

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

WALEED HAMED, as the Executor of the
Estate of MOHAMMAD HAMED,

Plaintiff/Counterclaim Defendant,

vs.

FATHI YUSUF and UNITED CORPORATION

Defendants and Counterclaimants.

vs.

**WALEED HAMED, WAHEED HAMED,
MUFEED HAMED, HISHAM HAMED, and
PLESSEN ENTERPRISES, INC.,**

Counterclaim Defendants,

WALEED HAMED, as the Executor of the
Estate of MOHAMMAD HAMED,

Plaintiff,

vs.

UNITED CORPORATION,

Defendant.

WALEED HAMED, as the Executor of the
Estate of MOHAMMAD HAMED,

Plaintiff,

vs.

FATHI YUSUF,

Defendant.

Case No.: SX-2012-cv-370

**ACTION FOR DAMAGES,
INJUNCTIVE RELIEF AND
DECLARATORY RELIEF**

JURY TRIAL DEMANDED

Consolidated with

Case No.: SX-2014-CV-287

**ACTION FOR DECLARATORY
JUDGMENT**

JURY TRIAL DEMANDED

Consolidated with

Case No.: SX-2014-CV-278

**ACTION FOR DEBT AND
CONVERSION**

JURY TRIAL DEMANDED

**HAMED'S OPPOSITION TO YUSUF MOTION TO STRIKE
AS TO CLAIMS H-4, H-5 AND H-6 - RE SUPERMARKET LEASE INCREASE**

This motion deals with the issue of whether United is entitled to any "extra percentage rent" beyond the agreed upon base amount of rent for the Plaza East store, where United was the landlord. In this regard, Yusuf asserted that United is entitled to an "extra" rent payment for the Plaza East store every time the landlord in St. Thomas is due an agreed upon amount for taxes, water and insurance in addition to the base rent. To date United has withdrawn \$177,896 based on this *totally fabricated position*, for which Hamed seeks reimbursement in Hamed Claims H-4, H-5 and H-6.

Yusuf starts this motion by complaining about having to file the initial motion on this "extra" rent because the Special Master already approved these payments. However, as Hamed's counsel explained in the email attached as Exhibit 1 to Yusuf's motion:

Greg-this is a landlord claim, just like the one seeking "funds to be held in reserve" for the 2015 taxes owed to the STT landlord (found in section II A on page 5 of your client's Oct 30th list of his amended claims). **As Judge Ross indicated, just because certain amounts have been paid to Mr. Yusuf that are based on the same premise--that United gets additional funds when the landlord in STT gets funds-- does not mean the payment was proper.** (Emphasis added.)

The Special Master has made it *clear* that the mere fact that such payments were authorized on an interim basis is irrelevant to the merits of this (or any other claims) motion. As for this specific claim for "extra percentage rent," this is *clearly* a claim as to which Yusuf and United should bear the burden of proof, requiring them to file the first motion, as there is no written agreement or Court order that supports such a claim, as further noted in the above referenced email to Attorney Hodges:

In short, the burden does not shift to Hamed to disprove the validity of this landlord claim just because they were paid during the wind-up phase. That is why we asserted **this allocation should be United's burden to prove at the hearing, requiring it to file its explanation for this payment first, which you agreed to on the record.**

With this clarification in mind, the facts relative to this claim are simple and straight forward.

Yusuf previously requested that Judge Brady allow him to pay United rent for the Plaza East store from 2012 through 2013, stating in a supporting affidavit (see **Exhibit 1**):

5. The period of January 1, 2012, through September 1, 2013, reflects a 21 month rental period at a monthly rate of \$58,791.38 calculated based upon the sales of the Plaza Extra Store in St. Thomas.

6. This rate has been agreed upon by myself and Mohammad Hamed The attached Exhibit B shows how the calculations have been done Therefore, the monthly rate of \$58,791.38 is what the current monthly rate is.

That declaration made it clear that **the parties had agreed** that the rent for the Plaza East store was \$58,791.31 per month, **without any reference to any additional amounts for additional "taxes, water and insurance" being due, as now claimed.**¹

Based on Yusuf's affidavit, Judge Brady entered the "Rent Order" on April 27, 2015, finding that United was entitled the monthly rent of \$58,791.03 from January, 2012, through the date of the Order, **as agreed between the parties**. See excerpt attached as **Exhibit 3**. The Court made no allowance for any "extra rent" as now being claimed—indeed, such a claim was never even raised, even though the same document raised here was used in that motion to set rent at the fixed amount of \$58,791.03.

Thus, this motion is nothing more than a motion for reconsideration. As such, it is out of time, lacks the necessary factual basis (i.e. newly discovered evidence) and should have been addressed to Judge Brady, not belatedly sought now.²

¹ Interestingly, Yusuf attached the **identical** one page of calculations to that affidavit that he now refers to as supporting his claim for "extra percentage rent" beyond the agreed upon amount of \$58,791.03, even though he made no such claim for any such additional amounts being due in that affidavit. Why? Because **the calculations were used to create a fixed monthly rent for the Plaza East** store that would not vary, even if the monthly sales of that store or the St. Thomas Plaza store subsequently dipped or increased, as those sales changed each year. See **Exhibit 2**.

² Aside from the fact that Yusuf never moved for reconsideration of this order to seek the "extra" amounts he now seeks, the motion would have been rejected even if he had filed it, as he had not previously raised the claim he now asserts for this "extra percentage rent."

In short, the Court has **already** set the rent for the Plaza East at \$58,791.03 since January 1, 2012, going forward until “Yusuf assumed sole possession and control of Plaza extra--East.” See **Exhibit 3** at p. 11. While Yusuf argues that the number used to calculate the \$58,791.03 figure should now, after the fact, be changed to include extra payments to United based on additional payments owed the St. Thomas landlord for taxes, water and insurance, **no such language is in that document or anywhere else** (nor was it previously raised with this Court when back rent since 2012 was sought from this Court).

Indeed, if the rent for the St. Croix Plaza store was to be based on the rent at the St. Thomas Plaza store, the rent would have fluctuated each year, as the total sales for that store varied each year, as noted in the calculations that took an average over the eight-year period between 2004 and 2012 to calculate this “fixed rent.” See **Exhibit 2**. In fact, as the Special Master will recall, Yusuf never sought payment for these amounts until KAC 357, Inc. sought the tax and insurance payment for the St. Thomas store for the time period before they took possession. After initially objecting to these payments, Yusuf devised this scheme, which was a windfall to him: Each payment for the St. Thomas items came 50/50 from each partner’s funds, while Yusuf then got 100 percent of the same amount for each withdrawal he took, netting him a nice gain each time to the detriment of the Partnership.

In summary, the amounts (totaling \$177,896.00) withdrawn by Yusuf for “extra percentage rent” should be returned to the Partnership, with interest (or an equal payment made to Hamed), as set forth in Hamed Claims H-4, H-5 and H-6, despite the prior approval of the Special Master.

Dated: January 15, 2018



Joel H. Holt, Esq.
Counsel for Plaintiff
Law Offices of Joel H. Holt
2132 Company Street,
Christiansted, VI 00820
Email: holtvi@aol.com
Tele: (340) 773-8709
Fax: (340) 773-867

Carl J. Hartmann III, Esq.
Co-Counsel for Plaintiff
5000 Estate Coakley Bay, L6
Christiansted, VI 00820
Email: carl@carlhartmann.com
Tele: (340) 719-8941

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 2018, I served a copy of the foregoing by email, as agreed by the parties, on:

Hon. Edgar Ross
Special Master
% edgarrossjudge@hotmail.com

Gregory H. Hodges
Stefan Herpel
Charlotte Perrell
Law House, 10000 Frederiksberg Gade
P.O. Box 756
St. Thomas, VI 00802
ghodges@dtflaw.com

Mark W. Eckard
Hamm, Eckard, LLP
5030 Anchor Way
Christiansted, VI 00820
mark@markeckard.com

Jeffrey B. C. Moorhead
CRT Brow Building
1132 King Street, Suite 3
Christiansted, VI 00820
jeffreymlaw@yahoo.com



CERTIFICATE OF COMPLIANCE WITH RULE 6-1(e)

This document complies with the page or word limitation set forth in Rule 6-1(e).




EXHIBIT 1

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

MOHAMMAD HAMED

Plaintiff

Vs.

FATHI YUSUF
UNITED CORPORATION

Defendants

CIVIL NO. SX-12-CIV-370

CIVIL ACTION

ACTION FOR DAMAGES

AFFIDAVIT OF FATHI YUSUF

AFFIDAVIT OF FATHI YUSUF

I, Fathi Yusuf, pursuant to 28 USC §1746, declare under oath that:

1. I am an adult of sound mind, and I am the treasurer and secretary of United Corporation, as such I am aware of the facts herein.
2. I have made repeated demands for rent outstanding to Plaintiff Hamed regarding the current rent obligations owed to United.
3. United Shopping Plaza is divided into various sized retail spaces. Each retail space is referred to as a "Bay." Since 1986, Bay 1, a 69,680 Sq. Ft. (approx.) retail space has been occupied by the Plaza Extra Supermarket in Sion Farm, St. Croix.
4. For the period of January 1st, 2012 through September 1, 2013 there is rent outstanding and due in the amount of \$1,234,618.98.
5. The period of January 1st, 2012 through September 1, 2013 reflects a 21 month rental period at a monthly rate of \$58,791.38 for a total of \$1,234,618.98. The monthly rate is calculated based on the sales of the Plaza Extra Store in St. Thomas.
6. This rate has been agreed upon by myself and Mohammed Hamed and was used to calculate the rent for the period of May 5th, 2004 through December 31st, 2011. The



attached Exhibit B shows how the calculations have been done, and to which everyone agreed to by issuing a check in the amount of \$5,408,806.74. Therefore, the monthly rate of \$58,791.38 is what the current monthly rent is.

7. For the period of January 1, 1994 through May 4th, 2004, there is rent outstanding in the amount of \$3,999,679.73 (69,680 Sq. Ft. of Retail Space @ \$5.55 sq. ft.). This reflects a rental period of 10 Years & 125 days. The rate of \$5.55 sq. ft. has always been significantly below market value.
8. United did not make a demand for the rent for the period of January 1, 1994 through May 4th, 2004 because records concerning the exact months that rental period began and ended were in the possession of the Federal government. Plaintiff knows well these records are in the possession of the federal government, and has never made any objections or denied that no agreement existed regarding the payment of rents.
9. It is respectfully requested that an Order permitting United withdraw the back rent of \$5,234,298.71 the value of all rents due for Bay 1.
10. As the fee simple owner of United Shopping Plaza, Defendant United is also entitled to repossess the premises immediately as a result of Plaintiff's bad faith refusal to allow United to withdraw rents at a rate that has already been agreed on.
11. Whether the court declares this to be partnership, a business agreement, or any other legal entity, the rent due must be paid, and there can be no excuse for failure to pay any rent.

Date:

9-5-2013



Fathi Yusuf

EXHIBIT 2

DECLARATION OF WALLY HAMED

I, Wally Hamed, declare, pursuant to V.I. R. CIV. P. 84, as follows:

1. I am over 18 years of age.
2. I am now the named Plaintiff herein and am familiar with the facts set forth herein.
3. Attached hereto is the calculation used to establish a fixed rent for the Plaza East store that was negotiated by me with Fathi Yusuf.
4. That calculation was intended to establish a fixed rent based on the eight-year average of rent paid the St. Thomas landlord for the St. Thomas Plaza store.
5. Had the intent been for this fixed amount to fluctuate based on the St. Thomas rent, the rent for the Plaza East store after 2012 would have fluctuated each year, as the St. Thomas rent fluctuated each year after 2012 due the variations in the sales, which changed from year to year.
6. At no time did Fathi Yusuf suggest that the partnership should pay United same the "extra percentage rent" payments due under the St. Thomas lease.

I declare under penalty of perjury that the foregoing is true and correct, executed on this 15th day of January, 2018.



Wally Hamed



United Corporation dba Plaza Extra

Tutu Park Store Sales:

1-1-2004 to 12-31-2004	32,323,902.88
Less: 1-1-2004 to 5-4-2004	-10,849,029.02
Sales 5-5-2004 to 12-31-2004	<u>21,474,873.86</u>

Tutu Park Store:

Paid Rent, Water, & Property Tax	263,577.53
Paid 1.5% Overage	71,914.23
5-5-2004 to 12-31-2004	<u>335,491.76</u>

1-1-2005 to 12-31-2005	515,361.54
1-1-2006 to 12-31-2006	590,533.60
1-1-2007 to 4-1-2007	255,699.33
4-2-2007 to 12-3-2007	468,689.55
1-3-2008 to 12-5-2008	540,180.12
1-5-2009 to 12-10-2009	529,799.66
1-6-2010 to 12-3-2010	527,565.40
1-1-2011 to 12-31-2011	<u>541,175.61</u>

Rent, etc. 5-5-2004 to 12-31-2011	4,304,496.57
Parking Lot Cleaning	126,000.00
Total Amount Paid	<u>4,430,496.57</u> a

Tutu Park Store Sales:

5-5-2004 to 12-31-2011	261,474,323.91
Portion of Sales - Rented building	217,895,269.93 b
Portion of Sales - Area built by Plaza	<u>43,579,053.98</u>

Total Paid as a % of Sales (Rented Bldg.) = a/b 2.0333147073%

Sion Farm Sales:

Sion Farm Sales 5-5-2004 to 12-31-2011	273,884,322.70
Less: R/X	-7,874,897.13
	<u>266,009,325.57</u>

Calculated Rent as a % of Sales Sion Farm S 5,408,806.74

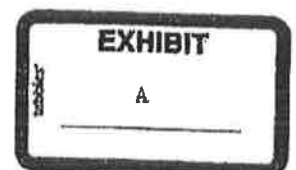


EXHIBIT 3

3. Defendant United is also entitled to rent from 2012 to 2013 in the amount of \$58,791.38 per month.

Plaintiff does not argue that the Partnership is exempt from paying rent to United. “[I]t is undisputed that United is the landlord and Plaza Extra is the tenant at the Sion Farm location, for which rent is due since January of 2012.” Response, 1. Rather, Plaintiff claims that United itself has created a dispute regarding rents from January 2012 by issuing rent notices seeking increased rent in the amount of \$250,000.00 per month, rather than the \$58,791.38 per month set out in Yusuf’s affidavit. Response, 4. The proof before the Court is clear as to United’s claim that rent is due for Bay No. 1 at the rate of \$58,791.38 per month from January 1, 2012 to September 30, 2013, when United’s Motion was filed.⁴

As the fee simple owner and landlord of Bay No. 1 United Shopping Plaza, United is entitled to rents from the Partnership for its continued use of Bay No. 1 for the operations of Plaza Extra - East. Therefore, the Court will order the Partnership to pay United the sum of \$1,234,618.98 for rent from January 1, 2012 through September 30, 2013, Plus rent due from October 1, 2013 at the same rate of \$58,791.38 per month until the date that Yusuf assumed sole possession and control of Plaza extra – East.

On the basis of the foregoing, it is hereby

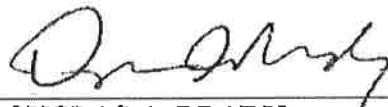
ORDERED that Defendant United Corporation’s Motion to Withdraw Rent is GRANTED, and the Liquidating Partner, under the supervision of the Master, is authorized and directed to pay

⁴ It is acknowledged that United delivered notices to the Partnership following the April 2013 Preliminary Injunction, seeking to collect an increased rent sum of \$250,000.00. United presents in its Motion and proofs no numerical or factual justification for such claims, which are not considered in this Order.

from the Partnership joint account for past rents due to United the total amount of \$5,234,298.71, plus additional rents that have come due from October 1, 2013 at the rate of \$58,791.38 per month, until the date that Yusuf assumed full possession and control of Plaza Extra – East. It is further

ORDERED that Plaintiff's Motion for Partial Summary Judgment is DENIED, in part, as to Plaintiff's claims that the statute of limitations precludes Defendant United's claims for past due rent.

Dated: April 27, 2015



DOUGLAS A. BRADY
Judge of the Superior Court

ATTEST:

ESTRELLA GEORGE
Acting Clerk of the Court

By: 
Court Clerk Supervisor
4/27/15

CERTIFIED TO BE A TRUE COPY
This 27th day of April 20 15

CLERK OF THE COURT

By:  Court Clerk KL