

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.*

---

**FATHI YUSUF**, *Plaintiff,*

vs.

**MOHAMMAD A. HAMED TRUST**, *et al,*  
*Defendants.*

---

**KAC357 Inc.**, *Plaintiff,*

vs.

**HAMED/YUSUF PARTNERSHIP**,  
*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**

Consolidated with

**Case No.: SX-2014-CV-278**

Consolidated with

**Case No.: ST-17-CV-384**

Consolidated with

**Case No.: ST-18-CV-219**

**HAMED MOTION AND MEMORANDUM FOR SUMMARY JUDGEMENT  
RE HAMED REVISED CLAIM H-1 -- FATHI YUSUF'S FAILURE  
TO PAY FUNDS RE SALE OF THE Y&S STOCK RESULTING IN  
THE SALE OF THE DOROTHEA CONDOS AND LAND**

## **I. Introduction**

Hamed moves for summary judgment on the H-1 "Dorothea" claim, \$802,966. The sole remaining issue is that Yusuf asserts that the claim is barred by Judge Brady's "2007 Bar Date." This amount, plus interest, is a valid claim by Hamed and should be credited to Hamed's Partnership account when all claims are reconciled.

## **II. Applicable Standard of Review**

The standard of review for summary judgment under *Rymer v. Kmart Corp.*, 68 V.I. 571 (Jan. 18, 2018) is:

- 1) the movant has the burden to demonstrate there is no genuine issue of material fact;
- 2) the burden shifts to the non-moving party to present contrary evidence showing a genuine issue for trial and
- 3) the reviewing court must consider the evidence in a light most favorable to the non-moving party.

## **III. Procedural Posture**

This has been before the Court and Special Master in various forms. Most recently, on January 7, 2019, the Master made findings of fact. (footnotes omitted):

[T]he Master finds that the following facts are undisputed: (1) Hamed and Yusuf each have 50% interest in the sale proceeds of Estate Dorothea; (2) Yusuf received the entire sale proceeds of Estate Dorothea; and (3) Hamed was never paid for his 50% interest in the sale proceeds. (SOF ¶ 31)

#### IV. Facts

##### A. Facts as found by the Special Master

The initial facts which must be taken as true are:

(1) Hamed and Yusuf each have 50% interest in the Estate Dorothea sale proceeds;

(2) Yusuf received 100% of Estate Dorothea proceeds; and

(3) Hamed was never paid for his 50% interest in sale proceeds. (SOF ¶ 31)

##### B. Additional Material Facts<sup>1</sup>

On September 26, 1994, the Y&S Corporation had its organizational meeting. It was formed by the Hameds and Yusufs, along with Hakima Salem for the purpose of purchasing land and hurricane destroyed condos in Estate Dorothea. (SOF ¶ 1) Salem owned 50% of the shares of Y&S. Neje Yusuf and Hisham Hamed each owned 25%. (SOF ¶ 1) Fathi Yusuf was President. (SOF ¶ 1)

On September 28, 1994, Y&S purchased the Dorothea property. (SOF ¶ 2) Fathi Yusuf stated the purchase included 51 acres of land and 23 condos. (SOF ¶ 5) Fathi Yusuf verified that half of the property, held in the Y&S Corporation, belonged to Salem and the remaining 50% belonged to Yusuf and Hamed. (SOF ¶ 4)

On June 15, 2000, Hisham Hamed and Neje Yusuf agreed to sell their Y&S stock to Salem. (SOF ¶ 7) The terms of the contract at issue here, the *Agreement of Sale of Stock*, stated that the buyer would make four \$225,000 installments. (SOF ¶ 7) The installments were due on January 15, 2001, January 15, 2002, January 15, 2003, and

---

<sup>1</sup> Hamed has filed his statement of facts separately. It is incorporated herein and references to it are denoted as "SOF."

January 15, 2004 -- although the contract had provisions for the possibility of these being paid late. (SOF ¶ 7) The stock was held in escrow by Attorney Robert King. (SOF ¶ 7) Once King received written notice from the seller that all payments were made, King was to deliver the stock certificates to the buyer. (SOF ¶ 7)

On that same day, June 15, 2000, Fathi Yusuf resigned as a Director of Y&S so that, in that same contract, he could be made the parties' "nominee" to receive the payments from the Buyer and give notice of payment for the release of the Y&S stock. (SOF ¶¶ 6, 8-9) Thus, *Mr. Yusuf had no independent basis for making decisions for Y&S or personally retaining the funds under the Agreement.* (SOF ¶ 8) ("2. Buyer agrees to pay to seller's nominee, Mr. Fathi. . . ." (SOF ¶ 6)).

Fathi Yusuf stated in discovery on December 18, 2018 that **he does not have any pre-2006 written records of the Y&S loan payments** (SOF ¶ 30) and no pre-2006 records of receipts have ever been produced. Thus, he, as the person asserting the SOL and laches affirmative defense, has repeatedly testified that he cannot prove that any amounts were actually received prior to Judge Brady's pre-September 17, 2006 bar date. (Mr. Salem is deceased.) Yusuf also, recently, testified that he cannot remember when such amounts were received.<sup>2</sup>

To the contrary, Yusuf did produce one post-2006 record showing when he received payments—an email dated November 16, 2011, that revealed that the Bank of America, N.A. transferred \$150,000 to the Bank of Palestine for a "concrete factory." (SOF ¶ 10) Yusuf explained in his January 21, 2019, deposition that he directed Salem

---

<sup>2</sup> On January 15, 2019 in a supplemental interrogatory response, Yusuf stated he could not recall for sure whether he received all of the Y&S loan payments prior to 2006.<sup>2</sup> (SOF ¶ 32)

to transfer this Y&S payment (SOF ¶ 11) and that **he deducted the \$150,000 from the \$1.5 million Mr. Salem owed for the Y&S stock.** (SOF ¶ 11) Thus, the only documented funds received under the contract were received well after 2006, in 2011. (SOF ¶ 12)

Similarly, Fathi Yusuf testified in his 2014 deposition that he received the proceeds for the Dorothea property **not more than three years earlier from the date of his April 2014 deposition, which is exactly consistent with the documented November 16, 2011 transfer of funds for final payment of the Y&S stock by Salem.** (SOF ¶ 13)

Yusuf also asserted in a deposition on January 21, 2019 that just three months after the November 2011 email, in February 2012 he directed Hisham ("Shawn") Hamed sign the 2012 written release of the Y&S stock from escrow, directing the remaining shares of Y&S to be released to the buyer. (SOF ¶ 15, 17)

Moreover, prior to that release being signed, Yusuf prepared and tendered to Waheed "Willie" Hamed and Shawn Hamed, a handwritten document that Yusuf testified he prepared. (SOF ¶ 14) The handwritten document contained the \$802,966 amount owed to Hamed from the sale of the Y&S stock (i.e. the sale of the Dorothea property) and a loan Mohammad Hamed had paid on behalf of Yusuf. (SOF ¶ 14) Yusuf's handwritten calculations showed the total owed Hamed was \$802,966, and that in exchange for Hisham Hamed's signature, Yusuf would turn over the \$802,966 to Hamed. (SOF ¶ 14)

On February 19, 2012, Shawn and Nejeah signed a *Notice of Payment of Purchase Price and Authorization to Release Stock Certificates.* (SOF ¶ 17) That release authorized the escrow agent holding the stock under the contract to release it to the buyer. (SOF ¶

17) The 2011 receipt of funds, the 2011 failure to disburse the funds and the 2012 directions to sign the release of the Y&S escrow were post-2006 acts and dispositions under the contract.

On September 30, 2016, Yusuf confirmed, in his *Accounting Claims and Proposed Distribution Plan* that he owed Hamed \$802,966. (SOF ¶ 25) Critically, he **also stated the date of one such contractual payment as November 16, 2011.** (SOF ¶ 26)

On October 30, 2017, Yusuf submitted his amended accounting claims which were limited to transactions occurring on or after September 17, 2006. Yusuf now contends that the proceeds from the sale of the Y&S stock are barred by Judge Brady's July 21, 2017 Order re Limitations on Accounting. (SOF ¶ 27) **Despite this contention, in another section of this same amended claim, Yusuf placed the date of one loan payment made by the purchaser of the Y&S stock on November 16, 2011, squarely within the post September 17, 2006 timeframe.** (SOF ¶ 28)

On January 15, 2019 in a supplemental interrogatory response, Yusuf stated he could not recall for sure whether he received all of the Y&S loan payments prior to 2006.<sup>3</sup> (SOF ¶ 32)

---

<sup>3</sup> Originally, Yusuf stated that he received all loan payments before 2006. (SOF ¶ 30) However, after the Special Master granted Hamed's Motion to Compel regarding Yusuf's initial deficient response to Hamed's Dorothea interrogatory, Yusuf revised his response to "[i]t is my belief that the principle payments were received prior to 2006. However, I cannot say this for sure." (SOF ¶ 32)

## V. Argument

The only issue that remains to be resolved is whether Hamed's 50% of the proceeds from the sale of the Y&S stock, and by extension, the "Dorothea" condos, are barred by the July 21, 2017 Limitations on Accounting.

While the SOL or the doctrine of laches may obviate contractual claims outside of the limitations period (as set either by statute or court order), these limitations periods are tolled by a number of exceptions:

- 1) The "acknowledgment of the debt doctrine" -- acknowledgements in post-2006 documents and in post-2006 depositions.
- 2) Partial performance after the initial limitations period.
- 3) Continuing violations doctrine.

### A. *Written and Deposition Acknowledgements after 2006*

There is no dispute that Yusuf acknowledged the debt twice in two depositions after 2006 (2014 and 2019) and also in writing (2016).<sup>4</sup> (SOF ¶¶ 4, 9, 14, 25) Judge Brady has already articulated VI law and the law of the case here, in his April 17, 2015 Order:

While 5 V.I.C. § 31(3) sets a six year statute of limitations for contractual liabilities such as payment of rents, there are certain equitable principles which operate to toll a statute of limitations. **The "acknowledgment of the debt" doctrine (also known as the "revival of the promise to pay" doctrine) is recognized as follows:**

A debt which is time-barred may be "revived" by an acknowledgment by the debtor. 'It has long been recognized that the expiration of the statutory period does not bar the claim if the plaintiff can prove an acknowledgment, a new promise, or part payment made by the defendant either before or after the statute has run... .Such conduct

---

<sup>4</sup> This is black letter law. See, e.g., *Juniata Valley Bank v. Coffee Run Equity Assocs., LP*, No. 285 MDA 2017, 2018 WL 832043, at \*2 (Pa. Super. Ct. Feb. 13, 2018) ("Pursuant to the 'acknowledgement doctrine,' a statute of limitations may be tolled or its bar removed by a promise to pay the debt.").

revives the cause of action so that the statute starts to run again for the full statutory period.'

*Gee v. CBS, Inc.*, 471 F. Supp. 600, 663 (E.D. Pa. 1979).

The 2014 and the 2016 acknowledgements each, separately require applying this doctrine.

1. Acknowledgments in depositions (2014 and 2019)

On April 2, 2014, Fathi Yusuf testified in his deposition that he received \$1.5 million in proceeds for the sale of the Y&S stock/Dorothea property, that one-half of it is owed to Hamed and that he would pay it. (SOF ¶ 4). In his subsequent deposition, on January 21, 2019, Yusuf again acknowledged the debt (after the Court's order setting out the 2006 bar date) and stated that he owed \$802,966 to Hamed for the sale of the Y&S stock and a loan Hamed paid on behalf of Yusuf. (SOF ¶ 14).

2. Acknowledgements in writing (2016)

On September 30, 2016, Yusuf stated that "\$802,966 should be allocated to Hamed to equalize the Partnership distribution between the Partners resulting from the sale of the stock of Y&S and R&F." (SOF ¶ 25).

3. Summary

Under either form of acknowledgment, collection of the debt is not time-barred.

***B. Partial Performance of the Contract after 2006***

Yusuf's "SOL" argument is also defeated by the doctrine of partial performance. The June 15, 2000 contract required Fathi Yusuf to act as an agent for the sellers of the Y&S stock. (SOF ¶ 8) As an agent, Yusuf's duty was to collect the funds and distribute



them to the two owners of the stock.<sup>5</sup> (SOF ¶ 8) The contract anticipated that he would be receiving partial payments into the future, possibly later than scheduled. (SOF ¶ 7) Both in deposition and discovery, Yusuf admitted that he (1) did act as the contractual agent, (2) did receive funds several times under the contract, and (3) did not pay Hamed's half. (SOF ¶¶ 4, 9, 11-14, 16, 22, 25-26, 29, 32) On each receipt of payments pursuant to the contract (such as the documented contractual payment received from Salem in 2011), the SOL was reset and there was a new contractual failure to distribute at that time.<sup>6</sup> See e.g., *Taylor v. First Resolution Invest. Corp.*, 148 Ohio St. 3d 627, 672, cert. denied, 137 S. Ct. 39849 (2016).

---

<sup>5</sup> "The agent's duty ordinarily includes not only the duty of stating to his principal the amount that is due, *but also a duty of keeping an accurate record of the persons involved, of the dates and amounts of things received, and of payments made. The agent has a duty to take such receipts as are customarily taken in business transactions.* It is old, hoary law that one who undertakes an agency pursuant to a contract owes the duties of an agent to the parties. *Lion Bonding & Sur. Co. v. O'Kelly*, 221 S.W. 1115, 1116 (Tex. Civ. App. 1920), writ refused (Feb. 2, 1921) ("when the appellant undertook to complete the contract it became an agent or trustee for the appellee; it owed him the duty of using reasonable economy and ordinary care and diligence in the performance of that trust.")

<sup>6</sup> Although it is unnecessary to rely on additional legal theories here, it is also the case that there has been required future performance, which did not occur. It is black letter law that "a claim premised on misrepresentations regarding future performance does not accrue until such performance fails..." The statute of limitations is reset when a party fails to perform in the future as contractually obligated.

" 'A party breaches a contract when, without legal excuse, it fails to perform any promise which forms a whole or a part of the contract.' "*Royal Indem. Co. v. Factory Mut. Ins. Co.*, 786 N.W.2d 839, 846 (Iowa 2010). . . .As alleged, the family agreement contemplates action in the future—that title would be placed in the children of Douglas and Lavola equally *after the repurchase loan on the acreage was paid off.* The record before us indicates there has only been a partial release of the mortgage, and viewing the record in the light most favorable to the plaintiffs as we must, the inference arises the loan is still unpaid—and the family agreement still capable of being fulfilled.

What Yusuf is arguing, in effect, is that as he received each post-2006 partial payment, he had no duty to distribute the funds at that time. Even if this is so, when the full payment had been completed and Yusuf asked Hamed to execute the release that would transfer the stock, the statute of limitations was reset on the failure to make that payment to Hamed when Hamed signed over the transfer documents. Either way, there definitely were transactions in 2011 and 2012 that constituted new acts and new incidents of failure to pay the Hameds under the contract. (2011 transactions – SOF ¶¶ 10-12, 26, 28; and 2012 transactions – SOF ¶¶ 15, 17)

1. 2011 Transaction

Fathi Yusuf testified in his January 21, 2019 deposition that the purchaser of the Y&S stock, Salem, transferred \$150,000 of the Y&S stock purchase price for a concrete batch plant as a contractual payment. (SOF ¶ 11) Yusuf further testified that he directed Salem to transfer the money directly and Yusuf deducted the \$150,000 from the \$1.5 million Salem owed for the Y&S stock. (SOF ¶ 11) An email on November 16, 2011 produced by Yusuf in discovery showed a bank transfer \$150,000 to the Bank of Palestine for this “concrete factory.” (SOF ¶ 10)

2. 2012 Transaction

Fathi Yusuf also testified in his January 21, 2019 deposition that he asked Hisham (“Shawn”) Hamed to sign a release, allowing the remaining Y&S shares to be released to the buyer, Salem. (SOF ¶ 15) On February 19, 2012, Shawn Hamed and Nejeh Yusuf

---

*Stenoien v. Stenoien*, 855 N.W.2d 201, 2014 WL 3749374, at \*4 (Iowa Ct. App. 2014).

signed a *Notice of Payment of Purchase Price and Authorization to Release Stock Certificates* for Y&S. (SOF ¶ 15)

**C. Continuing violations doctrine under VI law**

Finally, Yusuf's arguments are also barred under the "continuing violations" doctrine, as Fathi Yusuf received a partial contractual payment in 2011. As the seller's nominee for collection under the contract, Fathi Yusuf (as an escrow agent) had a legal duty to either 1) distribute funds each time a partial payment was made by the purchaser (which occurred at least once in 2011) or 2) distribute all of the funds when requesting the release of the stock from the seller (which occurred in 2012).

2. In consideration of the transfer of its 1000 shares of Y&S Corporation, Inc., Buyer agrees to pay to **seller's nominee, Mr. Fathi Yusef** of 9-C Princess Hill, St. Croix. . .

and

6. Escrow: The stock sold under this agreement shall be endorsed by the sellers to the Buyer and such **stock shall be held in Escrow by Robert L. King, Esq. until all payments due hereunder have been paid to the Seller's Nominee. Robert L. King, as escrow agent shall deliver the stock certificates sold hereunder to the Buyer within 30 days of receipt of written notice from seller that the entire purchase price has been paid in full. The corporation shall immediately thereafter cause the transfer of shares to be registered upon the books of the corporation.** . . . (SOF ¶¶ 7-8) (emphasis added)

Thus, multiple contractual breaches occurred after 2006. Both 1) in 2011 when he received such a payment, and he was contractually required to make a payment to the Hameds and 2) when he received the full amount and thus requested the release of the

stock to the seller, and was required to pay the full amount. In either case, in both 2011 and 2012 he failed to make payment, and the periods for limitations and laches reset.<sup>7</sup>

In this case, each time Fathi Yusuf received funds that required him, under his sole power as the nominee, to distribute the funds and he failed to distribute, he either 1) re-breached the contract and reset the limitations periods or 2) committed an act of tortious conversion which started a new limitations period. These failures occurred several times after 2006 and culminated with his total failure to turn over funds when final payments and closing occurred in 2011 and 2012. See *Anthony v. FirstBank Virgin Islands*, 58 V.I. 224, 230–31 (Jan. 17, 2013), *as amended* (June 21, 2013)(emphasis added):

Normally, the time frame for any statute of limitations begins when the cause of action accrues. Accrual takes place on the “occurrence of the essential facts that give rise to that cause of action.” *Burton v. First Bank of P.R.*, 49 V.I. 16, 20 (V.I.Super.Ct. 2007) (citation omitted). However, under the “continuing violations” doctrine, “ ‘when a [claim] involves continuing or repeated conduct, **the limitations period does not begin to run until the date of the last injury** or when the [wrongful] conduct ceased.’ ” *Bluebeard's Castle, Inc. v. Hodge*, 51 V.I. 672, 685 (D.V.I.App.Div.2009). The plaintiff must make a threshold showing that his claim involved “ ‘**continual unlawful acts, not continual ill effects** from an original violation’ ” before a court will consider whether the equitable doctrine is available. *Id.* (emphasis added) (quoting *Sandutch v. Muroski*, 684 F.2d 252, 254 (3d Cir. 1982)); see also *Felter v. Norton*, 412 F.Supp.2d 118, 125 (D.D.C. 2006) (“When courts apply the continuing violation doctrine, **the claim will not be barred provided that at least one wrongful act occurred during the statute of limitations period and that it was committed in furtherance of a continuing wrongful act or policy or is directly related to a similar wrongful act committed outside the statute of limitations.**”)

---

<sup>7</sup> See, e.g., *Stenoien v. Stenoien*, 855 N.W.2d 201, 2014 WL 3749374, at \*4 (Iowa Ct. App. 2014)(no cause of action accrues until a “wrongful act produces loss or damage to the claimant.”)

Fathi Yusuf 1) wrongfully collected funds in 2011 and did not distribute them in breach of the contract and 2) after collecting them, in 2012 he failed to turn over Hamed's half of the funds when he sought and supplied the Hamed release of the escrow for the stock certificate. Both are wrongful contractual acts committed within the post-2006 period.

## **VI. Conclusion**

This debt is due, as Yusuf had repeatedly admitted. Moreover, Yusuf's assertion that Hamed's claim as to his 50% of the proceeds from the sale of the "Dorothea" stock is barred by Judge Brady's July 21, 2017 Order fails for each of the following reasons, any one of which is sufficient to negate Yusuf's defense:

- 1) The "acknowledgment of the debt doctrine."
- 2) Partial performance after the initial limitations period.
- 3) The continuing violations doctrine under VI law.

As such, judgment in the amount of \$802,966 plus prejudgment interest should be entered in favor of Hamed against Yusuf on Claim H-1 and credited to his Partnership account when all claims are reconciled.



**Dated:** February 25, 2019

**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

**Joel H. Holt, Esq.**  
*Counsel for Plaintiff*  
Law Offices of Joel H. Holt  
2132 Company Street,  
Christiansted, VI 00820

**CERTIFICATE OF SERVICE AND COMPLIANCE WITH RULE 6-1(e)**

I hereby certify that the above document meets the requirements of Rule 6-1(e) and was served this 25<sup>th</sup> day of February, 2019. I served a copy of the foregoing by email (via CaseAnywhere), as agreed by the parties, on:

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

**Gregory H. Hodges**  
**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

