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*,	**Case No.: SX-2012-CV-370** **ACTION FOR DAMAGES, INJUNCTIVE RELIEF AND DECLARATORY RELIEF** JURY TRIAL DEMANDED
WALEED HAMED, as the Executor of the Estate of MOHAMMAD HAMED, *Plaintiff,* vs. **UNITED CORPORATION,** *Defendant.*	Consolidated with **Case No.: SX-2014-CV-287**
WALEED HAMED, as the Executor of the Estate of MOHAMMAD HAMED, *Plaintiff* vs. **FATHI YUSUF**, *Defendant.*	Consolidated with **Case No.: SX-2014-CV-278**
FATHI YUSUF, *Plaintiff*, vs. **MOHAMMAD A. HAMED TRUST**, *et al,* *Defendants.*	Consolidated with **Case No.: ST-17-CV-384**
KAC357 Inc., *Plaintiff*, vs. **HAMED/YUSUF PARTNERSHIP,** *Defendant.*	Consolidated with **Case No.: ST-18-CV-219**

HAMED'S POST HEARING FILING RE YUSUF'S Y-2 and Y-4 CLAIMS (RENT AND INTEREST ALLEGEDLY DUE TO UNITED FOR BAYS 5 AND 8)

Hamed hereby respectfully submits his Proposed Findings of Fact and Conclusions of Law regarding the February 4, 2021, hearing on Yusuf's Y-2 and Y-4 claims for rent and interest allegedly due for Bays 5 and 8 of the United Shopping Plaza owned by United Corporation ("United"). Several preliminary comments are in order.

First, Hamed withdraws his prior Statute of Frauds argument, as it is now undisputed that the alleged Bay rentals were not for a fixed period of time and could be terminated at any time. As noted by the Virgin Islands Supreme Court in *Yusuf v. Hamed,* 59 V.I. 841, 852 (2013), agreements that can be terminated in less than a year are outside the Statute of Frauds, which Yusuf cited in his prior briefing on this issue in response to Hamed's SOF defense, as noted in the Special Master's November 13, 2019, Opinion (at pp. 11-12) denying summary judgment.

Second, Hamed asserts that United's rent claim prior to September 17, 2006, is barred by Judge Brady's July 21, 2017, Order cutting off claims that pre-date September 17, 2006 (the "Limitations" Order"). However, the Special Master previously held that this Limitations Order does not *necessarily* apply to claims regarding United, so this point will not be reargued here, although Hamed expressly preserves this objection in the event it may be needed for an appeal of this issue.[1] **It should be noted, however, that Hamed does believe the pre-2002 Y-2 rent claims for both Bays 5 and 8 are clearly barred by the applicable statute of limitations, as set forth the Conclusions of Law herein.**[2]

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[1] This objection was placed on the record in this case at Tr. 11-12 of the February 4th hearing.

[2] The Master commented on this possible conclusion on pp. 3-5 of his November 13, 2019, opinion, which was dependent on the evidence adduced at the hearing.

Third, the Conclusions of Law set forth herein propose alternate findings, as noted. For example, Hamed asserts that no rent is due, so that no interest is owed. However, if there is a finding that rent is due, Hamed asserts that no interest is due based on the previous finding made by the Special Master in his December 3, 2019 Order finding that no interest was owed for the back rent on Bay 1, holding as follows (at pp. 13-14):

> The foregoing shows that it was common practice for the Partnership to make lump sum rent payments when United made rent payment demands, as opposed to monthly or even yearly rent payments, and that the construct of Parties' rent payment arrangement for Bay 1 throughout their relationship never provided for prejudgment interest. Thus, the Master finds it inequitable and unjust to award prejudgment interest in this instance.

In short, alternate proposed findings need to be submitted to address the multiple findings that the Master might make based on the hearing records.

With the foregoing comments in mind, Hamed submits his proposed Findings Of Fact and Conclusions of Law.

I. HAMED'S PROPOSED FINDINGS OF FACT

This matter proceeded to a hearing on February 4, 2021, with the following testimony being presented by the Parties:[3]

A. Fathi Yusuf-First Witness

On direct examination, Fathi Yusuf testified:

1. That he was in charge of determining what rent was to be paid United by the Partnership. (Tr. 14).

2. That the United Shopping Center burned down in 1992 and was rebuilt so that it reopened in May of 1994. (Tr. 14-15).

3. That he worked in St. Thomas in 1994, but came back to St. Croix every 10 days. (Tr. 15).

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[3] All cites to the hearing transcript will be to "Tr.__" as there was only one volume of the hearing transcript. Yusuf exhibits will be referred to as "YEx__" and Hamed exhibits will be referred to as "HEx__."

4. That he saw the Plaza East Supermarket using Bays 5 and 8 in May of 1994. (Tr.15-16).

5. That Bay 5 is 3,125 square feet. (Tr. 17, 19).

6. That Bay 8 is 50 feet by 125 feet (6,250 sq ft). (Tr.).

7. That the supermarket used Bay 8 for storage when the store reopened. (Tr. 20).

8. That he had a conversation with someone on the "Hamed side" that they would have to pay rent for Bay 8 and Bay 5. (Tr. 20)

9. That the supermarket broke a hole in the wall so it could access Bay 5 for storage, which he saw and told Wally Hamed "You have to pay rent." (Tr. 22, 25).

10. That Wally agreed to pay rent for Bay 5. (Tr. 27).

11. That he and Wally reached an agreement in 2012 on back rent for the time period 2004 to 2012 for $5,408,806.74, but he testified that this figure did not include rent for Bays 5 and 8. (YEx. 3 and YEx. 4, Tr. 30-34)

12. That United had the absolute right to expel the supermarket from Bays 5 and 8 *at any time*, telling Wally "as soon the tenant come in, you have to get out." (Tr. 37-38, 109)

13. That his lawyer did not send a letter to the Hameds until May 17, 2013, to demand rent for Bays 5 and 8. (YEx 5, Tr. 40-41)

14. That he never thought this rent claim for Bays 5 and 8 would be contested. (Tr. 42)

15. That he read an affidavit he said his counsel prepared (YEx 2), reciting from it that he calculated the rent owed for Bay 5 to be $12 a square foot. He could not recall how that calculation was made. (Tr. 45, 46)

16. That YEx 11 is a retail lease for Bay 5 starting September 3, 2001, for $12 a square foot, so that he is seeking rent from the supermarket from May, 1994 to September 3, 2001, based on this figure. (Tr. 47-48)

17. That the Affidavit prepared by his counsel states that (YEx 2) he was seeking rent for Bay 8, which had 6,250 sq. ft., at $6.15 per sq. ft. from May 1, 1994 through September 30, 2002, for a total of $323,515.63. (Tr. 49-50)

18. That YEx 12 is a lease for Bay 8 by United to Mamud Idheilah commencing October 1, 2002. (Tr. 50)

19. That he then rented Bay 8 to the supermarket again from 2008 through 2013, but that he did "not know the price at that time." (Tr. 50-51)

20. That the affidavit prepared by his counsel, which he read into the record, states that rent for Bay 8 for this second time period was also $6.15, for a total of $198,593.75. (Tr. 51-52)

21. That he has *never* communicated anything about these rents to any of his accounting personnel, **and there have never been any accounting records showing the accrual of any the rents he now seeks**. (Tr. 52-54)

22. That he allowed this rent to accrue without seeking payment. (Tr. 54)

23. That in another, similar, situation United had rented a laundry to Mohammed Hamed for $600 a month, but in that transaction there WAS a lease that contained an amount, and that it also contained a specific term that the tenant had to pay for water. Yusuf testified that he did not charge Hamed for water usage and also allowed Hamed to charge someone else twice that much money for the premises, but that he did not void the lease, even though he could have done so. Yusuf testified that he mentioned all of this "Just to show you the kind of man I am . . . . I am here for dignity, not for money." (Tr. 54-55)

On cross-examination, Fathi Yusuf:

24. Admitted that his lawyer, Nizar Dewood, sought $12 a square foot for rent for Bay 8 in the May 17, 2014, letter, which Yusuf admitted was *wrong*. (Tr. 62-63)

25. Admitted that his lawyer, Nizar Dewood, only sought rent for the time period 2008 to 2013 for Bay 8, in the May 17, 2013, letter without any mention of the rent being due for Bay 8 from 1994 through 2002. (Tr. 63).

26. Admitted that the December 23, 2013, counterclaim filed by United did not seek rent for Bay 8 from 1994 through 2002 and sought $16.15 per sq. ft. in rent for Bay 8 from 2008 through 2013, which he said was also *wrong*. (HEx C, Tr. 64-67)

27. Admitted he does not pay rent to himself for the warehouse space he has in the Frank Weisner building he owns, even though it is a different company. (Tr. 71)

28. **Admitted that one always pays less for warehouse space**. (Tr. 72)

29. Admitted that Bay 5 leased to Diamond Girl in 2001 for retail sales required United to make certain improvements, including the installation of air-conditioning, before the new tenant had to pay rent at $12 per sq. ft. (YEx 11, Tr. 74-75)

30. Admitted that Bay 8 leased to a new tenant in 2002 required United to make certain improvements, including a loading door, a working bathroom and warehouse lighting before the new tenant had to pay rent. (YEx 12, Tr. 75-78)

31. Denied that he ever saw the August 27, 2001, letter sent by the Shopping Center Manager, Thomas Luff, stating that (1) Bays 5 and 8 were vacant, (2)

with no entry on the accounts receivable entry listing any rent due for either space **and (3) the sq. ft. rental rate for Bay 5 listed at $7.01 and the sq. ft. rental rate listed for Bay 8 at $5.50.** (HEx F, Tr. 78-83)[4] (Emphasis added.)

32. Denied he ever saw the February 2012 document that had the United tenant accounts listed, which noted (1) the deposit of the $5,408,00 rent settlement check and (2) *also notes that the Bay 8 rent has now been paid*. (HEx, 85-88)[5]

33. **Admitted that he has no documents that contain any record of any alleged back rent for Bays 5 and 8.** (Tr. 90-91, 113)

34. **Admitted that he had no idea what rent he planned on charging for Bay 5 until he had a new retail tenant who agreed to pay $12 per sq. ft.** (Tr. 92)

35. Admitted that **he did not provide a rental figure to Wally**, the only person he spoke to in 1994, when he said he was going to charge rent. (Tr. 93-94)

36. Admitted he did not tell Wally the rent for Bay 5 was $12 after he signed the Diamond Girl lease in 2001. (Tr. 94)

37. Admitted Nizar Dewood was his lawyer when Judge Brady entered the preliminary injunction on April 25, 2013, just three weeks before Nizar Dewood sent the May 17, 2013 letter demanding rent for Bay 5 from 1994 to 2001 and for Bay 8 from 2008 to 2013. (HEx K, Tr. 101)

On redirect, Fahti Yusuf testified:

1. That Bay 1 was not listed on YEx F. (Tr. 108)

2. That Wally "forced" him to allow Bay 5 to be used as a warehouse until he (United) could find a tenant, at which time Wally would have to move out. (Tr. 109)

3. That he has no documentation for the lease for Bays 1, 5 and 8, as there was no lease for Bays 1, 5 and 8. (Tr. 113)

B. Mike Yusuf-Second Witness

On direct examination, Mike Yusuf testified:

1. That he worked at Plaza East from 1992 to 2000 (Tr. 116)

2. That Plaza East used Bay 8 as a warehouse right after the Plaza East supermarket reopened in 1994 (Tr. 116-117)

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[4] HEx G was then marked showing the Luff letter came from the Plaza Supermarket records returned by the FBI after the criminal case was concluded.

[5] HEx I was identified as a document produced in discovery (along with hundreds of other documents) by Hamed in 2013, well before this rent dispute arose.

3. That Plaza East would have to move out of Bay 8 if someone else wanted to rent the space (as well as Bay 5). (Tr. 117, 153)

4. That Plaza East opened up a wall large enough for a forklift to drive through and began using Bay 5 as a warehouse right after the Plaza East supermarket reopened in 1994, which Fathi Yusuf was angry about when he found out about the hole in the wall, which Bay was used continuously by Plaza East until 2001 when an outside tenant was found. (Tr. 118-121)

5. That Plaza East had containers for that could be and were used to warehouse items behind the store from 1994 to 2000. (Tr. 123-124)

6. That **he never had any conversations with any Hamed about rent for Bays 5 and 8**, as his father (Fahti Yusuf) always dealt with rent for the store. (Tr. 124) (Emphasis added.)

7. That notwithstanding the fact the he did not deal with rent issues, he thought that the partnership was supposed to pay rent for Bays 5 and 8, even though he does not recall ever discussing rent with his father. (Tr. 125)

8. That the partnership needed **warehouse space** for the Plaza East store and benefitted from the use of Bays 5 and 8. (Tr. 126) (Emphasis added.)

9. That he remembered Thomas Luff, but that he never discussed anything with him that had to do with Plaza East. (Tr. 126-127)

10. **That Thomas Luff did show him ledgers that showed who the tenants were and which tenants owed rent**.[6] (Tr. 127)

On cross-examination, Mike Yusuf:

1. Admitted that additional land was purchased in 1993 by United behind the Plaza East store where trailers were stacked that were used for storage. (Tr. 129-130)

2. Admitted in 2000 he moved to Plaza West as the manager of that store, so he did not go back to see if Bays 5 and 8 were still being used. (Tr. 130-131)

3. Admitted that the building constructed for the Plaza West store had lots of storage space that Plaza East would use. (Tr. 131)

4. Admitted he did not know where Plaza East would store any items sent to it by Plaza West. (Tr. 132)

5. Testified he saw Plaza East using Bay 8 after 2008. (Tr, 134)

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[6] These ledgers have never been produced despite this Court directing all such documents to be produced.

6. **Admitted he does not know what the fair market price for warehouse space would be in the 1994-2001 time period**. (Tr. 141) (Emphasis added.)

7. Admitted he had no idea about what rent would be charged for Bays 5 and 8, as he never discussed it with his father. (Tr. 141-142)

8. Admitted Thomas Luff was the property manager, but he could not recall what Luff did with the reports that were generated. (Tr. 150)

9. Admitted Plaza East also used Bay 7 for a period of time. (Tr. 151-152)

On redirect, Mike Yusuf testified:

1. That Plaza East could be "put out" of Bays 5 and 8 anytime a third party renter was available. (Tr. 153)

2. That Mike Yusuf never discussed anything with Mr. Luff. (Tr. 153-154)

C. Wally Hamed-Third Witness

On direct examination, Wally Hamed testified:

1. That he started working for Plaza East in 1986. (Tr. 157)

2. That the partnership bought an acre of land behind the store after the fire in 1992 so that it could put trailers there for storage of inventory after Plaza East reopened in 1994. (Tr.157)

3. That he and Mike Yusuf broke a hole into the wall between Plaza Extra and Bay 5 **for warehouse storage** from time to time, but that Fathi never told him that United would charge rent for this Bay. (Tr. 159-160) (Emphasis added.)

4. That **he would not have utilized the space in Bay 5 if he knew Plaza Extra would be required to pay additional rent**, as there were other spaces in Plaza Extra that could have been used for warehousing materials if needed. (Tr. 160) (Emphasis added.)

5. That Plaza East did store items in Bay 8 as well from time to time, but **he would not have used that space either if he had known Plaza East would be required to pay additional rent**. (Tr. 161) (Emphasis added.)

6. That the Plaza West store was made as large as it was so that it could also provide storage to Plaza East after it was finished in 2000. (Tr. 161-162)

7. **That the May 17, 2013 letter from Nizar Dewood (HEx B) was the first time he was ever told that United would seek rent for Bays 5 and 8.** (Emphasis added.)

8. When he received the May 17, 2013, letter from Nizar Dewood (HEx B), he immediately had Plaza East remove everything in Bay 8, which was not a

significant amount of items, which he would have done a long time ago if he had known United would seek rent for its use. (Tr. 162)

On cross-examination, Wally Hamed:

1. Admitted that at any time United had a tenant for Bay 5, Plaza East would have to immediately clean it and move out. (Tr. 165)

2. Admitted that when he spoke with Fathi Yusuf about rent, neither one ever referred to Bay 1. Bay 2 or Bay 3, as all discussions were just about Plaza Extra, without reference to a particular Bay. (Tr. 166-167)

3. Admitted that the rent check in the amount of $5,408,806.74 was for rent owed by Plaza Extra to United for the time period between 2004 and 2012, so that it would not have covered rent claims before 2004 or after 2012, **although it would cover all rent claims between those dates, including rent claims for Bay 8**. (Tr, 169-172) (Emphasis added.)

4. Admitted that rent for Bays 5 and 8 were never discussed with Fathi Yusuf and that Plaza Extra "never agreed" to pay any such rent. (Tr. 173).

5. Admitted the partnership benefited from the use of Bays 5 and 8. (Tr. 173-174)

6. Admitted the partnership could have paid rent for Bays 5 and 8, but Fathi Yusuf chose not to charge for it. (Tr. 175)

7. Admitted that the partnership knows it must pay rent when it is owed. (Tr. 175. 177)

On redirect, Wally Hamed testified:

1. That the partnership is not required to pay any amount of rent that Fathi Yusuf or United demands, pointing out that **the Master rejected that very same argument when he denied Yusuf's claim for an extra $250,000 per month from 2012 to 2015**. (Tr. 178) (Emphasis added.)

2. Critically, that the only benefit Plaza East would have received from using Bays 5 and 8 is, at best, whatever the sq. ft. value of **warehouse rent** would be. (Tr. 178-179)
   [Note, the only benchmark for warehouse rent was $5.50 per foot, and even that was a full lease—it did not require the tenant to move out on a moment's notice. Thus, if there was an agreement for rent, it was for less than $5.50.]

3. That Plaza East would have moved out of Bays 5 and 8 if they had known Fathi Yusuf or United intended to charge rent, as Plaza East had other storage space available in its own store it could have used. (Tr. 178)

4. That prior to Nizar Dewood's May 17, 2013, he never had any idea Fathi Yusuf or United would try to charge any rent for Bays 5 and 8. (Tr. 179, 180)

5. That YEx 3, the calculation of rent owed by the partnership to United from 2004 through 2012 of $5,408,806.74 does not say this amount is limited to back rent for Bay 1 where the main store is located, as it does not mention any Bay number. (179-180)

6. That the check for $5,408,806.74 (YEx 4) simply says "Plaza Extra, Sion Farm, Rent." (Tr. 180)

7. That at the time he wrote the $5,408,806.74 check, he thought he was paying whatever rent the partnership still owed United. (Tr. 180)

8. That the $5,408,806.74 check covered the time period from 2004 to 2012, but he never knew there would be a rent claim by United that would predate 2004 when he wrote the check on February 12, 2012, as Nizar Dewood's May 17, 2013, letter was the first time he ever heard that rent for Bay 8 would be sought. (Tr. 180-181)

II. HAMED'S PROPOSED CONCLUSIONS OF LAW-RENT (Claim Y-2)

A. Proposed Conclusion of Law #1 Re United's Claims for Rent for Bays 5 and 7.

1. United has claimed back rent for Bays 5 and 8 of the United Shopping Center for three different time periods, identified as Claim Y-2.

2. United bears the burden of proof as to its claims.

3. United has failed to meet its burden of proof on this Y-2 rent claim.

4. In this regard, while there is no dispute that the Plaza Extra partnership occupied Bays 5 and 8 at different periods of time, *United must establish* by a preponderance of the evidence that the parties entered into an agreement to pay a specific amount of rent it seeks to collect. Hamed has denied there was ever an agreement to pay any amount of rent for either Bay at any time, much less a specific amount.

5. It is undisputed that there was never a written lease for any of the alleged time periods in question.

6. It is undisputed that the Plaza Extra partnership had to immediately move out of the Bays at any time Fathi Yusuf asked it to do so if a third party retail tenant

was found for the space, so this was an at-will tenancy terminable at any time by United.

7. It is undisputed that Yusuf was ordered to produce all records related to this alleged rental.[7]
8. It is undisputed that United did not offer any document or other written communication that even referenced any such rental agreement between the parties or what the rental amount was.
9. It is undisputed that Fathi Yusuf did not even decide what rent he thought United should seek for either Bay until after Judge Brady entered a preliminary injunction against him this litigation on April 25, 2013.
10. Moreover, the claimed amounts of rent, and the alleged rental periods for which rent is allegedly due, have varied widely since the first claim for rent was made on the partnership by Attorney Dewood on May 17, 2013.[8]

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[7] Indeed, despite the Master's January 7, 2019, Order, directing Yusuf to produce all such records, he claimed had no such records. Interestingly, Hamed was able to locate two such records (HEx G and H), which Yusuf denied were United Shopping Center records even though one letter, addressed to Yusuf, was seized in an FBI raid, while the other is clearly a record of the shopping center tenant accounts. This lack of any records documenting an agreement to the rent now being sought is an additional basis for finding that United has not carried its burden in this claim.

[8] Attorney Dewood sent a letter on May 17, 2013, seeking rent for Bay 5 from 1994 through 2001 at $12.00 per sq. ft. and for Bay 8 from 2008 through 2013 for $12.00 per sq. ft. (YEx 5). There was no claim asserted for rent for Bay 8 from 1994 though 2002 and Yusuf testified that the $12.00 figure for Bay 8 was incorrect.

Similarly, Attorney Hodges signed a counterclaim dated December 23, 2013, that only sought rent for Bay 5 from 1994 through 2001 at $12.00 per sq. ft. and for Bay 8 from 2008 through 2013 for $16.15 per sq. ft. (HEx C). **There was no claim asserted for rent for Bay 8 from 1994 though 2002** and Yusuf testified that the $16.15 figure for Bay 8 was incorrect as well.

Indeed, rents for the various tenants listed in the August 27, 2001, letter from United's Property Manager (from the FBI files) list Bay 5 and 8 as being vacant, with no rent being accrued at all. (Ex G at p. HAMD665068 to HAMD665070).

(1) BAY 5

1. As for Bay 5, Fathi Yusuf testified that the $12.00 per sq. ft. rate, **which he first decided to charge in 2013 after Judge Brady entered the April 25, 2013, preliminary injunction order,** is based upon the sq. ft. rate charged in the 2001 lease to a new tenant, referred to as Diamond Girl. (HEx 11)
2. It is undisputed that this written lease was for a retail tenant, with standard rental terms, for which United agreed to make certain improvements at the beginning of the lease, including installing air-conditioning. (HEx 11 at ¶9)
3. It is undisputed that this rental rate of $12.00 per sq. ft. is for a retail store, while Plaza Extra was only using the space as a warehouse, which generally rents for a rate much lower than retail rent.
4. Moreover, despite Fathi Yusuf's assertion that he is the sole person to decide what rent should be paid, **the Master has already determined** that such a broad statement is not correct as to such "decisions" made after the initiation of this action, as set forth in his March 13, 2018, Order denying United's claim for excess rent of $250,000 per month after February, 2012.
5. There is no evidence that the partnership ever agreed to pay any rent for Bay 5, much less this retail rate of $12.00 per sq. ft. first paid by a third party tenant in 2001 after Plaza Extra was told to move out of Bay 5.
6. The only rental record produced at the hearing, which was a record returned by the FBI to United, listed the fair market value of the Bay 5 retail space in 2001 (prior to the Diamond Girl lease) at $7.01 per sq. ft. (See HEx F at HAMD664275) (letter from United's Property Manager, Thomas W. Luff).[9]

[9] To assist the Master, the relevant excerpt from this exhibit is attached as Tab 1.

7. Thus, United's claim for rent for Bay 5 at the hearing of $12 per sq. ft. is based only on evidence of the rent charged to a new *retail* tenant which had a written lease (with normal retail lease terms), as opposed to a fair market value for warehouse rent (for an at-will tenant, with no terms, who could be immediately removed without any notice).
8. As such, United has failed to meet its burden of proof that the rent it sought at the hearing (1) was ever agreed to or (2) that the $12.00 sq. ft. amount is seeks for Bay 5 for unfinished warehouse space was even reasonable or would have ever been agreed to.

(2) BAY 8

1. As for Bay 8, Fathi Yusuf testified that the $6.15 per sq. ft. rate, **which he first decided to charge in 2013 after Judge Brady entered the April 25, 2013, preliminary injunction order,** is based upon the sq. ft. rate charged in the 2002 lease to a new tenant. (HEx 12)
2. It is undisputed that this lease was for a retail tenant for which United also agreed to make certain improvements at the beginning of the lease, including installing a bathroom and lighting. (HEx 12 at ¶8)
3. It is undisputed that this rental rate of $6.15 per sq. ft. is for a retail store, while Plaza Extra was only using the space as a warehouse, which generally rents at a rate lower than retail rent.
4. Moreover, despite Fathi Yusuf's assertion that he is the sole person to decide what rent should be paid, **the Master has already determined** that such a broad statement is not correct as to such "decisions" made after the initiation of this action, as set forth in his March 13, 2018, Order denying United's claim for excess rent of $250,000 per month after February, 2012.

5. There is no evidence that the partnership ever agreed to pay any rent for Bay 8, much less this retail rate of $6.15 per sq. ft. first established in 2002 after Plaza Extra was told to move out of Bay 8.
6. The only rental record produced at the hearing regarding warehouse use, which was a record returned by the FBI to United, listed the fair market value of the Bay 8l space in 2001 (prior to the Diamond Girl lease) at $5.50 per sq. ft. (See HEx F at HAMD664275) (letter from United's Property Manager, Thomas W. Luff).[10]
7. Thus, United's claim for rent for Bay 8 at the hearing of $6.15 per sq. ft. is based only on evidence of the rent charged to a new retail tenant who had written lease (with normal retail lease terms), not warehouse rent (at-will tenant, with no terms, and immediate removal).
8. As such, United has failed to meet its burden of proof that the rent it sought at the hearing (1) was ever agreed to or (2) that the $6.15 sq. ft. amount is seeks for Bay 8 for unfinished warehouse space was even reasonable or would have ever been agreed to.

B. Proposed Alternate Conclusion of Law #2 Re Hamed's SOL defense to Claim Y-2 for Bay 5 for the time period 1994-2001 and Bay 8 for the time period 1994-2002.

[NOTE: This alternate proposal need only be considered if Proposed Finding A has not been adopted.]

1. Hamed asserts that these claims against the partnership are barred by the statute of limitations (SOL), which it immediately raised on May 22, 2013 (HEx J) in response to Dewood's May 17, 2013, letter demanding rent. (YEx 5)

[10] To assist the Master, the relevant excerpt from this exhibit is attached as Tab 1.

2. The statute of limitations is an affirmative defense and thus Hamed bears the burden of proof.
3. The SOL for an action to recover rent is six years pursuant to 5 V.I.C. § 31(3)(A).
4. It is undisputed that Plaza Extra moved out of Bay 5 at the very latest by mid-2001, as a new tenant signed a new lease on September 3, 2001. (YEx 11)
5. It is undisputed that Plaza Extra moved out of Bay 8 at the very latest by mid-2001, as a new tenant signed a new lease on October 1, 2002. (YEx 12)
6. This claim for rent for Bays 5 and 8 was not filed until December 23, 2013 (HEx C), when United filed its counterclaim to Hamed's September 20, 2012, Complaint.
7. Thus, more than six years had passed before this claim was filed, as both rent claims were fully accrued and allegedly due no later than September 3, 2001, (Bay 5) and October 1, 2002, (Bay 8) respectfully.
8. United's argument that these rent claims did not accrue until a demand was made and then rejected in May of 201s is without merit for several reasons:
    - This was not "a mutual, open and current account" as defined by 5 V.I.C. § 33, as this debt (unlike the rent on Bay 1 as to which Judge Brady made findings) has never been acknowledged and has always been contested by Hamed.[11]
    - Even if this was a "mutual, open and current account" as defined by 5 V.I.C. § 33, the SOL begins to accrue when on the last date services were performed. *See, e.g., In re the Estate of Vanterpool*,[12] 2010 V.I. Lexis 113 (Super Ct., Dec. 30, 2010)(rejecting the argument that the

[11] Indeed, the May 17, 2013, letter did not even mention Bay 8.
[12] To assist the Master, this case is attached to this filing as Tab 2.

SOL begins when a demand for payment is made, finding instead that the SOL begins on the last date services were performed).[13]

9. Moreover, there is no evidence adduced at the February 4th hearing that warrants a finding that the SOL was tolled for Bay 5, as there was for United's Bay 1 rent claim due to Mohammad Hamed's statements "acknowledging" the rent due for the Plaza Extra store, which invoked "the acknowledgement of the debt doctrine and the payment on account doctrine." Here, not only was there no proffered testimony from Mohammad Hamed, the evidence is clear that Wally Hamed is not even *alleged* to have subsequently acknowledged the debt, nor were any rent payments ever made on Bay 5.
10. Thus, there is no basis for applying either "the acknowledgement of the debt doctrine and the payment on account doctrine," that was United's burden to prove, which it failed to do.

C. Alternate Proposed Conclusion of Law #3 Re Hamed's "Payment" defense to Claim Y-2 for Bay 8 for the time period 2008-2013.

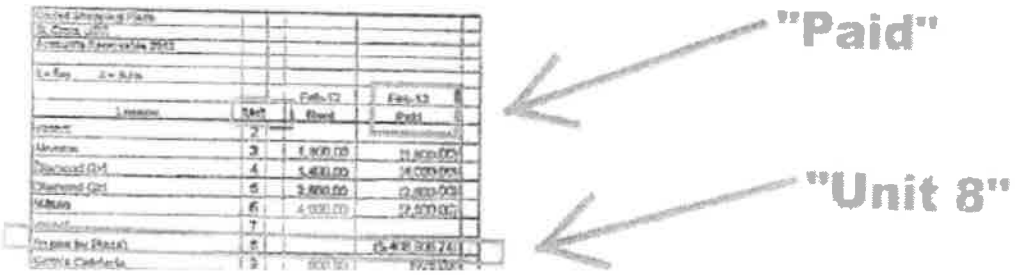
[NOTE: This alternate proposal need only be considered if Proposed Finding A has not been adopted.]

1. Hamed also asserts that the rent for Bay 8 for the time period 2008-2013 is barred based on the affirmative defenses of payment and accord and satisfaction, which are affirmative defenses for which the partnership has the burden of proof.
2. It is undisputed that the partnership paid $5,408,806.74 to United for rent from 2004 to 2012, with a notation on the check "Plaza Extra (Sion Farm) Rent."

---

[13] Indeed, under United's view of the law, it could demand rent for Bay 7 next week (which Mike Yusuf said was used by Plaza Extra as well) and then file suit tomorrow claiming this "never before made" demand triggered the commencement of the SOL so that this 19 year old claims is not time barred. This legal argument is rejected.

3. Wally Hamed testified that he thought this payment would cover all rents due to United by the partnership since 2004.
4. There is no evidence that Wally Hamed thought that rent was being charged for Bay 8, as he had the partnership promptly remove everything from Bay 8 after being told by Attorney Dewood on May 17, 2017, that United expected rent for Bay 8
5. Fathi Yusuf denies the check covered rent for Bay 8 for the time period in question.
6. To resolve this discrepancy, the Master relies on the United Shopping Center business record kept in the normal course of business, produced by Hamed in 2013 that contains a February 12, 2012, contemporaneous entry (which is the same date as the $5,408,806.74 check) marking the Bay 8 rent as paid in full (HEx I at HAMD262211):[14]



7. Thus, United's claim for rent for Bay 8 between 2008 through February, 2012, is denied, as the partnership has met its burden of proof on this affirmative defense of payment for this time period.

[14] To assist the Master, the relevant excerpt from this exhibit is attached as Tab 3.

D. Alternate Proposed Conclusion of Law #4 Re Claim Y-2 (Rent)-Rent is due, but at a warehouse rate.

[NOTE: This alternate proposal need only be considered if Proposed Findings A, B and C have not been adopted.]

1. As Wally Hamed admits the partnership used Bays 5 and 8 as a warehouse when not rented to a retail tenant, which benefitted the partnership if warehouse rated were applied, the Master finds that United is entitled to rent at the rate of $_____ per sq. ft. for Bay(s) ___ for the time periods from _____ to _____.

Note: Rents for the various tenants listed in the August 27, 2001, letter from United's Property Manager from the FBI files range as low as $2.40, with Bay 5 listed at $7.01 per sq. ft. (not $12.00) and Bay 8 listed at $5.50 per sq. ft. (not $6.15) (Ex G at p. HAMD665066) Using these figures, rent for one year for Bay 5 and Bay 8 would be:

Bay 5

$2.40 times 3,125 sq. ft=$7,500
$5.50 times 3,125 sq. ft.=$17,187.50
$7.01 times 3,125 sq. ft.=$21,906.25

Bay 8

$2.40 times 6,250 sq. ft.=$15,000
$5.50 times 6,250 sq. ft.=$34,375

III. HAMED'S PROPOSED CONCLUSIONS OF LAW-Interest (Claim Y-4)

A. Proposed Conclusion of Law #1 Re Claim Y-4 (interest)-No interest is due, as no rent is owed

1. As it was concluded that no rent is owned on Bays 5 or 8, no interest is owed.

2. Thus, Claim Y-4 is rejected.

B. Alternate Proposed Conclusion of Law #2 Re Claim Y-4 (interest)-No interest is due even if rent is owed.

1. While rent was found to be due as noted, the award of prejudgment interest is one that is discretionary. See *Isaac v. Cricholaw*, 63 V.I. 38, 69-70 (Super. Ct. February 10, 2015) ("The grant or denial of prejudgment interest remains within the sound discretion of the trial court.").

2. United never made a demand for rent until May 17, 2014. (YEx 5).

3. Yusuf testified this was because rent was agreed to be deferred so that the Plaza Extra Supermarket could utilize the funds for other needed purposes. (Tr. at p.__)

4. **There is also no history of the parties paying interest on back rent claims, as the 2012 agreed upon calculation for back rent for Bay 1 for the time period from 2004 to 2012 (YEx 4) did not include any adjustment for interest. In fact, neither Dewood's May 17, 2013, demand for rent (YEx 5), the claim for rent in United counterclaim (HEx C), Yusuf's 2014 affidavit (YEx 2), nor United's interrogatory responses (YEx 9) sought any prejudgment interest.**

5. As the Master held in his December 3, 2019, Order at pp. 13-14, regarding Yusuf's claim for interest on the Bay 1 rent, since it was common practice for the Partnership to make lump sum rent payments when United made rent payment demands, as opposed to monthly or even yearly rent payments, the construct of Parties' rent payment arrangement for Bays 5 and 8 throughout their relationship never provided for prejudgment interest (like Bay 1).

6. Thus, the Master finds it would be inequitable and unjust to award prejudgment interest for any of the Y-2 rent claims and rejects Yusuf's Y-4 claim.

IV. SUMMARY

Hamed respectfully submits the preceding Findings and Conclusions. Counsel will be glad to supplement this filing if requested.

Dated: February 23, 2021

Counsel for Hamed

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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 23rd day of February, 2021. 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

Stefan Herpel
Charlotte Perrell
TOPPER, NEWMAN FEUERZEIG LLP
Law House, 10000 Frederiksberg Gade
P.O. Box 756
St. Thomas, VI 00802
sherpel@dnfvi.com
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/s/ Joel H. Holt

TAB 1

United Corporation

United Shopping Plaza

P.O. Box 763, 4C & D Sion Farm, Christiansted, VI 00821 Phone (340) 778-6240, Fax (340) 778-1200

August 27, 2001

Fahti Yusuf
Plaza Extra, St. Thomas
Fax #775-5766

Subject: United Shopping Plaza Reports

Dear Mr. Yusuf,

Here is a brief summary of the enclosed reports:

#1. YTD summary of checkbook income- YTD $118,540 and balance $215. 055 before tax payments shown on first sheet. "Unrelated" items are family expenses.

2 & 3 are monthly worksheets of rent paid balanced against my Database and accounts receivable sheets. Gross receipts and tax are calculated, amount billed vs. paid, sum of taxes paid shown. The graph shows the payment pattern.

#4. A check register with every check shown and deposits by date. The month's income and YTD is calculated, plus the balance at the end of the month.

#5 The check amounts are distributed among expense categories and the checkbook balanced against the bank statement.

#6. Lists the tenants, rents, areas and rent / sq. ft. plus calculated account receivables to date. Vacancies and vacancy % are shown at the bottom.

#7 List of tenants by lease status: date signed, term and expiration date.

#8 Tax Invoice List- shows total amount billed in February and amounts paid by month to date. Totals show amounts paid and those remaining to be paid.

Y-2
PLAINTIFF'S EXHIBIT F

There are several other reports that I keep for my use in collecting rent and the accounts receivable sheet sent to Ben every month. Many of them mimic the paper records we have, but allow easy manipulation of the data by sorting, graphing and electronic searching. These records are backed up frequently so any data lost would be minimal and easily restored.

Please let me know if you would like any of these reports sent monthly or any other period. I send Ben #3,4 & 5 with the bank statement mid-month.

Thomas W. Luff, Property Manager

Thomas W Luff

United Shopping Plaza

Cc: Mike Yusuf

Enclosures:

1. List of Real Estate taxes to be paid 8/31/01.
2. Year to Date Summary of income & expenses with graph
3. Monthly Reconciliation of Rent and list of deposits-July & August (to date)
4. Check Register
5. Expense Distribution/ and balancing against bank statement
6. Accts Receivable list 8/22/01
7. Lease Data and Tenant List
8. Tax Payment record

Tenant List

Accts Receivable Current Month

Accounts Reclevable

7/27/01

Type	#	Business	last name	First Name	Rent	A/R 2001	Comments
Bay	2	U-Rental & Sales	Elcock & DeLaMot	Claude & Hilda	$ 995.00	497.50	Late
Bay	3	American Beeper	Leonardis	Robert	$ 835.00	0.00	
Bay	~~4~~	Vacant	Vacant	Vacant	$ 995.00	V	
Bay	5	plaza extra-Vacant	plaza extra-Vacant	plaza extra-Vace	$ 1,825.00	V	
Bay	6	JP Sales	Piñiero	Juan	$ 2,340.00	202.24	Int
Bay	~~7~~	plaza extra-Vacant	plaza extra-Vacant	plaza extra-Vace	$ 1,560.00	V	
Bay	~~8~~	plaza extra-Vacent	plaza extra-Vacant	plaza extra-Vace	$ 2,600.00	V	
Bay	9	Naty's Cafeteria	Ruiz	Cesar	$ 625.00	625.00	Late
Bay	10	Kay Travels	Zenon	Alidia	$ 762.50	0.00	
Bay	11	Augustin Nolosco Torres	Nolosco-Torres	Augustin	$ 600.00	150.00	Late
Bay	~~12~~	Vacant	Vacant	Vacant	$ 1,150.00	4,770.50	Court August 21
Bay	13	Plaza Cafe	Martin	Horatio	$ 1,355.00	15,730.16	PMT Plan
Bay	~~14~~	Vacant	Vacant	Vacant	$ 760.00	7,449.48	Court August 21
Bay	15	VI Nails	Nguyen	Kent	$ 575.00	0.00	
Bay	16	Bee's records	Bramble	Joseph	$ 761.25	5,798.44	PMT Plan
Bay	17	Gill Electronics	Gill	Michael	$ 761.25	3,459.96	PMT Plan
Bay	18	Elsa Beauty Salon	Elsa	Rodriguez	$ 760.00		
Bay	19	47Th St. Jewelers	Perez	Emilio	$ 761.25	0.00	
Bay	20	Peoples Laundry	Ballantine	Judith A.	$ 2,650.00	3,000.00	Late
Bay	21	Dimension Video	Raper	Eustace	$ 250.00	0.00	
Bay	22	Vacant	Vacant	Vacant	$ 900.00	V	
Bay	23	Mid Island Menswear	Idholleh	Mahmud	$ ~~1,166.65~~ 1165	5.00	
Bay	24	UWU	Peters	Ames	$ 1,500.00	(1,350.00)	
Bay	25	Island Finance	Island finance	Wells Fargo	$ 2,406.25	0.00	
Bay	26	Sports Plus	Alecia	Luis	$ 1,108.00	(1,386.59)	
Bay	27	~~Boyd Cleaners~~ Sued	Boyd	John & Dolores	1,450	(0.10)	
Bay	29	Sunstroke- Flash Closed	Clemence	Rachidi	$ 720.00	0.00	
Bay	30	King Cash	Berry, Jr	Arthur	$ 900.00	0.00	
Bay	32	Best Furniture	Hussein	Bakr & Akell	$ 2,000.00	14,442.77	PMT Plan
Suite	1	Vacant	Vacant	Vacant	Vacant	Vacant	
Suite	2	Vacant	Vacant	Vacant	Vacant	Vacant	
Suite	3	Vacant	Vacant	Vacant	$ 400.00	(391.00)	
Suite	3a	Mutual of Omaha	Phillip	Solomon	$ 475.00	(25.00)	
Suite	4	Vacant	Vacant	Vacant	$ 925.00	V	
Suite	5	Dr F. Alonso	Alonso	Dr. Francisco.	$ 1,250.00	0.00	
Suite	7	Vacant	Vacant	Vacant	$ 595.00	0.00	
Suite	8	LEI Technology	Lindsey	Ronald	$ 675.00	0.00	
Suite	9	USW Regional Off.	Joseph	Fred	$ 1,500.00	0.00	
Suite	11	Ranger Security	Richards	Delroy	$ 700.00	0.00	
Suite	12	vacant	vacant	vacant	$ 675.00	V	
Suite	13	vacant-Storeroom	vacant-Storeroom	vacant-Storeroo	$ 275.00	V	
Suite	14	USW 8526-~~Get~~	Jackson	Gerry	$ 1,195.00	0.00	

		Vacancy Rate			
stores	30	27%	22 Occupied	$ 48,866.15	60,369.77
Offices	13	54%	6 Occupied	Rent	A/R 2001

Installment loans
Payments YTD
($840.00)
($1,400.00)
$0.00
($125.00)
($2,365.00)

DB 2001.xls Accts Rec

7/27/01

Accts Receivable Current Month

Accounts Recievable 7/27/01

Type	#	Business	last name	First Name	Rent	A/R 2001	Comments
Bay	2	U-Rental & Sales	Elcock & DeLaMo	Claude & Hilda	$ 995.00	497.50	Late
Bay	3	American Beeper	Leonardis	Robert	$ 835.00	0.00	
Bay	4	Vacant	Vacant	Vacant	$ 995.00	V	
Bay	5	plaza extra-Vacant	plaza extra-Vacant	plaza extra-Vaca	$ 1,825.00	V	
Bay	6	JP Sales	Piñiero	Juan	$ 2,340.00	202.24	Int .
Bay	7	plaza extra-Vacant	plaza extra-Vacant	plaza extra-Vaca	$ 1,560.00	V	
Bay	8	plaza extra-Vacant	plaza extra-Vacant	plaza extra-Vaca	$ 2,600.00	V	
Bay	9	Naty's Cafeteria	Ruiz	Cesar	$ 625.00	625.00	Late
Bay	10	Key Travels	Zenon	Alidia	$ 782.50	0.00	
Bay	11	Augustin Noloaco Torres	Noloaco-Torres	Augustin	$ 600.00	150.00	Late
Bay	12	Vacant	Vacant	Vacant	$ 1,150.00	4,770.50	Court August 21
Bay	13	Plaza Cafe	Martin	Horatio	$ 1,355.00	15,730.16	PMT Plan
Bay	14	Vacant	Vacant	Vacant	$ 780.00	7,449.46	Court August 21
Bay	15	Vi Nails	Nguyen	Kent	$ 575.00	0.00	
Bay	16	Bee's records	Bramble	Joseph	$ 781.25	5,796.44	PMT Plan
Bay	17	Gill Electronics	Gill	Michael	$ 781.25	3,459.96	PMT Plan
Bay	18	Elsa Beauty Salon	Elsa	Rodriguez	$ 780.00		
Bay	19	47Th St. Jewelers	Perez	Emilio	$ 781.25	0.00	
Bay	20	Peoples Laundry	Ballantine	Judith A.	$ 2,650.00	2,656.00	Late
Bay	21	Dimension Video	Roper	Eustace	$ 250.00	0.00	
Bay	22	Vacant	Vacant	Vacant	$ 550.00	V	
Bay	23	Mid Island Menswear	Idhelleh	Mahmud	$ 1,166.65	5.00	
Bay	24	UPWU	Peters	Amos	$ 1,500.00	(1,350.00)	
Bay	25	Island Finance	Island finance	Wells Fargo	$ 2,406.25	0.00	
Bay	26	Sports Plus	Alecia	Luis	$ 1,100.00	(1,366.59)	
Bay	27	Boyd Cleaners	Boyd	John & Dolores	1,456.00	(0.10)	
Bay	29	Sunstroke-	Clemance	Rashidi	$ 729.00	0.00	
Bay	30	King Cash	Berry, Jr	Arthur	$ 900.00	0.00	
Bay	36	Best Furniture	Hussein	Bakr & Akeil	$ 7,000.00	14,442.77	PMT Plan
Suite	1	Vacant	Vacant	Vacant	Vacant	Vacant	
Suite	2	Vacant	Vacant	Vacant	Vacant	Vacant	
Suite	3	Vacant	Vacant	Vacant	$ 400.00	(391.00)	
Suite	3a	Mutual of Omaha	Phillip	Solomon	$ 475.00	(25.00)	
Suite	4	Vacant	Vacant	Vacant	$ 925.00	V	
Suite	5	Dr F. Alonso	Alonso	Dr..Francisco,	$ 1,250.00	0.00	
Suite	7	Vacant	Vacant	Vacant	$ 595.00	0.00	
Suite	8	LEI Technology	Lindsey	Ronald	$ 675.00	0.00	
Suite	9	USW Regional Off.	Joseph	Fred	$ 1,500.00	0.00	
Suite	11	Ranger Security	Richards	Delroy	$ 700.00	0.00	
Suite	12	vacant	vacant	vacant	$ 675.00	V	
Suite	13	vacant-Storeroom	vacant-Storeroom	vacant-Storeroo	$ 275.00	V	
Suite	14	USW #526-Oct	Jackson	Gerry	$ 1,195.00	0.00	
stores	32			32 Occupied	$48,516.15	60,369.77	
Offices	12			13 Occupied			

	Rent	A/R 2001
Payments YTD		
	($840.00)	
	($1,400.00)	
	$0.00	
	($125.00)	
	($2,365.00)	

Accts Receivable Current Month

Accounts Recievable

8/22/01

Type	#	Business	last name	First Name	Rent	Sq Ft	$/Sq. Ft.		A/R 2001	Comments
Bay	2	U-Rental & Sales	Elcock & DeLaMot	Claude & Hilda	$ 995.00	1,250	$ 9.55		995.00	Late
Bay	3	American Beeper	Leonardis	Robert	$ 835.00	1,250	$ 8.02		0.00	
Bay	4	Vacant	Vacant	Vacant	$ 1,150.00	1,250	$ 11.04	V		
Bay	5	plaza extra-Vacant	plaza extra-Vacant	plaza extra-Vaca	$ 1,625.00	3,125	$ 7.01	V		
Bay	6	JP Sales	Pifiiero	Juan	$ 2,340.00	3,125	$ 8.99		2,594.99	Int
Bay	7	plaza extra-Vacant	plaza extra-Vacant	plaza extra-Vaca	$ 1,692.71	3,125	$ 6.50	V		
Bay	8	plaza extra-Vacant	plaza extra-Vacant	plaza extra-Vaca	$ 2,864.58	8,250	$ 5.50	V		
Bay	9	Naty's Cafeteria	Ruiz	Cesar	$ 625.00	500	$ 15.00		925.00	Late
Bay	10	Kay Travels	Zenon	Alida	$ 762.50	625	$ 15.02		0.00	
Bay	11	Augustin Nolasco Torres	Nolasco-Torres	Augustin	$ 600.00	625	$ 11.52		1,350.00	Late
Bay	12	Vacant	Vacant	Vacant	$ 1,150.00	1,250	$ 11.04		0.00	settled $4000 cash
Bay	13	Plaza Cafe	Martin	Heraldo	$ 1,355.00	1,250	$ 13.01		16,700.84	PMT Plan $1500/month
Bay	14	Vacant	Vacant	Vacant	$ 780.00	625	$ 14.98	V		settled $4000 @100/mo
Bay	15	Vi Nails	Nguyen	Kent	$ 575.00	625	$ 11.04		0.00	
Bay	16	Bea's rosarda	Brumble	Joseph	$ 781.25	625	$ 15.00		5,360.94	PMT Plan$1000/mo
Bay	17	Gill Electronics	Gill	Michael	$ 781.25	625	$ 15.00		3,502.48	PMT Plan $1200/month
Bay	18	Elsa Beauty Salon	Elsa	Rodriguez	$ 760.00	625	$ 14.86		0.00	
Bay	19	47Th St. Jewelers	Perez	Emilio	$ 781.25	625	$ 15.00		781.25	
Bay	20	Peoples Laundry	Ballantine	Judith A.	$ 2,650.00	1,250	$ 25.44		3,006.00	Late
Bay	21	Dimension Video	Reper.	Eustace	$ 250.00	1,250	$ 2.40		0.00	
Bay	22	Vacant	Vacant	Vacant	$ 900.00	1,250	$ 8.64	V		
Bay	23	Mid Island Menswear	Idhelish	Mahmud	$ 1,165.00	1,750	$ 7.99		0.00	
Bay	24	UMU	Peters	Ames	$ 1,500.00	1,750	$ 10.29		0.00	
Bay	25	Island Finance	Island finance	Wells Fargo	$ 2,406.25	1,750	$ 16.50		0.00	
Bay	26	Sports Plus	Alecia	Luis	$ 1,100.00	1,750	$ 7.54		0.00	
Bay	27	Boyd Cleaners	Boyd	John & Delores	$ 1,456.00	3,500.00	$ 5.00		0.00	
Bay	29	Sunstrete-	Clemence	Rashidi	$ 729.00	1,750	$ 5.00		729.00	
Bay	30	King Cash	Berry, Jr	Arthur	$ 900.00	1,750	$ 6.17		0.00	
Bay	32	Best Furniture	Hussein	Bakr & Aisil	$ 7,000.00	10,500	$ 8.00		11,053.86	PMT Plan
						Average	$ 10.73			
Suite	1	Vacant	Vacant	Vacant	$ 525.00	520	$ 12.12	V		
Suite	2	Vacant	Vacant	Vacant	$ 900.00	625	$ 12.45	V		
Suite	3	Vacant	Vacant	Vacant	$ 450.00	486	$ 11.99	V		
Suite	3a	Mutual of Omaha	Phillip	Solomon	$ 475.00	450	$ 12.67		(25.00)	
Suite	4	Vacant	Vacant	Vacant	$ 925.00	925	$ 12.00	V		
Suite	5	Dr F. Alonso	Alonso	Dr. Francisco,	$ 1,250.00	1,250	$ 12.00		0.00	
Suite	7	Vacant	Vacant	Vacant	$ 595.00	576	$ 12.40	V		
Suite	8	UEI Technology	Lindsey	Ronald	$ 725.00	720	$ 12.08		0.00	
Suite	9	USW Regional Off.	Joseph	Fred	$ 1,500.00	1,126	$ 15.99		0.00	
Suite	11	Ranger Security	Richards	Delrey	$ 700.00	575	$ 14.61		0.00	
Suite	12	vacant	vacant	vacant	$ 675.00	576	$ 14.06	V		
Suite	13	vacant-Storeroom	vacant-Storeroom	vacant-Storeroo	$ 275.00	220	$ 15.00	V		
Suite	14	USW 6526-Oct	Jacobson	Gerry	$ 1,185.00	1,056	$ 13.58		0.00	
						64,873.00	$ 11.88		Average $/Sq. Ft.	
									46,876.37	
		Vacancy Rate							A/R 2001	
stores	30	27%		22 Occupied	$60,941.71					
Offices	13	64%		6 Occupied	Rent	Sq Ft	$/Sq. Ft.			

Felix
JP
Liger
Maynard

Installment to Installment loans

	Payments YTD	
Felix	($840.00)	
JP	($1,400.00)	
Liger	$0.00	Ct 8/21
Maynard	($125.00)	Ct 8/22
Grand Total	($2,365.00)	
% of Billed		

LEASE DATA

Type	#	Business	last name	First Name	Position	work phone	home Phone	Lease Dt.	Term	Expires	status	#	Rent	Sq Ft	$/Sq. Ft.
Bay	2	U-Rental & Sales	Block & DeLaMotte	Claude & Julia	Owners	778-7222	772-3581	2/1/00	5	1/31/05			$ 995.00	1,250	$ 9.55
Bay	3	American Sleeper-	Lemmerdo	Robert	Owner	778-8556	778-8556	2/1/99	10	1/31/09			$ 835.00	1,250	$ 8.02
Bay	4	Vacant	Vacant										$ 1,150.00	1,250	$ 11.04
Bay	5	plaza extra-Vacant											$ 1,625.00	3,125	$ 7.01
Bay	6	J & P Sales	Pinero	Juan	Owner	778-6962	773-6349	V	V	Vacant	Vacant		$ 2,340.00	3,125	$ 8.99
Bay	7	plaza extra-Vacant	V	V	V	V	V	8/1/01	5	7/31/06			$ 1,692.71	3,125	$ 6.50
Bay	8	plaza extra-Vacant	V	V	V	V	V	V	V	Vacant	Vacant		$ 2,664.56	6,250	$ 5.50
Bay	9	Nely's Cafeteria	Ruiz	Cesar	Owner	778-7020	778-3568	V	V	Vacant	Vacant		$ 625.00	500	$ 15.00
Bay	10	Key's Travels	Zenon	Alicia	Owner	773-3236	773-7572	1/5/00	5	10/1/05	Renewed		$ 782.50	625	$ 15.02
Bay	11	Augutin Nolasco Perez	Torres	Augustin	Owner	none		none		12/31/99	Expired-TAW		$ 600.00	625	$ 11.52
Bay	12	Vacant	Vacant					1/1/01	2	1/1/03	Incr on renewal		$ 1,150.00	1,250	$ 11.04
Bay	13	Plaza Cafe	Martin	Horatio	Owner	778-4447	778-6036	V	V	V	V		$ 1,355.00	1,250	$ 13.01
Bay	14	Vacant	Vacant					NO Lease					$ 780.00	625	$ 14.98
Bay	15	Vi Nails	Nguyen	Kent	Owner	692-2597	511775-6660	V	V	V	V		$ 575.00	625	$ 11.04
Bay	16	Bee's records	Bramble	Joseph	Owner	778-6146	778-6302	2/1/00	5	1/31/05			$ 781.25	625	$ 15.00
Bay	17	Gill Electronics	Gill	Michael	Owner	778-5640	772-6945	10/1/99	5	9/30/04	Renewal agmt		$ 781.25	625	$ 15.00
Bay	18	Elsa's Beauty Parlor	Elsa	Rodriguez	Owner	773-7212	778-6781	4/1/01	5	3/31/06	Expired-TOW		$ 780.00	625	$ 14.98
Bay	19	47Th St. Jewelers	Perez	Emilio	Owner	778-7815	778-7756	4/1/01	5	3/31/06			$ 781.25	625	$ 15.00
Bay	20	Peoples Laundry	Ballantine	Judith A.	Owner	773-2303/77	713-1066/772-	Leaving 9/1/	V	V	V		$ 2,650.00	1,250	$ 25.44
Bay	21	Dimension Video	Roper	Eustace	Owner	none	773-6140	11/5/92	10	12/31/02	New Owner 12/99		$ 250.00	1,250	$ 2.40
Bay	22	Vacant	Vacant					4/1/01	5	3/31/06			$ 900.00	1,250	$ 8.64
Bay	23	Mid Island Menswere	Idhelish	Mahmud	Owner	778-5738	773-6049	V	V	V	V		$ 1,165.00	1,750	$ 7.99
Bay	24	UWU	Peters	Amos	Vice Pres	778-6665	778-2571/778-	4/1/01	5	3/31/06			$ 1,500.00	1,750	$ 10.29
Bay	25	Island Finance	Island finance	Norwest Fin. Corp	Owner	778-6292	773-2214	8/30/99	10	8/31/09	Rent Incr 8/30/01		$ 2,406.25	1,750	$ 16.50
Bay	26	Sports Plus	Alicea	Luis	Owner	778-6446	778-2281	9/30/04	10	8/31/04	Rent Incr 10/1/01		$ 1,100.00	1,750	$ 7.54
Bay	27	Boyd Cleaners	Boyd	Dolores	Owner	778-1152	773-0664	5/1/01	3	5/31/04			$ 1,458.00	3,500	$ 5.00
Bay	28	Boyd Cleaners			same	same	same	7/1/99	10	7/31/09	Rent Incr 8/31/03			Incl above	Incl above
Bay	29	Sunstroke-	Clemance	Rashidi	Owner	773-6393	771-1213	same	same	same	same	per same	$ 725.00	1,750	$ 5.00
Bay	30	King Cash	Berry, Jr	Arthur & Deshawn	Owner	718-9564	713-9656	11/1/99	5	1/31/04	Rent Incr 11/1/01		$ 900.00	1,750	$ 6.17
Bay	36	Best Furniture	Hussein	Bakr & Akel	Owner	778-6440	773-4161	2/1/99	5	1/31/04			$ 7,000.00	10,500	$ 8.00
								7/1/99	3	6/30/02	Rent Incr pending			Average	$ 10.67
Suite	1	Vacant	Vacant	Vacant	Vacant	Vacant	Vacant	Vacant	Vacant	Vacant	Vacant		$ 525.00	520	$ 20.77
Suite	2	Vacant	Vacant	Vacant	Vacant	Vacant	Vacant	Vacant	Vacant	Vacant	Vacant		$ 900.00	858	$ 6.06
Suite	3	Vacant	Vacant	Vacant	Vacant	Vacant	Vacant	Vacant	Vacant	Vacant	Vacant		$ 450.00	466	$ 12.23
Suite	3a	Mutual of Omaha	Phillip	Solomon	Owner	778-9655	773-6771	4/1/01	5	3/31/06			$ 475.00	425	$ 26.12
Suite	4	Vacant						Vacant	Vacant	Vacant	Vacant		$ 925.00	925	$ 16.22
Suite	5	Dr F. Alonso	Alonso	Dr. Francisco	Dr	778-6165	773-6216	4/1/01	5	3/31/06			$ 1,250.00	1,250	$ 5.71
Suite	7	Vacant						Vacant	Vacant	Vacant	Vacant		$ 595.00	576	$ 15.10
Suite	8	LEI Technology	Lindsey	Ronald	President	713-9336		2/1/00	5	1/31/05			$ 725.00	720	$ 25.00
Suite	9	USW Regional Off.	Joseph	Frederick	Director	778-6634	772-3184	8/1/01	3	7/31/04			$ 1,500.00	1,126	$ 7.46
Suite	11	Ranger Security	Richards	Delroy	Mgr	718-9696	778-6277/778-	8/1/99	3	4/30/02	can extend at 5%/yr		$ 700.00	575	$ 14.09
Suite	12	vacant						V	V	V	V		$ 575.00	576	$ 6.73
Suite	13	vacant-Storeroom						V	V	V	V		$ 275.00	220	$ 65.16
Suite	14	USW 8526-Oct	Jackson	Gerry	Pres.	778-6906	692-6675	10/1/99	5	9/30/04			$ 1,195.00	1,056	$ 678.86
store	30												$80,941.79	84,948.00	$ 67.86 Average
office	12														

Type	#	Business	last name	First Name	Position	work phone	home Phone	Lease Dt.	Trm	Expires	status	Rent	Sq Ft	$/Sq. Ft.

35

No Leases
10 Key Travels
13 Plaza Cafe

TAB 2

In re Estate of Vanderpool

Superior Court of the Virgin Islands, Division of St. Thomas and St. John

December 30, 2010, Decided; December 30, 2010, Filed

Probate No. ST-04-PB-80

Reporter
2010 V.I. LEXIS 113 *

IN THE MATTER OF THE ESTATE OF OLGA VANDERPOOL, Deceased.

Core Terms

six-year, accrued, preclusion, accrual, judicata

Case Summary

Overview

HOLDINGS: [1]-An agreement between the claimants and the decedent to provide home health care services for the decedent was an open account, as it was reasonable to conclude that the parties intended the individual transactions to be connected; [2]-Under V.I. Code Ann. tit. 5, § 33, the claim accrued on the last date services were provided, as not more than a year elapsed between services or demands for payment, and the action was therefore timely under V.I. Code Ann. tit. 5, § 31(3)(A); [3]-Res judicata did not apply because an order dismissing an action against the decedent was not a judgment on the merits and did not appear to be an involuntary dismissal under Fed. R. Civ. P. 41(b); [4]-Because the claimants had not brought their claim within six months of the first publication of notice to creditors under V.I. Code Ann. tit. 15, § 392, their claim would not have priority.

Outcome

Claim allowed.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Creditors & Debtors

HN1 **Standards of Performance, Creditors & Debtors**

An "open account" is an agreement where there has been a series of transactions between the parties, constituting a running account, payable as bills may be rendered. An open account has also been defined as an account with a balance which has not been ascertained and is kept open in anticipation of future transactions. An open account results where the parties intend that the individual transactions in the account be considered as a connected series, rather than as independent of each other, subject to a shifting balance as additional debits and credits are made, until one of the parties wishes to settle and close the account, and where there is but one single and indivisible liability arising from such series of related and reciprocal debits and credits.

Contracts Law > Defenses > Affirmative Defenses > Statute of Limitations

HN2 **Affirmative Defenses, Statute of Limitations**

See V.I. Code Ann. tit. 5, § 33.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN3[] Estoppel, Collateral Estoppel

Under the doctrine of res judicata, a final judgment, rendered upon the merits acts as a bar to a subsequent action between the parties on the same claim. The doctrine consists of two preclusion concepts: claim preclusion and issue preclusion (or collateral estoppel). Claim preclusion arises after a judgment on the merits in a prior suit and bars a subsequent suit involving the same parties based on the same cause of action. Issue preclusion, or collateral estoppel, involves a subsequent suit upon a different cause of action and precludes relitigation of issues actually litigated and necessary to the outcome of the first suit.

Business & Corporate Law > Agency Relationships > Duties & Liabilities > Causes of Action & Remedies

Civil Procedure > Judgments > Entry of Judgments > Multiple Claims & Parties

HN4[] Duties & Liabilities, Causes of Action & Remedies

For purposes of judgment, an agent and principal are treated separately. Specifically, a judgment against an agent or a principal does not extinguish the liability of the other until the judgment is satisfied.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Dismissal

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN5[] Estoppel, Collateral Estoppel

Unless stated otherwise, an order to dismiss is without prejudice. A dismissal without prejudice necessarily means that the merits of the claim were not adjudicated. An issue must be adjudicated before res judicata and issue preclusion can bar a claim.

Contracts Law > Statute of Frauds > Requirements > Performance

HN6[] Requirements, Performance

Five classes of contracts are subject to the statute of frauds. One is a contract where full performance, within one year of its making, is impossible.

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Creditors & Debtors

Contracts Law > Remedies

HN7[] Standards of Performance, Creditors & Debtors

A claim on an open account is but one right of action for a balance due.

Estate, Gift & Trust Law > Estate Administration > Claims Against Estates > Priority of Claims

HN8[] Claims Against Estates, Priority of Claims

Claims against an estate filed within six months of the first publication of notice to creditors have priority. V.I. Code Ann. tit. 15, § 392 (1996). However, until the administration has been completed, a claim against the estate not barred by the statute of limitations may be presented, allowed, and paid out of any assets then in the hands of the executor or administrator not otherwise appropriated or liable. § 392.

Headnotes/Summary

Summary

Claim for home health care services. The Magistrate of

the Superior Court, Smith, J., allowed the claim.

Headnotes

VIRGIN ISLANDS OFFICIAL REPORTS HEADNOTES
[Headnotes classified to Virgin Islands Digest]

VI1.[] 1.

Accounts § 1.50 > Generally > Open Account

An "open account" is an agreement where there has been a series of transactions between the parties, constituting a running account, payable as bills may be rendered. An open account has also been defined as an account with a balance which has not been ascertained and is kept open in anticipation of future transactions. An open account results where the parties intend that the individual transactions in the account be considered as a connected series, rather than as independent of each other, subject to a shifting balance as additional debits and credits are made, until one of the parties wishes to settle and close the account, and where there is but one single and indivisible liability arising from such series of related and reciprocal debits and credits.

VI2.[] 2.

Accounts § 1.50 > Generally > Open Account

An agreement between the claimants and the decedent to provide home health care services for the decedent was an open account, as it was reasonable to conclude that the parties intended the individual transactions to be connected.

VI3.[] 3.

Limitation of Actions § 3.70 > Accrual of Actions > Particular Cases

Because August 3, 2001, was the date of the last item proved in the account on either side, a claim for home health care services accrued on that date. Because the claim was filed within six years of accrual, it was timely under the six-year statute of limitations. 5 V.I.C. §§ 31(3)(A), 33.

VI4.[] 4.

Judgments § 25.03 > Res Judicata > Generally

Under the doctrine of res judicata, a final judgment, rendered upon the merits acts as a bar to a subsequent action between the parties on the same claim. The doctrine consists of two preclusion concepts: claim preclusion and issue preclusion (or collateral estoppel). Claim preclusion arises after a judgment on the merits in a prior suit and bars a subsequent suit involving the same parties based on the same cause of action. Issue preclusion, or collateral estoppel, involves a subsequent suit upon a different cause of action and precludes relitigation of issues actually litigated and necessary to the outcome of the first suit.

VI5.[] 5.

Agency § 9.10 > Rights, Duties and Liabilities > Generally

For purposes of judgment, an agent and principal are treated separately. Specifically, a judgment against an agent or a principal does not extinguish the liability of the other until the judgment is satisfied.

VI6.[] 6.

Executors and Administrators § 9.30 > Claims By Creditors > Particular Matters

When the claimants obtained a judgment only against the agent for a decedent, which remained unsatisfied, they were free to bring a creditor's claim and ask the court to find that the cause of action survived the decedent and that the estate was liable for this debt.

VI7.[] 7.

Dismissal § 5.10 > Practice and Procedure > Generally

Unless stated otherwise, an order to dismiss is without prejudice. A dismissal without prejudice necessarily means that the merits of the claim were not adjudicated. An issue must be adjudicated before res judicata and issue preclusion can bar a claim.

VI8.[] 8.

Judgments § 25.35 > Res Judicata > Particular Cases

The small claims order dismissing the action against a decedent was not a judgment on the merits nor did it appear to be an involuntary dismissal. Therefore, the

claim against the decedent's estate was not barred under the doctrine of res judicata. FED. R. CIV. P. 41(b).

VI9.[] 9.

Statute of Frauds § 3.20 > Applicability > Contracts Not To Be Performed Within One Year

An estate provided no evidence that the agreement to provide home health care services to the decedent was to last for a year or more; rather, it appeared that either party was free to terminate the arrangement at anytime. Therefore, this agreement was outside of the statute of frauds and the lack of a written agreement was of no consequence to claimants' ability to recover from the estate.

VI10.[] 10.

Accounts § 1.50 > Generally > Open Account

A claim on an open account is but one right of action for a balance due.

VI11.[] 11.

Executors and Administrators § 9.45 > Claims By Creditors > Priorities

Claims against an estate filed within six months of the first publication of notice to creditors have priority; however, until the administration has been completed, a claim against the estate not barred by the statute of limitations may be presented, allowed, and paid out of any assets then in the hands of the executor or administrator not otherwise appropriated or liable. Since the claimants here failed to bring their claim within six months of the first publication of notice to creditors, their claim was not barred but would not have priority. 15 V.I.C. § 392.

Counsel: **[*1]** LEMUEL F. CALLWOOD, St. Thomas, USVI, *Attorney for the Estate.*

DENIECE M. RAINEY, The Heritage Law Firm, St. Thomas, USVI, *Attorney for Claimants.*

Judges: SMITH, *Magistrate of the Superior Court of the Virgin Islands.*

Opinion by: ALAN D. SMITH

Opinion

MEMORANDUM OPINION

(December 30, 2010)

Summary

Claims on open accounts accrue on the date of the last item proved in the account on either side. Independent Living Center and Castor filed a claim against the Vanderpool Estate seeking payment for services last provided on August 3, 2001. The question is whether the applicable six-year statute of limitations on contract actions bars this claim. Services were last provided by Independent Living Center and Castor within six years of date they filed their claim. Therefore, the claim is not barred by the statute of limitations.

Facts

Independent Living Center for Senior Citizens, Inc. and Melanie Castor ("Claimants") provided in-home care for Olga Vanderpool from sometime in the 1990s to August 3, 2001. Leslie Reovan, as agent for Vanderpool, made payments to Claimants for these services until his check, dated March 4, 2001, was returned for insufficient funds. On May 21, 2001, Castor filed a **[*2]** small claims action for $4,544.92 against Vanderpool and Reovan for services provided from February 2001 through April 29, 2001. The small claims action was heard on August 7, 2001. Although Vanderpool did not appear in that action, Reovan appeared and acknowledged the debt. Judgment was entered against

him for the total amount of the debt on August 9, 2001. The action against Vanderpool was dismissed. Reovan has not paid the judgment.

Vanderpool died on March 7, 2004. A petition to probate her estate was commenced on September 30, 2004. On July 27, 2007, Claimants filed a verified creditor's claim against the estate for $17,778.94 seeking compensation for services provided between February and August 2001, which was served on the attorney for the estate. Claimants amended the claim on July 30, 2007 to $18,252.80 but then reduced it to $17,006.95 through a second amended creditor's claim filed on February 7, 2008. On February 15, 2008, a supplement to the second amended claim was filed which included documents showing that Reovan had made payments to the Claimants since October 2000. The original creditor's claim and both of the amended creditor's claims included the $4,544.92 awarded **[*3]** in the small claims judgment against Reovan. The Estate filed an opposition to the claim on October 1, 2009.

Claimants appeared at the October 4, 2010 hearing on the final account and objected because their claim had not been paid and was not formally rejected. Based on the Claimant's objection and under the authority granted to the Court in 15 V.I.C. § 395, testimony was taken to determine whether the claim should rejected or allowed.

The Claim

VI[1] [1] The undisputed facts confirm that the agreement between the parties was HN1 an "open account". That is, an agreement "[w]here there has been a series of [transactions] between the parties, constituting a running account, payable as bills may be rendered."[1] An open account has also been defined as

> an account with a balance which has not been ascertained and is kept open in anticipation of future transactions. An open account results where the parties intend that the individual transactions in the account be considered as a connected series, rather than as independent of each other, subject to a shifting balance as additional debits and credits are made, until one of the parties wishes to settle and close the account, and where there is but one single and indivisible liability **[*4]** arising from such series of related and reciprocal debits and credits.[2]

VI[2] [2] Here, Claimants provided services and then billed Vanderpool for those services. Copies of the Claimants' "Request for Payment Form" dated May 19, 2001, June 9, 2001 and August 5, 2001 were filed with their July 27, 2007 claim. Reovan made payments up until March 4, 2001. Copies of Reovan's checks were submitted with Claimants' supplement to the second amended creditor's claim. Reovan does not dispute that the services were provided or that he received requests for payment. Given the nature of the services, it is reasonable to conclude that Vanderpool and Claimants intended the individual transactions to be a connected series rather than be independent of each other. Therefore, based on the evidence and the reasonable inference from the evidence that the in-home health care services provided by Claimants were intended as a series of connected transactions, the agreement between Claimants and Vanderpool is an open account.

The Accrual Date

Before deciding whether the claim is barred by the six-year statute **[*5]** of limitations for contracts[3], the date on which the claim accrued must be determined. For, it is from that date that statute of limitations began to run.

Both the Estate and Claimants agree that the six-year statute of limitations for contracts applies. The Estate argues that most or all of the services provided to Vanderpool occurred before accrual; the Estate does not, however, propose a specific date of accrual. Claimants contend that under the six-year statute of limitations the accrual date was no earlier than August 5, 2001, the date they submitted their last request for payment. They argue that the claim did not accrue until sometime thereafter when they were on notice that neither Vanderpool nor Reovan ever planned to make payment on the debt. The Court is not persuaded by this argument. Alternatively, Claimants argue that there was never an express or implied contract between Claimants and Vanderpool and that the claim is therefore not subject to the six-year statute of limitations in 5 V.I.C. § 31(3)(A) for contract actions but is instead subject to the residuary ten-year statute of limitations for claims not

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[1] Johnson v. Columbia Properties Anchorage, LP, 437 F.3d 894, 902 (9th Cir. 2006) (*quoting* 9 Arthur L. Corbin, *Corbin on Contracts* § 953 (Interim ed. 2002)).

[2] 1 Am Jur. 2d Accounts and Accounting § 4.

[3] V.I. Code Ann. tit. 5 § 31(3) (A) (1997).

otherwise specifically addressed.[4] This argument also fails because the arrangement **[*6]** between Claimants and Vanderpool was a contract.

The accrual date for this claim is determined by 5 V.I.C. § 33, which states:

> HN2[] In an action to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the date of the last item proved in the account on either side; but whenever a period of more than one year shall elapse between any of a series of items or demands, they are not to be deemed such an account.[5]

The last date on which services were provided for Vanderpool by Claimants was August 3, 2001. Not more than one year elapsed between any of the services provided or demands for payment. Therefore, the claim accrued on August 3, 2001.

Statute of Limitations

VI[3][] [3] Claimants provided services through August 3, 2001 and properly billed for those services. Because August 3, 2001 was the date of the last item proved in the account on either side, the claim accrued on that date. The six-year statute of **[*7]** limitations began to run on that date and expired on August 3, 2007. Claimants filed their verified creditor's claim on July 27, 2007. Because the claim was filed within six years of accrual, it was timely. Therefore, the claim is not barred by the six-year statute of limitations.

Affirmative Defenses

The Estate asserts the affirmative defenses of *res judicata* and the statute of frauds. None of these defenses operates to the bar the claim.

VI[4][] [4] HN3[] Under the doctrine of *res judicata*, a "final judgment, rendered upon the merits" acts as a bar to a subsequent action between the parties on the same claim.[6] "The doctrine consists of two preclusion concepts: claim preclusion and issue preclusion [or collateral estoppel].[7] Claim preclusion arises after a judgment on the merits in a prior suit and bars a subsequent suit involving the same parties based on the same cause of action.[8] Issue preclusion, or collateral estoppel, involves a subsequent suit upon a different cause of action and precludes relitigation of "issues actually litigated and necessary to the outcome of the first suit."[9]

VI[5,6][] [5, 6] The Estate's position is that the small claims action, filed against Vanderpool and Reovan **[*8]** on May 21, 2001, and the judgment against Reovan prevent this Court from considering this claim. This argument is not valid because, HN4[] for purposes of judgment, an agent and principal are treated separately.[10] Specifically, a judgment against an agent or a principal does not extinguish the liability of the other until the judgment is satisfied.[11] Here, Claimants only obtained a judgment against Reovan, as agent. That judgment remains unsatisfied. Claimants, however, never obtained a judgment against Vanderpool, as principal. Therefore, Claimants were free to bring a creditor's claim and ask the Court to find that the cause of action survived Vanderpool and that the Estate is liable for this debt. Consequently, this Court should only consider the judgment of the small claims court as to Reovan and not Vanderpool.

VI[7,8][] [7, 8] The small claims judgment stated as follows: "IT IS FURTHER ORDERED THAT THE COMPLAINT AGAINST DEFENDANT, OLGA VANTERPOOL [sic], IS DISMISSED." HN5[] Unless stated otherwise, an order to dismiss is without prejudice.[12] A dismissal without prejudice necessarily

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[4] § 31(2)(A).

[5] § 33. The Virgin Islands open accounts statute was derived from the one in Alaska, and they read identically. *See* Alaska Stat. § 09.10.110. Therefore, this section should be interpreted in light of Alaska law. *See* Benjamin v. Eastern Airlines, Inc., 18 V.I. 516 (1981).

[6] *See* Bank ***of Nova Scotia v. Bloch, 533 F. Supp. 1356, 19 V.I. 45, 51 (D.V.I. 1982)***, *aff'd*, ***707 F.2d 1388 (3d Cir. 1988)***.

[7] *See* Boyd-Richards v. Massac, 35 V.I. 62, 65 (Terr. Ct. 1996)

[8] *Id.*

[9] *Id.*

[10] *See* Restatement (Third) Agency § 6.09.

[11] *Id.*

[12] Fed. R. Civ. P. 41(a)(2).

means that the merits of the claim were not adjudicated.[13] An issue must be adjudicated before res judicata and issue preclusion **[*9]** can bar a claim.[14] The small claims order dismissing the action against Vanderpool was not a judgment on the merits nor does it appear to be an involuntary dismissal under *Fed. R. Civ. P. 41(b)*. Therefore, the claim against the Estate is not barred under the doctrine of *res judicata*.

VI[9][↑] [9] The Estate also argues that since there was no written agreement between Vanderpool and Claimants, the claim is barred by the statute of frauds. *HN6*[↑] Five classes of contracts are subject to the statute of frauds.[15] Although the Estate does not explicitly state which class this care-giving agreement falls under, the only reasonable choice is that this is a contract where full performance, within one year of its making, is impossible.[16] The Estate provides no evidence that the agreement for the care-giving services was to last for a year or more. Rather, it appears that either party was free to terminate the **[*10]** arrangement at anytime. Therefore, this agreement is outside of the statute of frauds and the lack of a written agreement is of no consequence to Claimants' ability to recover from the Estate.

Claimants Right to Recover

VI[10][↑] [10] The Court has already concluded that the statute of limitation does not bar this claim. *HN7*[↑] A claim on an open account "is but one right of action for a balance due ... ."[17] Because this claim on an open account was filed less than six years after the date services were last provided to Vanderpool, it is not barred by the six-year of statute of limitations. Nor, do the Estate's affirmative defenses of *res judicata* and statute of frauds defenses operate to deprive the Court of jurisdiction to hear the claim.

VI[11][↑] [11] *HN8*[↑] Claims against an estate filed within six months of the first publication of notice to creditors have priority.[18] However, "[u]ntil the administration has been completed, a claim against the estate not barred by the statute of limitations may be presented, allowed, and paid out of any assets then in the hands of the executor or administrator not otherwise appropriated or liable."[19] The Court notes that the first **[*11]** publication of notice to creditors was on May 10, 2006. Since Claimants failed to bring this claim on or before November 10, 2006, their claim is not barred but will not have priority.

Conclusion

The claim against the Estate is to recover payment for unpaid home-care services provided to Vanderpool between February 2001 and August 3, 2001. The agreement to provide these services created an open account. Here, "[w]here there has been a series of [transactions] between the parties, constituting a running account, payable as bills may be rendered, there is but one right of action for a balance due ... ." A cause of action on an open account accrues on the date of last item proved on either side. The last date on which the Claimants provided service to Vanderpool was August 3, 2001. The claim filed on July 27, 2007 was timely because the statute of limitations did not expire until August 3, 2007 and is not barred. Ther re Claimants are entitled to recover $17,006.95. An order allowing the claim in full will be entered.

End of Document

[13] 21A Karl Oakes, *Federal Procedure, Lawyers Edition* § 51:248 (2010).

[14] *Restatement (Second) of Judgments § 27*. "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Id.*

[15] ***RESTATEMENT (SECOND) OF CONTRACTS § 110*** (1979).

[16] *See* ***RESTATEMENT (SECOND) OF CONTRACTS § 130*** (1979).

[17] *Johnson, 437 F.3d at 902* (*quoting* 9 Arthur L. Corbin, *Corbin on Contracts* § 953).

[18] *V.I. Code Ann. tit. 15 § 392* (1996).

[19] *Id.*

TAB 3

The Bank of Nova Scotia
Tenant Account #92031923
Reconciliation 2012

			February 2012			February Disbursements:		
						2959	400.00	CL Feb
						2960	612.00	CL Feb
Balance per Bank	2/29/12		6,437,994.35			2961	450.00	CL Feb
						2962	1,600.00	CL Feb
Deposits In Transit	2/29/12		0.00			2963	3,250.00	CL Feb
						2964	550.00	CL Feb
Outstanding Checks	2/29/12		-2,208.00			2965	1,742.55	CL Feb
						2966	4,115.49	CL Feb
Other						2967	800.00	CL Feb
Adjusted Bank Balance			5,435,786.35			2968	1,380.00	CL Feb
						2969	1,000.00	CL Feb
Balance per Books	1/31/12		27,736.57			2970	245.90	CL Feb
						2971	774.18	CL Feb
Tenant Deposits	02/03/12		7,268.00			2972	4,000.00	CL Feb
Tenant Deposits	02/10/12		2,450.00			2973	90.00	CL Feb
Deposit Back Rent	02/10/12		5,408,806.74	[illegible]		2974	550.00	CL Feb
Tenant Deposits	02/17/12		8,745.00			2975	1,200.00	CL Feb
Tenant Deposits	02/28/12		12,960.00	5,440,229.74	[illegible]	2976	650.00	CL Feb
						2977	769.64	CL Feb
Disbursements	2/29/12		-29,039.56			2978	656.25	CL Feb
Add back stale checks						2979	168.00	OPEN
Bank Fee - Service Charge			-12.40			2980	450.00	OPEN
Returned Checks			-3,100.00			2981	1,600.00	OPEN
Returned Checks Fee			-30.00					
							27,044.11	
Adjusted Book Balance	2/29/12		5,435,786.35					
		Delta:	0.00			ADD BACK old checks Cleared in Feb:		
						2674	1,195.45	Written in Sept 2011
			February			2683	800.00	Written in Sept 2011
			Outstanding Cks					(Both Repairs & Maint)
		2979	168.00	OPEN				Acct#530000-30
		2980	450.00	OPEN			1,995.45	
		2981	1,600.00	OPEN				
			2,208.00				29,039.56	Total Disbursements

NOTE: TRANSFERS FROM:
2 - CHECK #1151 TO CHECK EAST $2,900,000.00
2 - CHECK #1108 TO CHECK WEST $2,900,000.00
BOTH TRANS TO OPERATING EAST #5830

2 - CHECK # 64866 FROM OPERATING #5830 $5,408,806.74
PAID TO UNITED SHOPPING CENTER
BACK RENT

"Check #64866 from Oper /////// #5830

Paid To United Shopping Center $5,408,806.94

BACK RENT"

HAMD262210

64866

UNITED CORPORATION D/B/A PLAZA EXTRA
UNITED SHOPPING PLAZA

Check Number: 64866
Check Date: Feb 7, 2012

Check Amount: $5,408,806.74

Item to be Paid - Description	Discount Taken	Amount Paid
Rent - Sion farm		5,408,806.74

64866

UNITED CORPORATION D/B/A
PLAZA EXTRA
4C & 4D ESTATE SION FARM
CHRISTIANSTED, VI 00821
(340) 778-0240 (340) 719-1870

BANCO POPULAR DE PUERTO RICO
101-657/216

DATE
Feb 7, 2012

AMOUNT
$ ***$5,408,806.74

Five Million Four Hundred Eight Thousand Eight Hundred Six and 74/100 Dollars

PAY TO THE ORDER OF:
UNITED SHOPPING PLAZA
P.O. BOX 763 C'STED
ST.C ROIX, VI 00821

VOID AFTER 90 DAYS

AUTHORIZED SIGNATURE

Memo: PLAZA EXTRA (SION FARM) RENT

Details on Back. Security Features Included

⑈064866⑈ ⑆021606674⑆ 191⑈148830⑈

HAMD262211

United Shopping Plaza
St Croix, USVI
Accounts Receivable 2013

S = Bay S = Suite

Lessee	Unit	Feb-12 Rent	Feb-12 Paid
vacant	2		
Invoice	3	1,800.00	(1,800.00)
Diamond Girl	4	1,400.00	(1,400.00)
Diamond Girl	5	2,500.00	(2,500.00)
Milieu	6	4,000.00	(2,500.00)
vacant	7		
(In care by Plaza)	8		(5,408,806.74)
Edith's Cafeteria	9	800.00	(765.00)
Guzman	10	850.00	(850.00)
Pebbles	11	850.00	(1,400.00)
Johny Jewelry	12	1,850.00	(1,850.00)
New Plaza Café & Bar	13	1,975.00	(2,000.00)
Jerry Andrus	14	850.00	
VI Nails	15	850.00	(850.00)
VI Nails	16	850.00	(850.00)
Perris Hair	17	800.00	(800.00)
Beautiful Hair	18	800.00	
92VI 3/1	19	800.00	
Laundromat	20		
vacant	21		
vacant	22		
M. L. Mens Wear	23	1,460.00	(2,920.00)
United Industrial Workers SIU	24	2,040.00	
Speedy Services	25	1,450.00	(2,400.00)
SportsPlus	26	1,458.33	(1,458.33)
vacant	27		
vacant	29		
Best Furniture	30	1,300.00	
Best Furniture	36	7,000.00	
Vacant	1		
Vacant	2		
Vacant	3		
United Steelworkers	3a	550.00	(550.00)
Vacant	4		
vacant	5		
vacant	7		
vacant	8		
United Steel Workers (Regional)	9	1,250.00	(1,250.00)
Americas Ranger Security	11	700.00	(700.00)
Vacant	12		
United Steel Workers (8526)	13	125.00	(125.00)
United Steel Workers (8525)	14	1,185.00	(1,185.00)
Totals		40,103.33	(5,449,230.07)

"Paid"

"Unit 8"

→ 5,408,806.74
31,423.33 RENT
5,440,230.07

2187

PLAZA EXTRA STT - POST FEB 2012

United Shopping Plaza

Rents February 2012

DEPOSITS

3-Feb			
Menswear		1,460.00	4387
Johny		1,850.00	1054
Sports		1,458.33	7300
Vi Nail		1,700.00	1434
Anna's Café		800.00	cash
		7,268.33	
10-Feb			
Steelworkers		1,750.00	33090
Ranger		700.00	10206
		2,450.00	
10-Feb			
Plaza East		5,400,606.74	64666
17-Feb			
Naty's		125.00	cash
Shoe		660.00	cash
Diamond Girl		2,500.00	cash
Treasure Prints		700.00	1161
USW		1,320.00	10922
Speedy		2,400.00	2432
Steelworkers		850.00	663
In error		300.00	cash
		8,745.00	
28-Feb			
correct error		(300.00)	cash
Plaza Café		2,800.00	cash
Diamond Girl		4,800.00	cash
Midiela		1,460.00	4388
Airvoice		1,800.00	1309
Perfil		800.00	1769
Prints		700.00	1162
Madonna		2,500.00	1274
		12,960.00	

Balance Reports

Total Deposits	Database	Difference	A/R sheet	Diff
5,440,230.07			0.00	5,440,230.07
5,440,230.07			0.00	5,440,230.07

Deposit Dates	3-Feb-12	10-Feb	2/10/12	17-Feb-12	28-Feb-12
Amounts	7,268.33	2,450.00	5,400,606.74	8,745.00	12,960.00
Cummulative	7,268.33	9,718.33	5,416,525.07	5,427,270.07	5,440,230.07

Bank Deposits 2012