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

MOHAMMAD HAMED, BY HIS AUTHORIZED AGENT WALEED 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.,** COUNTERCLAIM DEFENDANTS.	**Civil No. SX-12-CV-370** **ACTION FOR INJUNCTIVE RELIEF, DECLARATORY JUDGMENT, PARTNERSHIP DISSOLUTION, WIND UP, and ACCOUNTING**
WALEED HAMED, AS EXECUTOR OF THE ESTATE OF MOHAMMAD HAMED, PLAINTIFF, **V.** **UNITED CORPORATION,** DEFENDANT.	CONSOLIDATED WITH **Civil No. SX-14-CV-287** **ACTION FOR DAMAGES and DECLARATORY JUDGMENT**
MOHAMMAD HAMED, PLAINTIFF, **V.** **FATHI YUSUF,** DEFENDANT.	CONSOLIDATED WITH **Civil No. SX-14-CV-378** **ACTION FOR DEBT and CONVERSION**

ORDER

THIS MATTER came before the Special Master (hereinafter "Master") on United's revised motion for summary judgment as to Yusuf Claim No. Y-2: past rent due to United for Bay Nos. 5 and Bay 8 of the United Shopping Plaza, Yusuf Claim No. Y-3: prejudgment interest on the rent awarded by the Rent Order to United for Bay No. 1 of the United Shopping Plaza, and Yusuf Claim No. Y-4: prejudgment interest on the past rent due to United for Bay Nos. 5 and Bay 8 of the United Shopping Plaza.[1] In response, Hamed filed an opposition as to Yusuf Claim No. Y-2 and a separate opposition as to Yusuf Claim Nos. Y-3 and Y-4. Thereafter, United filed a single reply thereto. Subsequently, Hamed filed a notice of supplementation as to Yusuf Claim No. Y-2. For clarity, the Court will only address Yusuf Claim No. Y-2 in this order and will address Yusuf Claim Nos. Y-3 and Y-4 in a separate order.

BACKGROUND

Hamed filed his complaint on September 17, 2012, followed by his first amended complaint on October 19, 2012, seeking, among other relief, "A full and complete accounting … with Declaratory Relief against both defendants to establish Hamed's rights under his Yusuf/Hamed Partnership with Yusuf …" (Complaint, at 15, ¶1) Yusuf and United filed their first amended counterclaim on January 13, 2014, seeking, inter alia: Count X — Appointment of Receiver, Count XI — Rent for Retail Space Bay 1, and Count XII — Past Rent for Retail Spaces Bay 5 & 8.

On September 9, 2013, United filed a motion to withdraw rent.[2] On May 13, 2014, Hamed filed a motion for partial summary judgment re the statute of limitations defense barring United and Yusuf's counterclaim damages prior to September 16, 2006. On August 12, 2014,

[1] The Master was appointed by the Court to "direct and oversee the winding up of the Hamed-Yusuf Partnership" (Sept. 18, 2015 order: Order Appointing Master) and "make a report and recommendation for distribution [of Partnership Assets] to the Court for its final determination." (Jan. 7, 2015 order: Final Wind Up Plan) The Master finds that that United's instant motion for summary judgment falls within the scope of the Master's report and recommendation given that Yusuf Claim Nos. Y-2 through Y-4 are alleged debt owed by the Partnership to United.

[2] United's September 9, 2013 motion only sought back rent for Bay No. 1 of the United Shopping Center.

Yusuf and United filed a motion for partial summary judgments on Counts IV, XI, and XII of their counterclaims regarding past rent for certain premises at United Shopping Plaza. On April 27, 2015, the Court entered a memorandum opinion and order as to United's September 9, 2013 motion and Hamed's May 13, 2014 motion (hereinafter "Rent Order") and ordered United's motion granted and Hamed's motion denied in part. In its Rent Order, the Court held, *inter alia*, that the statute of limitations does not bar United's claim for rent and United is entitled to past due rent for Bay No. 1 of the United Shopping Center in the amount of $3,999,679.73 from 1994-2004, plus past due rent in the amount of $1,234,618.98 from January 1, 2012 through September 30, 2013, plus rent in the amount of $58,791.38 per month from October 1, 2013 until Yusuf assumed sole possession of Plaza Extra-East store. (Rent Order) The Court explained that "[i]n this case, both the acknowledgement of the debt doctrine and the payment on account doctrine apply to toll the statute of limitations on United's rent claims." (Rent Order, p. 9)

In 2016, per the Master's orders, Parties filed their respective accounting claims. Yusuf, in his accounting claims filed on September 30, 2016, included United's claims for: (1) past rent payment for Bay Nos. 5 and Bay 8 of the United Shopping Plaza (hereinafter "Bay 5" and "Bay 8" respectively) in the total amount of $793,984.34, (2) prejudgment interest thereto, and (3) prejudgment interest on the rent awarded by the Rent Order to United for Bay No. 1 of the United Shopping Plaza (hereinafter "Bay 1"). (Yusuf's accounting claims, pp. 7-8) Subsequently, in response to various pending motions, including Hamed's motion for partial summary judgment re the statute of limitations defense barring defendants' counterclaim damages prior to September 16, 2006, filed May 13, 2014, the Court entered a memorandum opinion and order dated July 21, 2017 (hereinafter "Limitations Order"). In the Limitations Order, the Court addressed, *inter alia*, United's claim for rent for Bays 5 and 8:

By Memorandum Opinion and Order entered April 27, 2015, the Court denied Plaintiff's Motion for Partial Summary Judgment Re: Statute of Limitations as to United's Count XI for debt in the form of rent owed with respect to "Bay 1" and granted United's Motion to Withdraw Rent, filed September 9, 2013; authorizing the Liquidating Partner, under the supervision of the Master, to pay to United from partnership funds 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. That Memorandum Opinion and Order also effectively, though not explicitly, granted in part Defendants' Motion for Partial Summary Judgment on Counts IV, XI, and XII Regarding Rent, filed August 12, 2014, as to Count XI, and entered judgment thereon in favor of United.

In Count XII of Defendants' Counterclaim, United seeks an award of $793,984.38 for rent owed with respect to "Bay 5" and "Bay 8," which the partnership allegedly used for storage space in connection with the Plaza Extra-East store during various periods between 1994 and 2013. Counterclaim ¶¶ 179-84. United's arguments against the applying the statute of limitations to bar its claims for rent generally fail to distinguish between the rent owed for Bay 1 (Count XI) and the rent owed for Bays 5 and 8 (Count XII). Thus, the Court must infer that United opposes Hamed's statute of limitations argument as to Count XII on the same grounds as it opposed the argument with respect to Count XI. In denying Hamed's Motion for Partial Summary Judgment Re Statute of Limitations as to Count XI, the Court found that the limitations period had been tolled on the basis of Hamed's undisputed acknowledgement and partial payment of the debt.

However, in his August 24, 2014 Declaration, attached as Exhibit 1 to Plaintiff's Response to Defendants' Rule 56.1 Statement of Facts and Counterstatement of Facts, Waleed Hamed expressly states that "there was no agreement to use [Bays 5 and 8] other than on a temporary and periodic basis, nor was there any agreement to pay rent for this space, as United made it available at no cost." Declaration of Waleed Hamed ¶¶ 19-20. Mohammed Hamed's comments acknowledging the debt, which formed the basis of the Court's judgment as to Count XI, do not explicitly distinguish between the rent owed for Bay 1 and the rent owed for Bays 5 and 8. Yet, considered in light of the declaration of his son, the Court is compelled to conclude that a genuine dispute of material fact exists as to whether Hamed ever acknowledged any debt as to rent owed for Bays 5 and 8, and more basically, whether the partnership ever agreed to pay any rent for the use of Bays 5 and 8 in the first place. Accordingly, both Hamed's Motion for Partial Summary Judgment Re: Statute of Limitations and Defendants' Motion for Partial Summary Judgment on Counts IV, XI, and XII Regarding Rent must be denied as to Count XII of Defendants' Counterclaim.[5] (Limitations Order, pp. 7-8)

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[5] Defendants' Motion for Partial Summary Judgment on Counts IV, XI, and XII Regarding Rent must also be denied as to Count IV (Accounting). While Hamed and Yusuf are each entitled to an accounting of the partnership pursuant to 26 V.I.C. § 177, 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.

Ultimately, the Court ordered, *inter alia*, that "the accounting in this matter, to which each partner is entitled under 26 V.I.C. § 177(b), conducted pursuant to the Final Wind Up Plan adopted by the Court, shall be limited in scope to consider only those claimed credits and charges to partner accounts, within the meaning of 26 V.I.C. § 71(a), based upon transactions that occurred on or after September 17, 2006." (Limitations Order, pp. 33-34)

In light of the Court's ruling, the Master ordered Parties to file their amended accounting claims. United's claims for rent for Bays 5 and 8 were again included in Yusuf's amended accounting claims, filed on October 30, 2017. (Yusuf's amended accounting claims, pp. 9-10) On June 22, 2019, United filed this instant revised motion for summary judgment.

STANDARD OF REVIEW

Rule 56 of Virgin Islands Rules of Civil Procedure (hereinafter "Rule 56") provides that "[a] party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought" and "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.I. R. CIV. P. 56; *see also Rymer v. Kmart Corp.,* 68 V.I. 571, 575 (V.I. 2018) ("A summary judgment movant is entitled to judgment as a matter of law if the movant can demonstrate the absence of a triable issue of material fact in the record."). "Once the moving party has identified the portions of the record that demonstrate no issue of material fact, "the burden shifts to the non-moving party to present affirmative evidence from which a jury might reasonably return a verdict in his favor." *Rymer*, 68 V.I. at 576 (citing *Chapman v. Cornwall*, 58 V.I. 431, 436 (V.I. 2013) (internal citations and quotation marks omitted). The non-moving party "may not rest upon mere allegations, [but] must present actual evidence showing a genuine issue for trial." *Rymer,* 68 V.I. at 576 (quoting *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008)). The reviewing court must

view all inferences from the evidence in the light most favorable to the nonmoving party, and take the nonmoving party's conflicting allegations as true if properly supported. *Williams,* 50 V.I. at 194; *Perez v. Ritz-Carlton (Virgin Islands), Inc.*, 59 V.I. 522, 527 (V.I. 2013). Because summary judgment is "[a] drastic remedy, a court should only grant summary judgment when the 'pleadings, the discovery and disclosure materials on file, and any affidavits, show there is no genuine issue as to any material fact.'" *Rymer,* 68 V.I. at 575-76 (quoting *Williams,* 50 V.I. 191, 194).

Rule 56 provides that "[e]ach summary judgment motion shall include a statement of undisputed facts in a separate section within the motion" and that "[e]ach paragraph stating an undisputed fact shall be serially numbered and each shall be supported by affidavit(s) or citations identifying specifically the location(s) of the material(s) in the record relied upon regarding such fact." V.I. R. CIV. P. 56(c)(1). Rule 56 also provides that "[a] party opposing entry of summary judgment must address in a separate section of the opposition memorandum each of the facts upon which the movant has relied pursuant to subpart (c)(1) of this Rule, using the corresponding serial numbering…" V.I. R. CIV. P. 56(c)(2)(B). Furthermore, under Rule 56, "a party opposing summary judgment may, if it elects to do so, state additional facts that the party contends are disputed and material to the motion for summary judgment, presenting one or more genuine issues to be tried" and "[t]he party shall supply affidavit(s) or citations specifically identifying the location(s) of the material(s) in the record relied upon as evidence relating to each such material disputed fact, by number." V.I. R. CIV. P. 56(c)(2)(C). "If the non-moving party has identified additional facts as being material and disputed, as provided in subpart (c)(2)(C) of this Rule, the moving party shall respond to these additional facts by filing a response using the corresponding serial numbering of each such fact identified by the non-moving party…" V.I. R. CIV. P. 56(c)(3). Additionally, Rule 56 permits the court to "grant

summary judgment for a nonmovant" after "giving notice and a reasonable time to respond." V.I. R. CIV. P. 56(f)(1). Finally, Rule 56 requires the court to "state on the record the reasons for granting or denying the motion." V.I. R. CIV. P. 56(a).

DISCUSSION

In his motion, United argued that it is entitled to recover past due rent for Bays 5 Bay 8 and for prejudgment interest thereto as follows: (1) Bay 5 – May 1, 1994 through July 31, 2001 for the total amount of $271,875.00 (hereinafter "Bay 5 Rent") (Motion, pp. 2-6); (2) Bay 8 – May 1, 1994 through September 30, 2002 for the total amount of $323,515.63 (hereinafter "First Bay 8 Rent") (Id., at pp. 2, 6-7); and (3) Bay 8 – April 1, 2008 through May 30, 2013 for the total amount of $198,593.75 (hereinafter "Second Bay 8 Rent") (Id., at pp. 2, 7-8). As to the Bay 5 Rent, United claimed that: (1) "Waleed Hamed has acknowledged that he and Mike [Yusuf] broke through the wall and used the space in Bay 5 for storage of Plaza Extra-East sodas and other items." (Motion, p. 3; SOF ¶ 14); (2) "Bay 5 was utilized by Plaza Extra-East from May 1, 1994 (upon reopening after the fire) until July 31, 2001 for storage (7 years and 2 month)." (Motion, p. 4; SOF ¶ 15); (3) "As with the rent for Bay 1, United allowed the rent to accrue to provide the Partnership with greater liquidity (as the business was rebounding after the fire and as Plaza Extra-Tutu Park was just beginning to open)" and that "Waleed Hamed agreed to this arrangement." (Motion, p. 5; SOF ¶ 23); (4) "There is no written lease for Plaza Extra-East's use of the Bays 5 or 8, just as there was no written lease for the use of Bay 1 space to house the Plaza Extra-East store as the entire grocery store business was operating as United." (Motion, p. 6; SOF ¶ 28); and (5) "The Bay 5 Rent is calculated by multiplying the square feet occupied (3,125) by $12.00 for 7.25 years" and "[t]he total due for Bay 5 Rent is $271,875.00." (Motion, p. 6; SOF ¶ 29) As to the First Bay 8 Rent, United claimed that: (1) "Plaza Extra-East reopened in May 1994 and began utilizing Bay 8 for additional storage."

(Motion, p. 6; SOF ¶ 32); (2) "Bay 8 was occupied by Plaza Extra-East from May 1, 1994 through September 30, 2002 (8 years and 5 months)." (Motion, p. 7; SOF ¶ 33); (3) "…Yusuf discussed with Waleed Hamed that Plaza Extra-East would need to pay rent for the use of this additional space and Waleed Hamed agreed." (Id.); (4) "As with the rent for Bay 1, United allowed the rent to accrue to provide the Partnership with greater liquidity" and "Waleed Hamed agreed to this arrangement." (Motion, p. 7; SOF ¶ 34); and (5) "The First Bay 8 Rent is calculated by multiplying the square feet occupied (6,250) by $6.15 for 8 years, 5 months" and "[t]he total amount due to United for the First Bay 8 Rent is…for $323,515.63." (Motion, p. 7; SOF ¶ 38) As to the Second Bay 8 Rent, United claimed that: (1) "As with the earlier period of use and the use of Bay 5, Yusuf discussed with Waleed Hamed that Plaza Extra-East would pay rent on the same terms as before and Waleed Hamed agreed." (Motion, pp. 8-9; SOF ¶ 39); (2) "Plaza Extra-East occupied and used Bay 8 from April 1, 2008 through May 30, 2013 (5 years and 1 month)" and "[t]he total amount due to United for the Second Bay 8 Rent is…$198,593.44." (Motion, p. 8; SOF ¶ 40); and (3) "As before, United allowed the rent for this period to accrue rather than demanding paying to allow the partnership greater liquidity and given the pendency of the criminal case to not take any action that would reflect that the business operated as a partnership." (Motion, p. 8; SOF ¶ 41) Furthermore, as to the rent of both Bays 5 and 8, United claimed that: (1) "Waleed Hamed has confirmed that the space was utilized, that Plaza Extra-East had unfettered and continuous access to the space for storage and that he is unable to dispute the timeframes of the use set forth by the Yusufs." (Motion, pp. 8, 15; SOF ¶ 42); (2) "Yusuf considered the partial rent payments[3] made by the Partnership as to Bay 1 as a partial payment of the total rent debt due, which included the rent for Bays 5 and

[3] The partial rent payments referenced by United is a check in the amount of $5,408,806.74 with the memo "Plaza Extra (Sion Farm) Rent" paid by the Partnership to United on February 7, 2012.

8." (Motion, p. 9; SOF ¶ 46); (3) Due to issues related criminal case, "Yusuf made a decision and Waleed Hamed, on behalf of Hamed, agreed, that there was no prospect for the payment of rent during the pendency of the criminal case and that the rent would continue to be deferred" and that a demand for payment was not made until May 17, 2013. (Motion, p. 11; SOF ¶¶ 51-52); and (4) The statute of limitation is not applicable here—the Second Bay 8 Rent's statute of limitations has not expired; the Bay 5 Rent and the First Bay 8 Rent's statute of limitations was tolled by the "doctrine of equitable tolling" and the "doctrine of acknowledgment of the debt and partial payment." (Motion, pp. 16-19) As such, United concluded that "[t]he Partnership's obligation to pay rent to United has been clearly established throughout this case…" and "United is entitled to past due rent for Bays 5 and 8..." (Motion, p. 20) However, United requested an evidentiary hearing "in the event that the Master determines there to be issues of fact as to the entitlement or amount of rent due to United." (Id., at p. 21)

In his opposition, Hamed claimed that while "Plaza Extra-East did use Bays 5 and 8 at various times as a convenience, but either (1) any rent claim was included in the payments and settlements already made to United or, more to the point, (2) he never agreed to pay (nor did he pay) additional rent for those spaces." (Opp., p. 3; CSOF ¶¶ 26, 29) (emphasis omitted) Hamed also claimed that there is no agreed-upon rent amount—to wit, United "discuss[ed] at least three different amounts per square foot for Bays 5 and 8 (the United Corporation Accounts Receivable Current Month report adds a fourth rental amount)—and no agreed-upon rent period—to wit, United alleged "that the Bay 5 lease ended either on October 31, 2001 or July 31, 2001" and "Yusuf initially stated that Bay 8 was used only from April 1, 2008 to May 30, 2013…then stated that Bay 8 was also used from May 1, 1994 to July 31, 2001." (Opp., p. 4) (emphasis omitted) Thus, Hamed argued that there are "two key points" against Yusuf Claim No. Y-2: the statute of frauds and the statute of limitations. (Id., at p. 3) First, Hamed argued

that "the statute of frauds ("SOF"), is dispositive, so the Special Master need not reach the statute of limitations ("SOL") issue." (Id.) Hamed pointed out that: (1) the Virgin Islands SOF requires real estate contracts of more than a year to be in writing. *See* Title 28 V.I.C. §§241(a),[4] 242;[5] *see also, Stanley v. Browne*, 62 V.I. 384, 391-92 (V.I. Super. Ct., April 30, 2015), *aff'd*, 66 V.I. 328 (V.I. 2017) (The Statute of Frauds, codified in the Virgin Islands at V.I. Code Ann. tit. 28, §241(a), requires that the conveyance of any interest in real property, outside of a lease for no more than one year, must be in writing.) (Opp., p. 5); (2) Yusuf admitted that no writing exists here (Opp., p. 5); (3) "United tacitly asserts an exception to the statute of frauds—that even though there was no writing, a contract should be 'implied' because Hamed has somehow 'admitted' such a contract was formed in 1994 [b]ut what United really contends is that it can claim an exception if Wally Hamed admits the store 'used the property' or discussed 'use of' the property with Mr. Yusuf." (Id., at p. 5) (emphasis Omitted); (4) that no such exception to SOF as claimed by United exists. (Id.); and (5) "United absolutely does not argue that Hamed 'admits to the contract's existence and its terms'" but "[t]o the contrary, what United argues is that Wally Hamed has admitted use of the premises." (Id., at p.7) Second, Hamed argued that "if the Master does reach the SOL issue, United is wrong: There was no admission—United confuses the affirmation of use of the premises with an affirmation of a contractual obligation, and no partial performance, as the store never paid a cent for the 'alleged rent obligations'

[4] Title 28 V.I.C. §241(a) provides:

> (a) Except for a lease for a term not exceeding one year, no estate or interest in real property, and no trust or power over or concerning real property, or in any manner relating thereto, can be created, granted, assigned, transferred, surrendered, or declared, otherwise than—
>
> (1) by operation of law; or
>
> (2) by a deed of conveyance or other instrument in writing, signed by the person creating, granting, assigning, transferring, surrendering, or declaring the same, or by his lawful agent under written authority, and executed with such formalities as are required by law.

[5] Title 28 V.I.C. §242 provide:

Every contract for the leasing for a longer period than one year from the making thereof, or for the sale of any lands, or any interest in lands, shall be void unless the contract or some note or memorandum is in writing, and signed by the party to be charged, or by his lawful agent under written authority.

under a lease contract for Bays 5 and 8." (Id., at p. 3) (emphasis omitted) Hamed pointed out that: (1) As to the Bay 5 Rent and the First Bay 8 Rent, they are both barred by the Court's Limitations Order. (Id., at pp. 13-14); (2) As to the Second Bay 8 Rent, the facts surrounding is distinguishable from the rent for Bay 1—to wit, "Hamed had agreed to the existence of such rent for Bay 1 in deposition, but he never agreed to anything about Bays 5 and 8. Nor did the store ever partially perform this alleged obligation – it never paid a cent under such a contract." (Id., at p. 15); (3) There is nothing in writing that limits the application of the check in the amount of $5,408,806.74 with the memo "Plaza Extra (Sion Farm) Rent" paid by the Partnership to United on February 7, 2012 to rent for Bay 1 (Id., at p. 16); (4) On May 17, 2013, United's attorney sent a letter to Hamed's attorney demanding rent for: "Bay No. 5, May 1, 1994 through October 31, 2001; 3,125 SQ. FT. at $12.00, 6 years and 184 days, Balance Due $243,904.00" and "Bay No. 8 April 1, 2008 through May 30, 2013; 6,250 SQ. FT. at $12.00, 5 years and one month, Balance Due $381,250.00." (Id.; (5) In response to United's May 17, 2013 letter, Hamed's attorney sent a letter stating that there never was an agreement to pay rent for Plaza-Extra-East's use of Bays 5 and 8. (Id.); and (6) United's attorney "never contradicted this or sent contrary facts in response." (Id.) As such, Hamed requested the Master to deny United's motion for summary judgment.

In its reply, United made the following arguments in response to Hamed's opposition: (1) The statute of frauds does not bar United claims for the Bay 5 Rent, the First Bay 8 Rent, and the Second Bay 8 Rent because the agreement between United and the Partnership regarding Bay 5 and Bay 8 "could have been terminated by either party in less than a year" and "[t]his takes it outside the statute of frauds." (Reply, pp. 3-4)—United pointed out that, "[i]n *Yusuf v. Hamed*, 59 V.I. 841 (2013), the Supreme Court rejected Yusuf's and United's argument that an oral Partnership claim was void under the statute of frauds…because the

alleged agreement was for an indefinite term that exceeded one year" and 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." 59 V.I. at 852 (emphasis omitted) (Reply, p. 3). United also pointed out that the Supreme Court explained 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" and that it is "immaterial that the performance of the contract *actually* exceeds one year…" 59 V.I. at 852-53 (citation and internal marks omitted; emphasis in original) (Reply, p. 3); (2) "Even assuming that Hamed has raised any genuine issues of material fact regarding the enforceability of the contract claims, he has admitted facts sufficient to establish liability for unjust enrichment" (Reply, p. 6)—United pointed out that "Hamed's testimony satisfies those elements [of an unjust enrichment claim in the Virgin Islands], and establishes liability for unjust enrichment." (Id., at p. 7); (3) The Limitations Order only applies to the claims between the partners does not apply to claims of United for debts (Id., at pp. 8-9); (4) Although Hamed stated that the dates as to occupancy have changed, "United set for the correct dates in the [sic] 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." (Id., at p. 9); (5) "The proper foundation was not laid for the admission of the report [prepared by Luff] as a business record and therefore, it cannot be considered…" and "[e]ven if considered, it offers no relevant evidence as to the issues before the Court." (Id., at pp. 10-11); and (6) The check in the amount of $5,408,806.74 with the memo "Plaza Extra (Sion Farm) Rent" paid by the Partnership to United on February 7, 2012 only covered rent due for the period between 2004 to 2011, and "[i]t is United's position that the Partial Settlement Check did not and could not include rent for Bays 5 and 8." (Id., at pp.

11-12)0 As such, United concluded that it "is entitled to a judgment for amounts owed for the Partnership's use of Bays 5 and 8 and interest, under a contract or unjust enrichment theory" or "[i]n 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." (Id., at pp. 12-13) United further concluded "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" and "[h]ence, 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 facts as to frequency, duration and fair value." (Id., at p. 13)

In his notice of supplementation, Hamed advised the Master that "a business record of United, prepared by its accounting staff and consistent with other such reports provided with regard to [United's revised motion for summary judgment]… demonstrates that United, itself – on its own contemporaneous accounting records – showed that the $5 million settlement check WAS for back rent on the units in the 'Shopping Center,'" and "[m]ore particularly, the record shows that United booked the payment in specifically against Bay 8." (Ntc., p. 2) the notice was accompanied by a declaration of Carl J. Hartmann III, Esq., Hamed's attorney, dated October 31, 2019.

Based on the record before the Master, there is clearly a genuine dispute as to the Bay 5 Rent, the First Bay 8 Rent, and the Second Bay 8 Rent. While United argued in its motion that it was agreed upon for the Partnership to pay United rent for Bays 5 and 8, Hamed repeatedly refuted such argument in his opposition and in his counter statement of facts that he

never agreed to pay rent for Bays 5 and 8: (1) "[Hamed] never agreed to pay (nor did he pay additional rent for those spaces [at Bays 5 and 8]." (Opp., p. 3) (emphasis omitted); (2) "United absolutely does not argue that Hamed 'admits to the contract's existence and its terms. To the contrary, what United argues is that Wally Hamed has admitted use of the premises." (Id., at p. 7) (emphasis omitted); (3) Hamed's attorney's May 22, 2013 letter in response to United's attorney's May 17, 2013 letter demanding rent for Bays 5 and 8—"there was never any agreement to pay rent for [Bay 5]" and "[t]he rent claimed for this Bay [8] was never agreed to." (Opp., at p. 16; CSOF ¶ 12); and (4) "On January 21, 2019, Wally Hamed testified in his deposition that Bays 5 and 8 were provided to the Partnership rent-free and he had no conversation with Fathi Yusuf where he agreed or Fathi Yusuf asked that the Partnership would pay rent for the Bays." (CSOF ¶ 26) Thus, as the Court previously concluded in its Limitations Order, the Master is similarly compelled to conclude that "a genuine dispute of material fact exists as to whether Hamed ever acknowledged any debt as to rent owed for Bays 5 and 8, and more basically, whether the partnership ever agreed to pay any rent for the use of Bays 5 and 8 in the first place." (Limitations Order, p. 8) Furthermore, there is also a genuine dispute as to whether the check in the amount of $5,408,806.74 with the memo "Plaza Extra (Sion Farm) Rent" paid by the Partnership to United on February 7, 2012 is a settlement that applied to Bay 5 and/or Bay 8—United said no while Hamed said yes. As such, the Master concludes that United has not satisfied his burden of establishing that there is no genuine dispute as to any material fact regarding Yusuf Claim No. Y-2.[6] *See Rymer,* 68 V.I. at 575-76 (quoting *Williams,* 50 V.I. 191, 194) ("Because summary judgment is "[a] drastic remedy, a court should only grant summary judgment when the 'pleadings, the discovery and disclosure materials on file, and any affidavits, show there is no genuine issue as to any material fact.'")

[6] At this juncture, in light of the Master's finding, the Master need not address other issues raised by Parties.

CONCLUSION

Based on the foregoing, the Master will deny Yusuf's revised motion for summary judgment as to Yusuf Claim No. Y-2. Accordingly, it is hereby:

ORDERED that United's revised motion for summary judgment as to Yusuf Claim No. Y-2: past rent due to United for Bays 5 and 8 is **DENIED**.

DONE and so ORDERED this 13th **day of November, 2019.**

EDGAR D. ROSS
Special Master