

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,)
MUFEED HAMED, HISHAM HAMED, and)
PLESSEN ENTERPRISES, INC.,)

Additional Counterclaim Defendants.)

MOHAMMAD HAMED,)
)
Plaintiff,)

v.)

UNITED CORPORATION,)
)
Defendant.)

MOHAMMAD HAMED,)
)
Plaintiff,)

v.)

FATHI YUSUF,)
)
Defendant.)

CIVIL NO. SX-12-CV-370

ACTION FOR DAMAGES,
INJUNCTIVE RELIEF
AND DECLARATORY RELIEF

Consolidated With

CIVIL NO. SX-14-CV-287

ACTION FOR DAMAGES
AND DECLARATORY RELIEF

CIVIL NO. SX-14-CV-278

ACTION FOR DEBT
AND CONVERSION

JURY TRIAL DEMANDED

**FATHI YUSUF'S BRIEF IN RESPONSE TO
HAMED'S NOTICE OF SUPPLEMENTAL AUTHORITY**

Plaintiff has filed a Notice of Supplemental Authority which cites to and quotes from the Virgin Islands Supreme Court decision in *United Corporation v. Waheed Hamed*, 64 V.I. 297 (V.I. 2016) (hereafter "*United*"). Plaintiff offers this case as new authority in support of his May 13, 2014 Motion for Partial Summary Judgment as to Statute of Limitations. In an Order dated April 27, 2015, this Court denied Plaintiff's Motion as to United's rent claims regarding Bay 1 at the United Shopping Center, which was the primary space occupied by Plaza-Extra East. Other rent claims for smaller bays used by Plaza Extra-East remain unresolved, and have been made part of Defendant Fathi Yusuf's ("Yusuf") partnership claims presented to the Master on September 30, 2014.¹

United is not a new case, as Plaintiff implies, but instead is one that was decided almost a year ago, on January 12, 2016. Plaintiff is apparently bringing this case to the Court's attention in order to buttress its position taken in recent briefing that partnership claims should not be resolved initially by the Master, in a Report and Recommendation, and ultimately by the Court, in its review of the Master's Report and Recommendation. Plaintiff appears to believe, erroneously, that this case supports its position that any Yusuf partnership claims for which it has a statute of limitations defense must be resolved by a jury that would be specially empaneled to decide those limitations issues.

¹United also seeks rent as to other smaller bays at the United Shopping Center (Bays 5 and 8) that were used by Plaza Extra-East to warehouse inventory for the grocery store. Those additional rent claims were briefed in an August 12, 2014 motion for partial summary judgment filed by United and Yusuf, but were not addressed in the Court's April 27, 2015 order granting United's motion as to unpaid rent for Bay 1. Yusuf submitted partnership claims regarding, among other things, the unpaid rent for Bays 5 and 8 to the Master on September 30, 2016.

Even a cursory review of *United* shows that it does not stand for the proposition that whenever a party raises a statute of limitations defense, there are necessarily genuine issues of material fact that preclude summary judgment and require submission of those issues to a jury for resolution. In *United*, *United* alleged that, while Waheed Hamed was managing the Plaza Extra-East store, he misappropriated *United* inventory to “secretly operate a competing business.” 64 V.I. at 300. *United* also alleged “that in 1995, Hamed used \$70,000 of *United*’s funds for an unauthorized purposes through a cashier’s check.” *Id.* at 300. *United* claimed that “it only learned of these acts in October 2011, when federal prosecutors returned financial records that were seized in 2001 as part of the tax-evasion prosecution against *United*, Hamed and other defendants that this Court is well aware of from prior briefing in this case.” *Id.* The Superior Court dismissed the claim regarding the \$70,000 misappropriation by granting Hamed’s motion for judgment on the pleadings. The Court later dismissed the claim regarding the competing business by granting a motion for summary judgment.

On appeal, the Virgin Islands Supreme Court reversed both of the rulings of the Superior Court, albeit for different reasons. With respect to the dismissal of the claim based on an alleged \$70,000 misappropriation, the Virgin Islands Supreme Court held that by considering evidence outside the four corners of the pleadings, the Superior Court converted the motion to dismiss for judgment on the pleadings into a motion for summary judgment. *See id.* at 307. The Supreme Court held that while the Superior Court had the power to convert the dismissal motion into a summary judgment motion, it should have given *United* notice and an opportunity to respond before doing so. *Id.* The Supreme Court held that by failing to give *United* notice and an opportunity to respond, the Superior Court erred by depriving *United* of the opportunity to try to “submit[] evidence that would create genuine issues of material fact regarding when it

discovered the conversion and whether it should have discovered the conversion earlier if it had exercised reasonable diligence.” *Id.* at 307. In the course of discussing Waheed Hamed’s motion to dismiss, the Supreme Court did state in *dicta* that the discovery rule issue of when a party knew or should have known of its injury is “typically a question of fact,” and that kind of issue “typically cannot be decided on the pleadings alone.” *Id.* at 306. But saying that discovery rule issues do not usually lend themselves to judgments on the pleadings is obviously not the same as saying that they cannot usually be resolved by summary judgment, and the Supreme Court expressed no such view. It simply held that denying United the opportunity to attempt to create a triable issue of fact regarding the applicability of the discovery rule was reversible error.

With respect to the Superior Court’s grant of summary judgment on United’s second claim – the claim that Waheed Hamed had used United inventory to secretly operate a competing business – the Supreme Court’s reversed that ruling because Hamed had failed to carry his burden in a summary judgment motion to “identify[] evidence indicating that there is an absence of any issue of fact.” *Id.* at 309. Hamed moved for summary judgment on the discovery rule by attaching two affidavits of FBI agents involved in the criminal prosecution stating that “United had full access to the documents seized by federal prosecutors. . . as early as 2003.” *Id.* at 310. Among these documents were the “1992 tax returns [of Waheed Hamed] revealing Hamed’s competing business . . .” *Id.* at 308. Hamed argued that by virtue of having had access to this document as far back as 2003, the statute of limitations had “expired long before United filed its complaint in this case.” *Id.* at 310.

The Supreme Court ruled that Hamed had failed to carry his burden of showing an absence of a genuine issue of a material fact regarding the applicability of the discovery rule because “mere access to these documents was not enough to prevent the statute of limitations

from being tolled . . .” *Id.* at 310. The Court said that “[t]here must also be a suspicious circumstance to trigger a duty to exploit the access,” *id.* at 310, something which Hamed had not showed. The Supreme Court ruled that because “Hamed did not meet his initial burden at summary judgment,” the “Superior Court erred in granting summary judgment to Hamed . . .” *Id.* at 310.

The Supreme Court went on to discuss United’s failure to heed an order of the Superior Court to submit “proof by affidavit from the United States Attorney’s Office that [United] no longer has access to review documents held by the federal government.” *Id.* at 310. The Court ruled that the Superior Court’s order was erroneous, because even if access to documents was relevant to the discovery rule analysis, the Superior Court by issuing this order was in effect requiring United to “definitively prove its case” in order to avoid summary judgment. *Id.* at 310. As the Supreme Court said, once the moving party makes an initial showing that there is no genuine issue of material fact, “the nonmoving party cannot be required to definitively prove its case at summary judgment, or even to provide the most convincing evidence supporting its case.” *Id.* at 311. “Its only burden,” the Supreme Court stated, “is to submit sufficient evidence to create a genuine issue of material fact for a jury to resolve.” *Id.* at 311.

The Supreme Court’s statement in *United* that the nonmoving party need only raise a genuine issue of material fact in order to avoid summary judgment is hardly a novel or remarkable one. It is basic to all summary judgment motion practice and is well-known to this Court. The statement certainly does not mean, as Hamed said in a recent brief, “that a jury **must** hear factually based statutory limitations defenses such as the ones presented here.” (emphasis in original). Hamed’s October 18, 2006 Opposition to Defendants’ Motion to Strike Hamed’s Response re Jury Issues, p. 7 (discussing *United*). In short, other than showing that mere access

to documents that reveal tortious conduct does not establish knowledge of a claim for discovery rule purposes – an argument that Mohammad Hamed has previously made in the instant case in his own summary judgment motions regarding the statute of limitations – *United* has no relevance to resolution of the remaining partnership claims in this case.²

Respectfully submitted,

DUDLEY, TOPPER and FEUERZEIG, LLP

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By:



Gregory H. Hodges (V.I. Bar No. 174)
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, VI 00804
Telephone: (340) 715-4405
Telefax: (340) 715-4400
E-mail: ghodges@dtflaw.com

Attorneys for Fathi Yusuf
and United Corporation

²In the instant case, Mohammad Hamed has made the very same argument that the Supreme Court rejected in *United* – viz., that mere access to documents establishes discovery of a claim for statute of limitations purposes. *See* Hamed’s June 20, 2014 Reply Brief in Support of his Motion for Partial Summary Judgment as to the Statute of Limitations, pages 13-17. The decision in *United* precludes Hamed from continued reliance on that argument.

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of December 2016, I served the foregoing **Fathi Yusuf's Brief in Response to Hamed's Notice of Supplemental Authority**, via e-mail addressed to:

Joel H. Holt, Esq.
LAW OFFICES OF JOEL H. HOLT
2132 Company Street
Christiansted, V.I. 00820
Email: holtvi@aol.com

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

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

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

The Honorable Edgar A. Ross
Email: edgarrossjudge@hotmail.com

Michelle Barb