

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,	)	CIVIL NO. SX-12-CV-370
v.)	
	)	ACTION FOR INJUNCTIVE
FATHI YUSUF and UNITED CORPORATION,	)	RELIEF, DECLARATORY
	)	JUDGMENT, AND
Defendants/Counterclaimants,	)	PARTNERSHIP DISSOLUTION,
v.	)	WIND UP, AND ACCOUNTING
)	
WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED, and PLESSEN ENTERPRISES, INC.,)	
)	
<u>Additional Counterclaim Defendants.</u>	)	Consolidated With
WALEED HAMED, as Executor of the Estate of MOHAMMAD HAMED,)	
	)	CIVIL NO. SX-14-CV-287
Plaintiff,)	
v.	)	ACTION FOR DAMAGES AND
	)	DECLARATORY JUDGMENT
UNITED CORPORATION,)	
)	
<u>Defendant.</u>)	
WALEED HAMED, as Executor of the Estate of MOHAMMAD HAMED,	)	CIVIL NO. SX-14-CV-278
)	
Plaintiff,	)	ACTION FOR DEBT AND
v.	)	CONVERSION
)	
FATHI YUSUF,)	
)	
<u>Defendant.</u>)	
FATHI YUSUF and UNITED CORPORATION,	)	CIVIL NO. ST-17-CV-384
)	
Plaintiffs,	)	ACTION TO SET ASIDE
v.	)	FRAUDULENT TRANSFERS
)	
THE ESTATE OF MOHAMMAD HAMED, Waleed Hamed as Executor of the Estate of Mohammad Hamed, and THE MOHAMMAD A. HAMED LIVING TRUST,)	
)	
Defendants.)	
)	

**UNITED'S REPLY TO HAMED'S RESPONSE TO ITS
SUPPLEMENTAL BRIEF RE: STATUTE OF LIMITATIONS FOR CLAIM Y-8**

Hamed's October 22, 2020 Response to United's October 15 Supplemental Brief re: Statute of Limitations was filed a day after the Master's issuance of his Order as to United Claims Y-7 and Y-9 for return of advances made by United to partnership (supermarket) accounts. Hamed's Response ignores entirely the statutes of limitations analysis in the Master's October 20 Order, and then proceeds to make an argument that flatly contradicts a critical part of the Order. Hamed argues that that each sale of water should represent an accrual of the claim for limitations purposes, which is another way of saying that the 6-year statute of limitations should run anew with each water sales transaction. *See* Hamed's Response, p. 8. From this premise, and his assertion that the Y-8 claim was brought on September 30, 2016, when United filed its claims, Hamed argues that any claims for return of any water revenues derived from sales occurring before September 30, 2010 are time-barred.

There is no principled reason why the Master's statute of limitations analysis as to United's claims Y-7 and Y-9 should not apply equally to United's Y-8 claim for return of water revenues. In his October 20 Order, the Master concluded that the Y-7 and Y-9 claims were brought on September 30, 2016, when United filed its claims for resolution by the Master. In that respect, and in that respect only, Hamed's argument regarding Claim Y-8 is consistent with the Master's limitations ruling of October 20. But that Order rejected Hamed's argument that the statute of limitations began running with each advance that United made to the partnership. Instead, relying on equitable estoppel principles, the Master concluded that the statute of limitations did not accrue on a claim for the total sum of accumulated advances until February 10, 2012. Since September 30, 2016 is well before February 10, 2018, the Master ruled that the

entire claim for advances made up to February 10, 2012 was timely. The Master accordingly awarded summary judgment to United on claims Y-7 and Y-9 in the amount of \$188,132.00.¹

In the October 20 Order, the Master ruled that Hamed was equitably estopped from invoking the statute of limitations as a defense to United's Y-7 and Y-9 claims for recovery of advances made from United's tenant account to partnership accounts. *See* October 20, 2020 Order, pp. 22-29. "The doctrine of estoppel has long been accepted as one of the bulwarks of equity in Anglo-American jurisprudence." *Allen v. A.H. Robins Co.*, 752 F.2d 1365, 1371 (9th Cir. 1985). "Estoppel to plead the statute of limitations is often invoked on the broad general ground that parties may not take advantage of their own wrongs." *Id.* at 1371. "As a general rule, a defendant will be estopped from setting up a statute-of-limitations defense when its own prior representations or conduct have caused the plaintiff to run afoul of the statute and it is equitable to hold the defendant responsible for that result." *Id.* at 1371-1372.

Relying heavily on Judge Brady's findings in his limitations order, the Master concluded as follows:

- 1) "[T]he partners and their respective sons were well aware from the inception of their involvement with the business that Yusuf acted as the managing partner of the Partnership and had absolute control over the Partnership finances." Master's October 20, 2020 Order at p. 23.
- 2) "[B]oth partners and their respective sons were also well aware from the inception of their involvement with the business that Yusuf, while he functioned as the managing partner of the Partnership, he also simultaneously functioned as the president of United, and that the dealings between the Partnership and United were treated as one unit." *Id.* at 24.

¹The October 20 Order did deny recovery for certain supplemental dollar claims for advances, because they were first asserted after the six-year statute had run from February 10, 2012 (i.e., after February 10, 2018). *See* Master's October 20, 2020 Order at p. 36.

- 3) “[S]ince the inception of the business, by practice and usage, all authority resided in Yusuf as he simultaneously functioned as the president of United and the managing partner of the Partnership, and thereby, since the inception of the business, the dealings between the Partnership and United were treated as one unit with Hamed’s full knowledge and agreement.” *Id.* at 24.
- 4) “Hamed’s action during the pendency of the criminal case brought by the United States against United further exemplified that Hamed was fully aware and content that all authority resided in Yusuf and that the dealings between the Partnership and United were treated as one unit.” *Id.* at 24.
- 5) “Yusuf, as the president of United, made advances on behalf of the Partnership to third-parties and directly to the Partnership by transferring funds from United’s Account to United’s Partnership Account and had the discretion to seek repayment from the Partnership at any time, and that Yusuf, as the managing partner of the Partnership, had the discretion to accept the advances from United and to determine when the Partnership should repay United for the advances.” *Id.* at 27-28.
- 6) Hamed lulled Yusuf into inaction by his “ongoing and repeated material misrepresentation” that he “agreed and consented to Yusuf having absolute control over the Partnership finances, to Yusuf having total authorities over the Partnership and United, and to the treatment of the dealings between the Partnership and United as one unit.” *Id.* at 27.
- 7) Yusuf reasonably relied on Hamed’s misrepresentations and actions by “fail[ing] to timely demand the repayment from the Partnership.” *Id.* at 28.

On the basis of the above findings and conclusions, the Master concluded that Hamed was equitably estopped to use the bar of the statute of limitations against United on the Y-7 and Y-9 claims until February 10, 2012, when, Nizar DeWood, who was then United and Yusuf’s

attorney, gave Hamed notice of dissolution of the partnership and asked for settlement of all accounts. *See id.* at 29. And since United filed its claim for return of those monies on September 30, 2016, its claim was filed within the applicable 6-year limitation period that began on February 10, 2012. *See id.* at 29.

The Master's reliance on the doctrine of equitable estoppel to preclude Hamed's reliance on the statute of limitations for any Y-7 and Y-9 claims arising before February 10, 2012 applies equally to the limitations defense that Hamed has raised as to Claim Y-8. There is no principled reason for treating United's water sales revenues placed in partnership accounts differently than advances to the partnership made from United's rental income for statute of limitations purposes. The Master has found in his September 3 Order that the water – and hence the revenue generated by its sales – belonged to United. Yusuf, as the president of United, and the managing partner with absolute control over partnership finances, had the discretion to place water sales revenues in supermarket accounts, and to determine when they would be paid to him, as president of United, from those accounts. Hamed acquiesced in Yusuf's discretion over the use of partnership accounts to hold monies that belonged to United until such time as he determined that it made economic sense to repay them. And United's reliance by not taking any action to force a repayment of the accumulated water revenues was reasonable up until February 10, 2012, when Nizar DeWood sent notice of dissolution of the partnership to Hamed. Hamed is therefore equitably estopped from invoking the statute of limitations as to any water sales revenues collected before that date. This conclusion applies regardless of whether the Master treats the Y-7 and Y-8 claims as sounding in unjust enrichment, restitution, conversion, express contract or implied contract (quasi-contract)².

²Hamed uses the terms “equitably based contract claim” or “equitable contract claims” to refer to quasi-contract or implied contract claims. *See* Hamed's October 22, 2020 Response to Supplemental Brief, at pp. 5, 8.

In its Supplemental Brief, United invoked equitable tolling as an alternative ground for ruling no part of its Y-8 claim is time-barred. United referred the Master to parts of its Motion for Summary Judgment as to Claims Y-7 and Y-9 in support of its reliance on that doctrine. United does not believe the Master has to reach the issue of whether equitable tolling applies in the circumstances of this case. In the event that the Master does need to reach that issue, United would like to respond to a point made by the Master in its October 20 ruling. The Master noted at page 31, n. 49 of that Opinion that “a *Banks* analysis was never conducted to establish the elements of equitable tolling for breach of contract.” The Master added that because he was ruling for United on equitable estoppel grounds, he “need not conduct a *Banks* analysis to determine the elements of equitable tolling for breach of contract.” *Id.* at p. 31, n. 49.

In case it becomes necessary for the Master to undertake a *Banks* analysis regarding equitable tolling to resolve the Y-8 claim, United believes a *Banks* analysis on that issue is straightforward. As the U.S. Supreme Court has broadly stated, “Time requirements in lawsuits between private litigants are customarily subject to ‘equitable tolling.’” *Irwin v. Dep't of Veterans Affairs*, 111 S. Ct. 453, 457 (1990). The High Court has also held that “[g]enerally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.” *Pace v. DiGuglielmo*, 125 S. Ct. 1807, 1814 (2005).³ The Supreme Court has applied that test in a variety of contexts, including in habeas corpus proceedings and contract cases. *See Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750, 753 (2016) (recognizing that equitable tolling is available to “to preserve contract claims not timely presented,” but holding that in that case it did not apply under the *Pace* test because the appellant “cannot establish extraordinary circumstances that stood in the way of timely filing”).

³*Pace* was decided by the High Court on *certiorari* from the United States Court of Appeals for the Third Circuit.

In *Thomas v. V.I. Bd. of Land Use Appeals*, 60 V.I. 579, 588–89 (V.I. 2014), the Virgin Islands Supreme Court adopted the *Pace* test for equitable tolling in *dicta*. And then in *Bonelli v. Gov't of Virgin Islands*, 67 V.I. 714, 722 (2017), an employment discrimination and wrongful discharge case, the Virgin Islands Supreme Court once again approvingly quoted to the *Pace* test for equitable tolling, without deciding if that was the applicable test. In light of the U.S. Supreme Court’s statements about the broad availability of equitable tolling in American law, it is clear that equitable tolling is a doctrine that all or nearly all jurisdictions have adopted. And because the U.S. Supreme Court in *Pace* adopted the test for equitable tolling used in the Third Circuit and other Circuits, and has applied the test across the board, it is a widely used test that most courts would apply to unjust enrichment, conversion, restitution, express contract or implied contract claims. United believes it is the soundest rule for the Virgin Islands because it furthers the policy of deciding cases on the merits, and it prevents a person from lulling another by his deceitful actions into unwittingly giving up his or her rights to sue on meritorious claims.

For all of the reasons set forth above, and in United’s prior briefs supporting its claims for summary judgment on Y-8, United respectfully asks the Master to reject Hamed’s argument in his October 22 filing that the portion of United’s Y-8 claim that pre-dates September 30, 2010 is time-barred. Instead, consistent with the Master’s statute of limitations analysis in his October 20 grant of summary judgment on Claims Y-7 and Y-9, the Master should rule that no portion of the Y-8 Claim is time-barred.

Respectfully submitted,

DUDLEY NEWMAN FEUERZEIG LLP

DATED: November 6, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November, 2020, I caused the foregoing **UNITED'S REPLY TO HAMED'S RESPONSE TO ITS SUPPLEMENTAL BRIEF RE: STATUTE OF LIMITATIONS FOR CLAIM Y-8**, 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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