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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
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
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
FATHI YUSUF and UNITED CORPORATION, Plaintiffs, v. THE ESTATE OF MOHAMMAD HAMED, Waleed Hamed as Executor of the Estate of Mohammad Hamed, and THE MOHAMMAD A. HAMED LIVING TRUST,	CIVIL NO. ST-17-CV-384 ACTION TO SET ASIDE FRAUDULENT TRANSFERS

Defendants.)
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)

UNITED'S REPLY IN SUPORT OF ITS MOTION TO SUPPLEMENT SUMMARY JUDGMENT RECORD RE: CLAIM H-150

Hamed's Response to United's Motion to Supplement Summary Judgment Record re: Claim H-150 notes that the May1994 ScotiaBank mortgage is "not newly discovered evidence," and faults United for waiting until "after the close of discovery and depositions" to provide him a copy of the mortgage, notwithstanding earlier motions to compel and Rule 37 letters. Hamed's Response at 2 & n. 1. United and Yusuf had no obligation to produce the document before the close of discovery because it did not have possession of the document then. United and Yusuf (and presumably Hamed, too) were not able to locate it in the FBI hard drive containing documents seized by that law enforcement agency during the October 2001 raid on the Plaza Extra stores and the homes of various Yusuf and Hamed family members.[1] And the mortgage is not among the very few United files that the FBI left behind in the 2001 raid on the stores.

Copies of recorded documents are, however, available to any member of the pubic who requests them from the VI Recorder of Deeds and pays the copying charge. United and Yusuf had no need to obtain a copy of the ScotiaBank mortgage from the Recorder of Deeds until very recently, because Mr. Yusuf had sworn to the existence of the 1994 Scotiabank mortgage as far back as June 2014, in a declaration filed contemporaneously with a brief, and that statement had

[1]As the Master knows from prior briefing, the FBI hard drive consists of well over a hundred thousand pages of documents that were seized in the FBI's 2001 raid of Plaza Extra stores and Hamed and Yusuf homes, or obtained by subpoena from third parties. The FBI hard drive is notoriously difficult to search, not only because of the sheer number of documents it contains, but also because it does not reproduce files as they were maintained by United, but instead rearranges them in haphazard fashion.

never since then been challenged by Hamed.[2] To the contrary, Hamed relied on the Scotiabank loan when he argued in his November 18, 2019 Motion for Partial Summary Disposition re: Claim H-163 that the partnership partially repaid that loan, and that he would be seeking recovery of those payments. *See* Hamed's November 18, 2019 Motion for Summary Judgment re: Claim H-163 at p. 5. But that argument put the date the mortgage was paid off and released in issue, because Judge Brady's laches-based limitations order bars any claims that arose before September 17, 2006. This was the first time in these proceedings that United had any need to ask the Recorder of Deeds for copies of the recorded February 11, 2000 release of the mortgage and the mortgage itself. The Recorder provided those copies on January 30, 2020, and United referenced them in and then attached them to its April 9, 2020 Opposition to Hamed's Motion for Partial Summary Judgment re: Claim H-163. *See id*. at 16. Hamed must have determined that Mr. Yusuf's reference to the mortgage in his 2014 declaration was adequate for his own purposes, because he apparently did not ask the Recorder of Deeds for a copy of the mortgage prior to filing his H-163 motion last November.

So much for United's alleged withholding from discovery of a document is should have produced back in 2014. Turning to its evidentiary significance, Hamed claims that United, by describing the 1994 loan in its Motion to Supplement as being for the benefit of the partnership, has engaged in a "blatant admission of a central fact which Yusuf has always evaded" – namely, that the ScotiaBank loan was "for the partnership." Hamed's Response at p. 4. This contention makes absolutely no sense, because Mr. Yusuf's June 6, 2014 declaration expressly states that the May 1994 ScotiaBank loan was "for the benefit of the partnership." *See* Exhibit 12 to United

[2]Mr. Yusuf's June 6, 2014 Declaration was first submitted in connection with Defendant's June 6, 2014 Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment re: Statute of Limitations Defense. The declaration has been used with other filings in the Superior Court and in these claims proceedings before the Master.

Corporation's April 15, 2020 Motion for Summary Judgment re: Claim Y-7 and Y-9, Declaration of Fathi Yusuf, pp. 1-2, ¶2. There was no evasion of this fact then, or at any time since then.

Next, Hamed argues that committing to use the shopping center as collateral to attempt to obtain a loan cannot be consideration for the agreement to pay United's GRTs because it is "an empty, unsupported assertion made for the first time now, and totally unsupported by any testimony or writing." Hamed's Response at pp. 4-5. That statement is incorrect. Mr. Yusuf did testify in deposition that he told Hamed he would use the shopping center as collateral for a loan, and United cited that deposition testimony in its Opposition to Hamed's motion regarding claim H-150.

Mr. Yusuf was asked in his January 21 deposition about the agreement he made with Hamed at the outset of their business relationship, and specifically the agreement regarding payment of United's GRT's. In response, Mr. Yusuf testified that he told Hamed that "we're going to face a project in the millions, at least $3 to $4 million," and that because they were undertaking a "big business way above our financial capability, we have no choice but to hit a lending institute." *See* Exhibit 1 to United's June 11, 2020 Opposition to Hamed's Motion for Summary Judgment re: Claim H-150, pp. 9-10 ("United's H-150 Opposition"). Mr. Yusuf added that in order to obtain a loan of that size, he would have to put up the shopping center as collateral, because "from experience, nobody will lend any money without taking United Shopping Center as a collateral…." *Id*. at 10.

As United pointed out in its Motion to Supplement at page 2, footnote 1, United's principal argument in support of its motion re: claim Y-5, and in opposition to Hamed's motion re: claim H-150, is that the mutual promises in the oral rent and partnership agreements that

Yusuf and Mohammad Hamed made in 1986 provide the consideration for the term requiring United's shopping center GRTs to be paid from Plaza Extra accounts. For that reason, the Master need not even decide whether what Hamed calls Yusuf's "rationales" for the GRT agreement were valid ones. *See* United's H-150 Opposition, pp. 4-5. United's Opposition did argue in the alternative that the so-called rationales discussed by Hamed – the low rent being charged by United and the deduction for shopping center depreciation on United's tax returns – would count as separate consideration if that were required. *See id*. at 5-6. United showed that the rent charged by United for Plaza Extra East was indeed below market, and also that until John Gaffney began treating the shopping center business as a partnership for accounting purposes, in 2013, depreciation for the shopping center had been deducted from United's tax returns, and therefore could result in lower taxes on supermarket income. *See id*. at 5-6.

To be sure, United did not specifically mention the use of the shopping center as collateral for the 1994 loan in its discussion of Hamed's separate consideration contention. But United did point out that Hamed's motion "fails to mention other 'rationales' for the GRT agreement," and in support of that statement cited to the very deposition pages from the January 21, 2010 deposition (pages 9 and 10) in which Mr. Yusuf said that he told Hamed he would put up United Shopping Center as collateral to obtain a loan for the supermarket business. *See id*. at 6. That was sufficient to put Hamed on notice that the 1994 mortgage is relevant to Hamed's separate consideration argument, in the event the Master even needs to reach that issue.

Hamed does not even attempt to argue how he would be unfairly prejudiced by making the 1994 mortgage part of the summary judgment record regarding claim H-150, and it is very difficult to imagine in these circumstances how he could press such an argument. This is especially so because the mortgage was referenced in a Yusuf declaration that was filed more

than 6 years ago (and has been used since then in this litigation in several filings). In addition, Hamed's November 2019 motion regarding claim H-163 shows not only that he was aware of the mortgage, but was also seeking to assert a claim for damages based on it.

Finally, Hamed suggests that Yusuf's commitment to put up the shopping center as collateral for a loan to support the supermarket business cannot count as separate consideration because the mortgage does not "say anything" about the GRT agreement. Hamed's Response at 5. If separate consideration were needed to support the GRT agreement, one such consideration would be the promise to offer the shopping center as collateral to obtain the loan. The mortgage of its shopping center property that United ultimately gave is additional evidence that the promise was made, but it should not itself be regarded as the consideration. *See Tourism Industries, Inc. v. Benjamin*, 1982 WL 1035049, *2 (Terr. Ct. 1982) ("it is the exchange of promises which makes the consideration of the contract, not the performance of these promises...") (citation and internal marks omitted). But even if the mortgage itself was the consideration, there plainly is no legal requirement that it reference the GRT agreement in order to count as consideration for that agreement. Hamed cites no case law that would support this novel requirement.

Hamed has invited United to file the equivalent of a sur-reply brief responding to Hamed's reliance, in his H-150 reply, on the Virgin Islands Supreme Court's decision in *Kennedy Funding, Inc. v. GB Properties, Ltd*., 2020 Westlaw 2555113 (V.I. 2020). United has a few remarks about the case and its applicability to the Y-5 and H-150 dispositive motions, and will make them here. Contrary to Hamed's contention, *Kennedy Funding* does not articulate new law regarding burdens of the moving and non-moving party in the summary judgment context, but instead simply recites boilerplate rules drawn from the text of Rule 56 and from its own prior

decisions. Hamed's reply places in bold typeface the Supreme Court's statement that the "non-moving party, in response to the summary judgment motion, was not free to rely on its pleadings or bare assertions, but was required to set forth facts to show a genuine issues of material fact." Hamed's Reply in Support of his Motion for Summary Judgment re: Claim H-150 (emphasis in Hamed's quotation; internal marks omitted). This statement hardly sets forth new requirements concerning what the non-moving party must do to avoid summary judgment where the moving party has shown the absence of a genuine issue of material fact. It is nothing more than an old platitude which the Supreme Court supported by citations to the language of Rule 56 and a decision of the Court from 7 years ago. *See Kennedy Funding*, *supra* at p. *6.

It is well-accepted that the oral or affidavit testimony of a party that an oral agreement was reached is a permissible and sufficient means of establishing that a genuine issue of material fact that precludes summary judgment for the party contending that there was no oral agreement. *See, e.g., Shillingford v. Hess Oil of VI,* 2009 WL 1765677, *9 (D. V.I. 2009) (plaintiff's "affidavit attesting to the existence and details of an oral employment contract…is sufficient to create a genuine issue of material fact") *Rule v. Brine, Inc.,* 85 F.3d 1002, 1013 (2d Cir.1996) (plaintiff's testimony of defendant's oral promise to pay fair royalty sufficient to preclude summary judgment); *Larsen v. Erickson*, 549 F.2d 1136, 1138 (8th Cir. 1977) (affidavits attesting to oral agreement having been reached "created a genuine issue of material fact in regard to the existence of the subsequent oral agreement") *Nowlin v. Resolution Trust Corp.,* 33 F.3d 498, 508 (5th Cir.1994) (holding that plaintiffs' affidavit and deposition testimony were sufficient to preclude grant of summary judgment for defendant on oral contract claim, despite existence of written contract).

Nothing in the facts or holding of *Kennedy Funding* alters the rule exemplified by this line of cases that, at the very least, a party who testifies that he or she made an oral agreement with a particular term has raised a triable issue of material fact regarding the existence of the contract and that term. As noted in United's Motion to Supplement, *Kennedy Funding* involved an alleged agreement between a judgment creditor in a foreclosure sale, Kennedy Funding, and a company, GAD Properties, Ltd ("GAD"), that was to bid at the sale, under which GAD, if the successful bidder, would pay the statutory commission owed to the U.S. Marshall's Service. In an unremarkable ruling, the Virgin Islands High Court held that Kennedy Funding's email to GAD proposing a contract under which GAD would agree to pay all expenses of sale was not sufficient to create a genuine issue of material fact regarding the existence of the alleged contract, because there was no written or oral evidence manifesting the bidder's acceptance of that and other terms of the proposed contract. As the Supreme Court found, Kennedy Funding had offered "no evidence of a response in writing *or otherwise* manifesting GAD's acceptance of these terms and conditions." *Id*. at *8 (emphasis added). This can only mean that Kennedy Funding offered neither an email or other document from GAD showing its written assent to the terms of the contract proposed in Kennedy Funding's email, nor any deposition or affidavit testimony showing GAD's oral assent. Because "Kennedy failed to produce *any* evidence indicating that GAD offered or agreed to pay the USMS commission," the Supreme Court ruled that it "has therefore failed to prove an issue of triable fact in regard to the USMS commission." *Id*. at *8 (emphasis added).

The only important issue raised by *Kennedy Funding's* discussion of burdens in the summary judgment context is whether Hamed has met his burden as the moving party in connection with his H-150 dispositive motion, and whether he has met his burden as the non-

moving party in connection with United's dispositive motion as to claim Y-5. Mr. Yusuf has been consistent in maintaining that payment of United's GRTs was a condition of the oral partnership and rent agreements reached with Hamed in 1986. He said so unequivocally in his 2014 deposition and reiterated that testimony in his 2020 deposition.[3] *See* United's H-150 Opposition, p. 7. Mohammad Hamed never asserted anything to the contrary either by deposition or declaration before he passed away in 2016. *See id*. at p. 11. All that his sons can muster to try to undercut Yusuf's consistent testimony is offering their own deposition testimony in January of this year that their father never told them about this term of his agreement with Mr. Yusuf. For the reasons explained in United's prior briefs regarding the Y-5 and H-150 claims, this is very weak evidence indeed, and it is hardly enough to satisfy either Hamed's burden as movant or non-movant for the parties' respective dispositive motions. *See* United's H-150 Opposition, pp. 9-11.

CONCLUSION AND RELIEF REQUESTED

For all of the foregoing reasons, and those set out in its Motion to Supplement the Summary Judgment Record for Claim H-150, the Master should grant the motion and consider the evidence of the 1994 Scotiabank mortgage, to the extent that he decides that it is necessary to reach the separate consideration issue raised by Hamed. United also requests that the Master consider the *Kennedy Funding* case and its applicability to the Y-5 and H-150 dispositive motions in a manner consistent with United's arguments about the case in this Reply.

[3] John Gaffney provided further evidence of Mr. Yusuf's consistency on this point. He testified that Mr. Yusuf instructed his predecessor at United, Margie Soeffing, to pay United's GRTs for shopping center income from Plaza Extra accounts, and also instructed her that for accounting purposes those payments should be treated as Plaza Extra expenses, not United Shopping Center expenses. *See* United's H-150 Opposition, p. 14.

Respectfully submitted,

DUDLEY NEWMAN FEUERZEIG LLP

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By: s/Charlotte K. Perrell

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of August, 2020, I caused the foregoing **UNITED'S REPLY IN SUPORT OF ITS MOTION TO SUPPLEMENT SUMMARY JUDGMENT RECORD RE: CLAIM H-150**, 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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