3,999,679.73 in past due rents for the period January 1, 1994 to May 4, 2004 to be paid to United from the partnership joint account so that this allegedly disputed

¹ Although Hamed claimed that “this situation warrants reconsideration under subsections (2) and (3) of District Court R. 7.3,” *see* Motion at p. 3, he never even argued entitlement to relief pursuant to LRCi 7.3(2), which addresses the “availability of new evidence.”

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claim can be handled pursuant to the “Claims Resolution Process” purportedly contemplated by § 9, Step 6 of this Court’s Final Wind Up Plan of the Plaza Extra Partnership (the “Plan”). Although Hamed twice refers to the “Claims Resolution Process,” *see* the Motion at p. 2 and 3, nowhere in the Plan is any such process defined or addressed. Section 9, Step 6 of the Plan clearly applies only to the Partners², not to a third-party holder of a Claim³ such as United. Since the Motion is nothing more than a request to stay enforcement of the Order without even addressing, much less establishing, the factors ordinarily required for a stay, the Motion should be summarily denied.

Legal Standard for Reconsideration and Stay

The standards for reconsideration are difficult to meet. *Four Winds Plaza Corp. v. Caribbean Fire and Assoc.*, 2008 U.S. Dist. LEXIS 13180, * 6 (D.V.I. 2008). The Rule is “intended to focus the parties on the original pleadings as the ‘main event,’ and to prevent parties from filing a second motion with the hindsight of the court’s analysis covering issues that should have been raised in the first set of motions.” *Bostic v. AT&T of the Virgin Islands*, 312 F. Supp. 2d 731, 733 (D.V.I. 2004). It “is not a vehicle for registering disagreement with the court’s initial decision, for rearguing matters already addressed by the court, or for raising arguments that could have been raised before but were not.” *Addie v. Kjaer*, 2005 WL 1473847, *1 (D.V.I. June 13, 2005), quoting *Bostic*, 312 F.Supp. 2d at 733. “Reconsideration is an extraordinary remedy not to be sought reflexively or used as a substitute for appeal.” *Id.* *See also Brunn v. Dowdye*, 2009 V.I. LEXIS 19, * 2 (Superior Ct. Oct. 19, 2009) (“Motions for reconsideration are granted sparingly” and quoting from *Bostic*); *First American Development*

² Unless otherwise defined, capitalized terms shall have the same meaning as provided in the Plan.

³ As defined at ¶ 1.4 of the Plan.

Group/Carib, LLC v. WestLB AG, 2010 V.I. LEXIS 68, * 9 (Superior Ct. Sept. 29, 2010) (A motion to reconsider “will fail if it seeks to ‘reargue matters already addressed by the Court or [raise] arguments that could have been raised before but were not,’” (quoting from *Bostic*)).

Hamed certainly has not established that this Court “overlooked some dispositive factual or legal matter that was presented to it,” as is required to show clear error or manifest injustice. *Cabrera Point Development, Inc. v. Evans*, 52 V.I. 968, 975 (D.V.I. 2009) (quoting from *In re Rose*, 2007 U.S. Dist. LEXIS 64622, *3 (D.N.J. Aug. 30, 2007)).

What dispositive factual matter that was presented to the Court does Hamed claim was overlooked? Hamed provides no clue. What dispositive legal matter that was presented to this Court does Hamed claim was overlooked? Again – nothing.

The test for determining whether to grant a stay (or partial stay) is “identical to that which applies to a request for a preliminary – as opposed to a permanent – injunction.” *Tip Top Construction Corporation v. Government of the Virgin Islands*, 2014 V.I. Supreme LEXIS 15, *4 (V.I. 2014) (citing to *Yusuf v. Hamed*, 2013 V.I. Supreme LEXIS 87, *12, n.3 (V.I. 2013)). The test for a preliminary injunction is

- (1) whether the movant has shown a reasonable probability of success on the merits;
- (2) whether the movant will be irreparably injured by denial of the relief;
- (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and
- (4) whether granting the preliminary relief will be in the public interest.

Yusuf v. Hamed, supra, at *9. Our Supreme Court has not yet decided whether all four of these factors must be met (which would make it a “sequential test”) or whether it is enough if some but not all of these factors are satisfied (a “sliding-scale test”). Id. at *11. Hamed did not address any of these factors in the Motion.

ARGUMENT

At page 1-2 of the Motion, Hamed tells the Court what portions of the Order he is not complaining about. For reasons Hamed fails to explain, he points out that the Plan provides for the establishment of a Liquidating Expense Account to be used by the Liquidating Partner for Wind Up Expenses. However, if one simply looks at the definition of Liquidating Expense Account at § 1.7 of the Plan and Wind Up Expenses at § 1.34 of the Plan, it is clear that these concepts have nothing to do with United's Claim for any portion of the rent awarded in the Order. While Hamed appears to magnanimously avoid reconsideration of the payment of rent that accrued since 2012, incredibly, he suggests that this rent somehow is tied to the issue of the exact square footage occupied by the Plaza Extra-East store. However, it is undisputed that beginning on January 1, 2012, the rent for Bay 1 of the premises occupied by the Plaza Extra-East store was based on the same percentage of sales formula that led to the payment (by check signed by Waleed Hamed) of \$5,408,806.74 on February 7, 2012, covering the period from May 5, 2004 to December 31, 2011. The exact square footage of the Bay 1 space occupied by Plaza Extra-East after January 1, 2012 simply has no relevance whatsoever to rent calculations based on the percentage of sales formula used to calculate both the \$5,408,806.74 payment and the undisputed portion of the rent awarded in the Order. Defendants defy Hamed to explain how a determination of the exact square footage is relevant to the issue of the immediate payment of this rent.

Hamed claims that the disputed portion of the Order requiring the payment of rent from January 1, 1994 to May 4, 2004 in the principal amount of \$3,399,679.73 "is part of the 'Claims Resolution' process and should not be paid . . . until the final accounting is completed due to potential offsets against it." *See* Motion at p. 2. Hamed then goes on to claim that § 9,

Step 6 of the Plan requires “that the parties submit their proposed accounting and distribution plan 45 days after the completion of the liquidation Partnership Assets. Thus, the ‘Claims Reserve Account’ has its own procedure that would allow offsets against amounts owed a party, such as this rent claim for 1993 [sic] – 2004.” *Id.* Section 9, Step 6 of the Plan only requires the Partners, Hamed and Yusuf, not United or any other parties, to submit a proposed accounting and distribution plan following completion of the liquidation of the Partnership Assets. Step 6 should be read in conjunction with § 4 and 5 of the Plan, which deal with the powers and duties of the Liquidating Partner. Section 4 provides that “the Liquidating Partner shall have authority to . . . pay and settle Debts” Section 5 of the Plan provides, in pertinent part, as follows:

The Liquidating Partner . . . shall pay all just Partnership Debts. The Liquidating Partner shall provide a Partnership accounting. Any Liquidation Proceeds and Litigation Recovery shall be placed into the Claim Reserve Account from which all Partnership Debts shall first be paid. Following payment of all Partnership Debts, any remaining funds shall be continue to be held in the Claims Reserve Account pending distribution pursuant to agreement of the Partners or order of the Court following a full accounting and reconciliation of the Partners’ capital accounts and earlier distributions.

Accordingly, the Order has determined that United’s Claim for unpaid rent in the principal amount of \$3,399,679.73 is a just Debt. The Liquidating Partner has already proposed to the Master that this Debt be paid as provided in the Order and the Plan. Hamed can certainly point to no provisions of the Plan that even suggest that this long overdue Debt of the Partnership should not be paid now.

Hamed’s claims that Yusuf’s withdrawal of \$2,784,706.45 on August 15, 2012 and the payments totaling \$504,591.03 to attorneys were somehow improper can and will be addressed as part of the Partners’ accounting, reconciliation, and proposed distribution of the funds

remaining in the Claims Reserve Account after payment of all Debts. After all, the disputed withdrawal of \$2,784,706.25 was made by Yusuf, as acknowledged by Hamed in ¶ 29 of his First Amended Complaint. Such withdrawal was merely effected by a check made payable to United. Accordingly, all of Hamed's alleged claims can be resolved by way of the accounting to be submitted by the Partners and Hamed makes no suggestion whatsoever that any of his claims cannot be effectively offset against or collected from Yusuf.

To the extent the Motion is treated as seeking a stay of execution of the Order, it completely fails to address the factors traditionally considered by courts when they are asked to provide the extraordinary relief of a stay or injunction. Defendants should not be required to address those factors, which Hamed has completely ignored, in the first instance in this Opposition. It is respectfully submitted that it would be improper for Hamed to address these factors for the first time in a Reply to this Opposition. If he does so, however, Defendants should be entitled to submit a sur-reply.

For all of the foregoing reasons, the Motion should be denied.

Respectfully Submitted,

DUDLEY, TOPPER AND FEUERZEIG, LLP

DATED: May 11, 2015

By:



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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of May, 2015, I caused the foregoing **Opposition To Motion For Reconsideration Of Portion Of Rent Order** to be served upon the following via e-mail:

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