

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

HISHAM HAMED, derivatively, on behalf)
of **SIXTEEN PLUS CORPORATION**,)

Plaintiff,)

vs.)

FATHI YUSUF, ISAM YOUSUF and)
JAMIL YOUSEF,)

Defendants,)

and)

SIXTEEN PLUS CORPORATION,)

a nominal defendant.)

Case No.: 2016-SX-CV-650

**DERIVATIVE SHAREHOLDER
SUIT, ACTION FOR DAMAGES,
CICO RELIEF, EQUITABLE RELIEF
AND INJUNCTION**

JURY TRIAL DEMANDED

**DEFENDANT, FATHI YUSUF'S RULE 56(d) OPPOSITION TO
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Defendant, Fathi Yusuf ("Mr. Yusuf"), through undersigned counsel, pursuant to Federal Rule of Civil Procedure 56(d)¹, hereby opposes Plaintiff, Hisham Hamed's Motion for Partial Summary Judgment on his claim for breach of fiduciary duty as wholly premature given that: 1) a Motion to Dismiss Plaintiff's claim for breach of fiduciary duty is pending; and 2) no discovery has been conducted. In support, Mr. Yusuf states as follows.

1. On January 9, 2017, Mr. Yusuf timely filed a Motion to Dismiss Plaintiff's First Amended Complaint ("Motion to Dismiss") on the grounds that all counts were: 1) barred by the statute of limitations; 2) were insufficiently pled; and 3) were also properly dismissed for failure to join a required party.

¹ In *Rivera-Mercado v. General Motors Corp.*, 51 V.I. 307 (V.I. 2009), the Supreme Court of the Virgin Islands confirmed Federal Rule of Civil Procedure 56(f), the precursor to Rule 56(d), applies to practice in the Superior Court of the Virgin Islands.

2. On January 20, 2017, Plaintiff filed an Opposition to the Motion to Dismiss.

3. On the very same day, Plaintiff filed a Motion for Partial Summary Judgment on his breach of fiduciary duty claim.

4. On February 6, 2017, Mr. Yusuf timely replied in support of his Motion to Dismiss.

5. Accordingly, the Motion to Dismiss is fully briefed and ripe for adjudication.

6. As a practical matter, providing a substantive response to a Motion for Summary Judgment when there is a pending Motion to Dismiss the same claim on which summary judgment is being sought is plainly a waste of resources.

7. Moreover, the parties have not conducted a Rule 26(f) conference, submitted a Rule 26(f) Report or proposed Scheduling Order to the Court, or engaged in any discovery.

8. As the Third Circuit has explained in *Doe v. Abington Friends School*, 480 F.3d 252, (3d Cir. 2007):

It is well established that a court is obliged to give a party opposing summary judgment an adequate opportunity to obtain discovery. This is necessary because, by its very nature, the summary judgment process presupposes the existence of an adequate record. *See* FED.R.CIV.P. 56(c) (instructing that summary judgment be decided on the basis of the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any”) ... In this vein, the [U.S.] Supreme Court has explained that “[a]ny potential problem with ... premature [summary judgment] motions can be adequately dealt with under Rule 56(f).” Therefore, if the non-moving party believes that additional discovery is necessary, the proper course is to file a motion pursuant to Rule 56(f). District courts usually grant properly filed Rule 56(f) motions as a matter of course. . . . If discovery is incomplete in any way material to a pending summary judgment motion, a district court is justified in not granting the motion.

Id. at 257 (some internal cites and quotations omitted); *see also Bethea v. Merchants Commercial Bank*, Civil Case No. 11-51, 2011 WL 4861873, at * 2 (D.V.I. Oct. 13, 2011)

(“Plaintiff herein has had no opportunity to conduct discovery [.]. . . I find MCB’s motion for

summary judgment prior to discovery to be premature. Accordingly, I deny MCB's motion for summary judgment without prejudice to refile after discovery has concluded.").

9. Pursuant to the requirements of Federal Rule of Civil Procedure 56(d), counsel for Mr. Yusuf is submitting a declaration herewith which sets forth the information in possession of the movant and third parties which is necessary to challenge what are actually the highly disputed "facts" proffered in support of the Motion for Summary Judgment. *See Exhibit 1.*

10. Therefore, in the absence of any discovery, the facts necessary to oppose the Motion for Summary Judgment are not fully available to Mr. Yusuf, and the Court may properly defer consideration of the same until discovery is complete. *See Federal Rule of Civil Procedure 56(d).*


11. A proposed order is being submitted herewith for the Court's consideration.

Respectfully Submitted,

DUDLEY, TOPPER and FEUERZEIG, LLP

Dated: February 9, 2017

By:



Stefan B. Herpel (V.I. Bar No. 1019)

Lisa Michelle Kömives (V.I. Bar No. 1171)

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F. Yusuf's Opposition to Motion for Partial Summary Judgment

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of February, 2017, I served the foregoing
*DEFENDANT, FATHI YUSUF'S RULE 56(d) OPPOSITION TO PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT* via e-mail addressed to:

Joel H. Holt, Esq.
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Michele Barber

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EXHIBIT 1

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
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DECLARATION

I, **LISA MICHELLE KÖMIVES**, pursuant to Superior Court Rule of Procedure 18, do declare and state as follows:

1. I am an attorney licensed to practice in the U.S. Virgin Islands.
2. I am Of Counsel at Dudley, Topper and Feuerzeig, LLP, the law firm representing Defendant, Fathi Yusuf (“Mr. Yusuf”), in the above-captioned matter and am personally involved with the defense of the case.
3. I make this declaration from my personal knowledge and could competently testify to the facts set forth herein.
4. Discovery on multiple issues is necessary in order to mount an opposition to Plaintiff’s Motion for Partial Summary Judgment (“Motion”) on his breach of fiduciary duty claim.
5. For example, discovery is needed concerning whether the allegedly “sham mortgage,” was in fact a sham, which of the Hameds were aware of the allegedly “sham

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mortgage,” which of the Hameds consented to the “sham mortgage,” communications the Hameds have had with third parties about the “sham mortgage,” *etc.*

6. Discovery is also needed with respect to the 2010 power of attorney executed by Manal Yousef, who procured it, who has the original, what uses, if any, to which it has been put, *etc.*

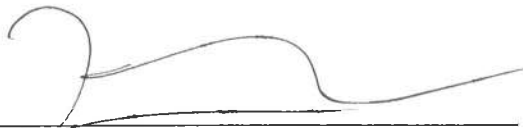
7. Discovery is necessary concerning Sixteen Plus’s tax returns, the information provided to the preparer, by whom it was provided, amendments thereto, *etc.*

8. Notably, Hisham Hamed, the only individual Plaintiff, executed the Verified Complaint. Many “facts” which Hisham “verified” are outside of his personal knowledge and further represent “conclusory allegations” which are properly tested in the discovery process if the claim is not dismissed by the Court.

9. Therefore, it is plain that information crucial for Mr. Yusuf to properly defend against the Motion is needed from both the Hameds and, potentially, third parties.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: February 9, 2017



LISA MICHELLE KÖMIVES

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ORDER

THIS MATTER came before the Court on Defendant, Fathi Yusuf's Rule 56(d) Opposition to Plaintiff, Hisham Hamed's Motion for Partial Summary Judgment. The premises being duly considered, it is hereby

ORDERED and ADJUDGED that Plaintiff's Motion for Partial Summary Judgment is **DENIED** without prejudice as a Motion to Dismiss the claim at issue is pending and no discovery has been conducted in this matter.

DATED: February ____, 2017

Robert A. Molloy
Judge of the Superior Court

A T T E S T:

Estrella H. George
Acting Clerk of the Court

By: _____
Deputy Clerk ____/____/____

cc: Joel H. Holt, Esq.
Stefan B. Herpel, Esq.