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

WALEED HAMED, as Executor of the Estate of MOHAMMAD HAMED, Plaintiff/Counterclaim Defendant, v. FATHI YUSUF and UNITED CORPORATION, Defendants/Counterclaimants, v. WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED, and PLESSEN ENTERPRISES, INC., Additional Counterclaim Defendants.	CIVIL NO. SX-12-CV-370 ACTION FOR INJUNCTIVE RELIEF, DECLARATORY JUDGMENT, AND PARTNERSHIP DISSOLUTION, WIND UP, AND ACCOUNTING Consolidated With
WALEED HAMED, as Executor of the Estate of MOHAMMAD HAMED, Plaintiff, v. UNITED CORPORATION, Defendant.	CIVIL NO. SX-14-CV-287 ACTION FOR DAMAGES AND DECLARATORY JUDGMENT
WALEED HAMED, as Executor of the Estate of MOHAMMAD HAMED, Plaintiff, v. FATHI YUSUF, Defendant.	CIVIL NO. SX-14-CV-278 ACTION FOR DEBT AND CONVERSION

UNITED'S REPLY TO HAMED'S OPPOSITION TO UNITED'S MOTION FOR SUMMARY JUDGMENT AS TO Y-2 THROUGH Y-4 (UNPAID RENT FOR BAYS 5 AND 8 AND INTEREST ON UNPAID RENT) AND HAMED'S OPPOSITION TO UNITED'S STATEMENT OF UNDISPUTED MATERIAL FACTS

INTRODUCTION

Hamed's Opposition to United's Motion for Summary Judgment as to Y-2 through Y-4 and Opposition to United's Statement of Undisputed Material Facts regarding unpaid rent for use by the Plaza Extra Partnership (hereafter "Plaza Extra" or the "Partnership") of Bays 5 and 8 and interest at the United Shopping Center relies *ad nauseam* on the contention that the motion should be denied because the alleged lease was undocumented and unwritten. That argument ignores the fact that nearly everything about this Partnership, including its relations with United, was done informally and without written agreements. Notably, the Partnership agreement itself was undocumented, as was the obligation to pay rent for the main Bay in this case, Bay 1. That fact did not prevent Judge Brady from concluding that a Partnership agreement had been formed, and later awarding $3.9 million dollars in favor of United and against the Partnership on the rent claim for Bay 1. If the unwritten and informal nature of agreements in this case were fatal to their enforcement, then the entire case would have been dismissed years ago, and the parties would not have spent the better part of the last two years litigating claims between the partners and between the Partnership and United.

The Court and the Master have had to rely on oral testimony, equitable considerations and common sense to resolve many issues in this case, and the instant issue of the amounts due to United by Plaza Extra for this particular use of its real estate is no exception. Hamed has responded to United's motion for summary judgment with a lengthy opposition brief and opposition to United's statement of fact. But despite that verbosity, he does not create any genuine issue of fact regarding the Partnership's use of United's property–specifically, Bays 5 and 8–to store inventory

for the Plaza Extra store.[1] Instead, the thrust of Hamed's argument is that this use by Plaza Extra should go uncompensated because of the statute of frauds and statute of limitations. These formalistic arguments do not withstand scrutiny and cannot defeat United's motion.[2]

I. The Statute of Frauds Does not Bar this Rent Claim.

One need only read the Virgin Islands Supreme Court's 2013 decision in the instant case to understand why Hamed's reliance on the statute of frauds as a purported bar to this rent claim is misplaced. In *Yusuf v. Hamed*, 59 V.I. 841 (2013), the Supreme Court rejected Yusuf's and United's argument that an oral Partnership agreement was void under the statute of frauds, which is codified at 28 V.I.C. § 244, because the alleged agreement was for an indefinite term that exceeded one year. The Supreme Court held that "the statute of frauds has no application to oral contracts that, while intended to last more than a year, have no stated durational terms and *could* conclude within a year." *Id*. at 852. The Court stated that "it is well settled that the oral contracts invalidated by the statute of frauds because they are not to be performed within a year include only those which cannot be performed within that period." *Id*. at 852 (citation and internal marks omitted; emphasis in original). It is therefore "immaterial that the performance of the contract *actually* exceeds one year . . .." *Id*. at 852-853 (citation and internal marks omitted; emphasis in original).

What United claims here, and what the pertinent undisputed testimony of Yusuf supports, is that the agreement between United and the Partnership regarding the use of Bays 5 and 8 was of indefinite duration, and that it could have been terminated by either party in less than a year.

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[1] Bays 5 and 8 are full-size commercial retail stores as depicted in United Exhibit 2, United Statement of Fact ("USOF")¶3.

[2] As Hamed has incorporated and relied upon his original Oppositions and Counter-Statement of Undisputed Facts ("CSOFs") filed on April 1, 2019, United also incorporates and relies upon its original Replies filed as to Y-2 and Y-3 thru Y-4 both of which were filed on April 24, 2019.

This takes it outside the statute of frauds. The fact that the Partnership's use of these bays continued well beyond one year does not undercut that conclusion in the least. If the oral Partnership agreement between Hamed and Yusuf that undergirds this entire litigation did not violate the statute of frauds, then how could a subsidiary oral agreement between the two of them regarding use of United's Bays 5 and 8 violate the statute?

In deposition, Yusuf made it clear that the arrangement between Plaza Extra and United regarding the use of Bays 5 and 8 had to be terminable at will at any time in order to permit United to rent to a third-party tenant (e.g., Diamond Girl):

> Q. …And on the Diamond lease, it said they could be there for a certain amount of time right?
> A. Yes.
> Q. And you couldn't move them out just one day because you felt like it could you?
> A. I don't want to move them out.
> Q. Could you move Plaza Extra [the Partnership] out any time?
> A. Yes.
> …
> Q. If you wanted to move Diamond in – when you moved Diamond in, didn't you just go to them [Hamed/the Partnership] and say you have to take the Plaza Extra stuff out?
> A. Who?
> Q. Didn't you tell him Hamed?
> A. Yeah, yeah.
> Q. You did?
> A. Yeah.
> Q. And you could tell them to leave any time?
> A. Yeah…

See **United Exhibits 7 and 8**, Yusuf Depo. 86:8-25, Hamed COSF¶32 and Hamed Ex. 13. Hence, the arrangement for the Partnership's use of Bays 5 and 8 was indefinite in duration and terminable whenever United elected to rent to another tenant. And because the statute of frauds does not apply, Hamed's argument that it cannot be waived is inapposite.

What Yusuf's testimony shows is that when Plaza Extra was in need of the additional space for inventory storage, the arrangement then was reached under which the Partnership could remain in the space until such time as United rented it to a third party. This arrangement between Plaza Extra and United was terminable at will by either party. The Partnership occupied the space for storage of grocery store inventory, enjoyed the use of utilities, and had the convenience of a location adjacent to the Plaza Extra. Hamed effectively argues that despite gaining the benefit of inventory storage facilities on-site (as opposed to off-site, which is far less economical, because it requires truck transport of inventory to the supermarket), the Partnership owes nothing to United for the years it occupied the spaces.[3] Judge Brady has already found (in his July 21, 2017 Opinion and Order) that the Partnership owed back rent to United for Bay 1 in the amount of $3,999,679.73 notwithstanding the absence of a written lease. If a written lease was unnecessary to justify a rent recovery of this magnitude for Bay 1, then why should it be necessary to support the far smaller sum for the Partnership's occupancy of Bays 5 and 8? Hamed never offers any cogent answer to this question in his lengthy discussion of the law or the facts.

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[3] Waleed Hamed testified that he "believed" that the use of the space was rent-free, but admitted that he never had any discussions with Mr. Yusuf which would have justified that belief:

> Q. [PERRELL] you indicated that it was your understanding that Bays 5 and 8 were to be provided by United to the Partnership rent-free; is that correct?
> A. [WALEED HAMED] That's correct.
> Q. . . . .And you had no communications with Mr. Yusuf in this regard; is that correct?
> A. That's correct.
> Q. . . . .So it is your belief that it was rent-free, despite not having any conversations with Mr. Yusuf about that?
> A.That is correct.

See **United Exhibit 5** - Waleed Deposition, p. 9:3-13; Hamed COSF¶26. United shows that the "belief" is a self-serving position worthy of no probative value as there is no reason for Hamed to "believe" that the Partnership's use and occupancy of a space would be assumed to be free. Such an unfounded assumption is contrary to all other dealings between the Partnership and United relating to the payment of rent and in the alleged absence of a conversation with Yusuf.

II. Even Assuming that Hamed Has Raised any Genuine Issues of Material Fact Regarding the Enforceability of the Contract Claim, He has Admitted Facts Sufficient to Establish Liability for Unjust Enrichment.

The modern common law rule is that restitutionary claims, including claims for unjust enrichment, are not barred by the statute of frauds. *See, e.g.*, *Kellogg v. Shushereba*, 82 A.3d 1121, 1129 (Vt. 2013) ("Failure to conform to the Statute of Frauds does not prevent recovery based on unjust enrichment"); *Mandel v. Ward*, 377 P.3d 1228, 1232 (Mont. 2016) (citing approvingly to Restatement (Third) of Restitution § 31 for the proposition that "equitable claims may be brought despite statutes requiring contracts to be in writing, so long as the statute does not prohibit a claim in restitution. . ."); *Dumas v. Auto Club Ins. Ass'n*, 473 N.W.2d 652, 663 (Mich. 1991) (citing Restatement and holding that "the statute of frauds does not bar the assertion of an unjust enrichment claim). *See generally* Restatement (Second) of Contracts § 375; Restatement (Second) of Contracts § 141 and Comment a; Restatement (Third) of Restitution and Unjust Enrichment § 31(1), all of which recognize the general rule that the equitable remedies of restitution and unjust enrichment are available to a party even if performed under a contract that was later declared unenforceable under the statute of frauds; 2 G. Palmer, The Law of Restitution, § 6.1(b) ("Restitution does no violence to the provision of the Statute of Frauds or its purposes").

The Virgin Islands Supreme Court has not yet adopted this majority rule, though one reported Superior Court case has endorsed it. *See In the Matter of the Estate of McConnell*, 42 V.I. 43, 50 (V.I. 2000) (rejecting argument that a party to a contract that is unenforceable under the statute of frauds may not seek restitution). The rule is rooted in equity and fairness, and there is no reason to believe that the Virgin Islands Supreme Court would regard it as anything other than the soundest rule for the Virgin Islands.

Hamed admitted in testimony that the Plaza Extra Partnership used United's Bays 5 and 8 whenever they were not rented to a third party during the period 1994 to 2012. *See* USOF ¶ 42. The elements of an unjust enrichment claim in the Virgin Islands are: "(1) that the defendant was enriched, (2) that such enrichment was at the plaintiff's expense, (3) that the defendant had appreciation or knowledge of the benefit, and (4) that the circumstances were such that in equity or good conscience the defendant should return the money or property to the plaintiff." *Walters v. Walters*, 60 V.I. 768, 779-780 (V.I. 2014). Significantly, and consistent with the common law, the elements do not include a requirement of an agreement between the Plaintiff and Defendant covering the use that gives rise to the benefit.[4] Thus, even assuming *arguendo* that Hamed has raised genuine issues of material fact regarding the existence of an agreement as such between the Partnership and United regarding use of Bays 5 and 8, Wally Hamed's admission is sufficient to show that United is entitled, at the very least, to partial summary judgment on an unjust enrichment theory. Hamed's testimony satisfies those elements, and establishes liability for unjust enrichment. Insofar as there are any disputed issues regarding the dollar amount of damages recoverable on this claim – i.e., the value of the benefit conferred to the Partnership by its use of Bays 5 and 8 – that issue can be resolved by the Master after an evidentiary hearing.

[4] The rule in other jurisdictions, likewise, is that a plaintiff need not show an agreement with a defendant in order to make out a claim for unjust enrichment. *See, e.g., Forest Park Pictures v. Universal Television Network*, 683 F.3d 424, 432 (2d Cir. 2012) ("[t]heories of implied-in-law contract, quasi-contract, or unjust enrichment differ significantly from breach of contract because the plaintiff need not allege the existence of an actual agreement between the parties").

III. The July 21, 2017 Order limiting the timeframe as to the claims *between the partners*, does not apply to claims of United for debts of the Partnership.

Hamed also argues that United's claims for rent as to Bays 5 and 8 violates the "statute of limitations" decision in Judge Brady's July 21, 2017 Order. That contention misses the mark for two reasons. First, Judge Brady's July 21, 2017 Order specifically rejected the limitations defense. *See* **United Exhibit 11**-July 21, 2017 Order at p.1, 12.[5] Instead, the July 21, 2017 Order limited the claims *between the partners* as to their accounting claims, under the equitable doctrine of laches, to only those claims arising after September 17, 2006. Moreover, this limitation as to claims *between the partners* does not impact debts of the Partnership. Rather, the Court explicitly found that "United's cause of action for rent is entirely unrelated to the partners' respective actions for accounting except insofar as each partner will ultimately be liable in the final accounting for 50% of whatever debt is found to be owing from the Partnership to United." *See* **United Exhibit 11**-July 21, 2017 Order at p.8, n.5. Hence, Judge Brady's laches-based limitation on the *partners' claims* in the July 21, 2017 Order has no applicability to United's claims for past due rent. Hamed made this identical argument previously, in connection with United's separate claims for increased rent as a hold-over tenant as to Bay 1, and the Master rejected it, when he ruled on March 13, 2018 that the claims for rent are "United's" as opposed to "Yusuf's." Therefore, the equitable limitation imposed upon claims *between the partners* in the July 21, 2017 Order cannot be a bar to United's claims against the Partnership regarding Bays 5 and 8.

The only relevant portion of July 21, 2017 Order as to the claims for Bays 5 and 8 is the finding that there are questions of fact regarding Bays 5 and 8 precluding summary judgment for

[5] Judge Brady explained "…the statute of limitations, by its plain language, has no direct applicability to individual, claimed credits and charges presented within the accounting process. Accordingly, Plaintiff's [Hamed] Motion for Partial Summary Judgment will be denied." *See* **United Exhibit 11**-July 21, 2017 Order at p.1, 12.

United at that time, thereby denying United's August 12, 2014 Rent Motion as well as Hamed's Motion for Partial Summary Judgment Re: Statute of Limitations. *See* United Brief, p. 13-14 and United Exhibit 11-July 21, 2017 Order p.7-8. Judge Brady explained that **"Mohammed Hamed's comments acknowledging the debt, which formed the basis for the Court's judgment as to Count XI [granting United's Motion to Withdraw Rent for Bay 1], do not explicitly distinguish between rent owed for Bay 1 and the rent owed by Bays 5 and 8."**[6] *Id.* at p. 8. As set forth in the current United Motion, since the time of the August 12, 2014 Rent Motion, additional discovery has been conducted and the matter is now ripe for adjudication. *See* United Brief, p. 3, fn.1.

IV. Additional Reasons for Rejecting Hamed's Arguments

A. United's Representations as to the Dates of Occupancy by the Partnership Are Correct.

Hamed argues that the dates as to the occupancy reflected by United have changed and, therefore, that they must be uncertain. United set forth the correct dates in the its August 12, 2014 Motion and Declaration of Yusuf which are accurate and further supported by the subsequent interrogatory responses and documents produced reflecting when third-party tenants occupied Bays 5 and 8. *See* United Exhibits 1, 3, 4, 6, 7, 8 and 9 and United SOF 15, 25-26 (admitted by Hamed), 31(admitted by Hamed) and 32-33. Further, Waleed Hamed admitted that the Partnership used Bays 5 and 8 when not occupied by a third-party tenant. *See* USOF ¶42**,** Waleed Hamed Depo. 9:14-17; 12:11-14, 18-21; 93:8-11. Waleed Hamed further admitted that Mike Yusuf or others on the United side would have accurate information as to the dates of occupancy and that

[6] This statement, coupled with Waleed Hamed's acknowledgment of continuous use of Bays 5 and 8 by the Partnership, Yusuf's acknowledged roll as the individual responsible for all issues relating to rent, Yusuf's testimony on behalf of United that he never intended to rent the space to the Partnership in the first place, much less to provide it to them rent free, all support an award of rent for Bays 5 and 8.

he could not dispute those dates. *See* USOF ¶43, Waleed Hamed Depo. at 56:6-10; 89:13-18, 21-25. Further, Hamed admitted that the he could not dispute that the occupancy would have been continuous during those periods. *See* USOF ¶44, Waleed Hamed Depo. at 92:20-93:4.

B. The Luff Report Has No Probative Value.

Hamed argues that the report allegedly prepared by a Mr. Luff constitutes a business record. The proper foundation was not laid for the admission of the report as a business record and therefore, it cannot be considered as sufficient evidence in support of Hamed's position in opposition. Even if considered, it offers no relevant evidence as to the issues before the Court.

First, at the time that it was allegedly prepared, the Partnership was not an acknowledged legal entity. Rather, by all outward appearances, United operated Plaza Extra East. But once the partnership structure was superimposed on the relationship between Hamed and Yusuf, it of necessity followed that the Partnership was actually a tenant of United's occupying Bay 1 and operating the grocery store business. However, the Luff Report fails to reflect a tenant for Bay 1 at all–the largest single tenant in the United Shopping Center. If the report is to be believed and reflective of the true arrangements as Hamed purposed, then United operated the grocery store business and there was no tenant paying rent as to Bay 1. But clearly this was not the case. Moreover, as of July 2001, the date on the Accounts Receivable page (FBIX237825), there are no arrears noted for Bay 1. However, Judge Brady has already determined that by July 2001 rent in excess of $2.8 million dollars had accrued and was due to United for Bay 1. *See* **United Exhibit 10**-Rent Order, awarding $3,999,679.73 for Bay 1 rent for 1994 to 2004. Clearly, the Luff Report does not reflect the true rental arrangements between the Partnership (an entity not even acknowledged at the time) and United. If anything, it reflects that Bays 5 and 8 were not occupied by a third-party renter at the purported date of the report and that Plaza Extra was occupying those

Bays. Mr. Yusuf confirmed that he had not seen the report and does not recall ever receiving it. Hence, Hamed's assertions as to the Luff Report are entitled to no weight in evaluating whether Hamed has raised a genuine issue of material fact precluding entry of summary judgment (or at the very least, partial summary judgment) on United's claims regarding Partnership use of Bays 5 and 8.

C. Settlement Check of $5,408,806 Did Not Cover Bays 5 and 8.

Hamed argues that the settlement check of $5,408,806 ("Partial Settlement Check") paid on February 7, 2012, covers the rent due, if any, as to Bays 5 and 8. *See* Hamed Opposition Brief, p. 15-16. However, Judge Brady has already determined that the Partial Settlement Check only covered the rent due United for the period between 2004 to 2011. *See* **United Exhibit 10**-Rent Order, p. 2. Waleed Hamed acknowledged that the Partial Settlement Check only covered a portion of the years that the rent was due:

> Q. So this rent check did not cover all of the rent for the space utilized by Plaza Extra from 1994 through 2012, it only covered a portion, correct?
> A. Only covered a portion – yeah, portion of the years, yes.

See **USOF** ¶47, **United Exhibit 5**-Waleed Hamed Depo. 90:25-91:4 and Exh. 5 attached thereto. It is United's position that the Partial Settlement Check did not and could not include rent for Bays 5 and 8 for the three periods claimed.

1. The Bay 5 Rent claimed covers the period from May 1, 1994 to July 31, 2001 –it is not covered by the Partial Settlement Check, which relates to 2004-2011.
2. The First Bay 8 Rent claimed covers the period from May 1, 1994 through September 30, 2002 – it is not covered by the Partial Settlement Check, which relates to 2004-2011.

3. The Second Bay 8 Rent claimed covers the period from April 1, 2008 to May 30, 2013 and therefore, could not have been covered by the Partial Settlement Check, which relates to 2004-2011 as a portion of the rent claim occurred *after* that date and *after* the date the check was issued in February of 2012.

Hence, the dates alone demonstrate that the Partial Settlement Check could not have included the rent claims for Bays 5 and 8.

V. Conclusion

United's rent claims for the Partnership's continuous occupancy of Bays 5 and 8 for the periods specified is not subject to the statute of frauds, as the arrangement was indefinite in duration and terminable at-will. Recovery of the unpaid rent is available under various theories including the equitable doctrine of unjust enrichment, which does not even require proof of an agreement. The July 21, 2017 Order does not apply to United's rent claims and, therefore, does not bar the claims for Bays 5 and 8. The Partial Settlement Check was to cover rent between 2004 and 2011 and, therefore, cannot conceivably cover amounts owed for Bays 5 and 8 because those uses took place before 2004 and after 2011. Waleed Hamed's acknowledgment of use of Bays 5 and 8 by the Partnership and inability to contest the period of use, Yusuf's acknowledged roll as the individual responsible for all issues relating to rent, Yusuf's testimony on behalf of United that he never intended to rent the space to the Partnership in the first place, much less to provide it to them rent free, undisputed testimony that the space was used by the Partnership when not otherwise rented, all support an award of rent for Bays 5 and 8 to United. For all of these reasons and the others discussed above, United is entitled to a judgment for amounts owed for the Partnership's use of Bays 5 and 8 and interest, under either a contract or unjust enrichment theory.

In the alternative, at the very least, United is entitled to partial summary judgment finding that it is entitled to recover from the Partnership for its use of Bays 5 and 8 as there is no triable issue regarding the fact that the Partnership utilized Bays 5 and 8 for storage and has not paid United for that use. Although United maintains there are no genuine issues of fact, if any disputes raised by Hamed are deemed to create genuine issues of material fact, they relate only to the frequency and duration of the use of Bays 5 and 8 by the Partnership and possibly the fair value of that use by the Partnership. Hence, United is entitled to partial summary judgment finding that it is entitled to recover from the Partnership for its use of Bays 5 and 8, the value of which the Court can determine by conducting a limited evidentiary hearing to resolve those issues of fact as to frequency, duration and fair value.

As Hamed has not filed a cross-motion for summary judgment as to Y-2 through Y-4, if the Court deems there to be genuine issues of material fact raised by Hamed's Oppositions, then United seeks an evidentiary hearing on those factual issues in dispute.

Respectfully submitted,
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DATED: August 22, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 2019, I caused the foregoing **UNITED'S REPLY TO HAMED'S OPPOSITION TO UNITED'S MOTION FOR SUMMARY JUDGMENT AS TO Y-2 THROUGH Y-4 (UNPAID RENT FOR BAYS 5 AND 8 AND INTEREST ON UNPAID RENT) AND HAMED'S OPPOSITION TO UNITED'S STATEMENT OF UNDISPUTED MATERIAL FACTS**, which complies with the page or word limitation set forth in Rule 6-1(e), to be served upon the following via the Case Anywhere docketing system:

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