

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

**MOHAMMAD HAMED, BY HIS  
AUTHORIZED AGENT WALEED HAMED,**

PLAINTIFF/COUNTERCLAIM DEFENDANT,

v.

**FATHI YUSUF AND UNITED  
CORPORATION,**

DEFENDANTS/COUNTERCLAIMANTS,

v.

**WALEED HAMED, WAHEED HAMED,  
MUFEEED HAMED, HISHAM HAMED,  
AND PLESSEN ENTERPRISES, INC.,**

COUNTERCLAIM DEFENDANTS.

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**WALEED HAMED, AS EXECUTOR OF THE  
ESTATE OF MOHAMMAD HAMED,**

PLAINTIFF,

v.

**UNITED CORPORATION,**

DEFENDANT.

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**MOHAMMAD HAMED,**

PLAINTIFF,

v.

**FATHI YUSUF,**

DEFENDANT.

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Civil No. SX-12-CV-370

**ACTION FOR INJUNCTIVE  
RELIEF, DECLARATORY  
JUDGMENT, PARTNERSHIP  
DISSOLUTION, WIND UP, and  
ACCOUNTING**

CONSOLIDATED WITH

Civil No. SX-14-CV-287

**ACTION FOR DAMAGES and  
DECLARATORY JUDGMENT**

CONSOLIDATED WITH

Civil No. SX-14-CV-278

**ACTION FOR DEBT and  
CONVERSION**

**ORDER**

**THIS MATTER** came before the Special Master (hereinafter “Master”) on Hamed’s motion for partial summary judgment for Hamed Claim No. H-72: reimbursement to the

Partnership of Fathi Yusuf's matching draw in 2015 in the amount of \$1,288,602.64, filed on April 16, 2023.<sup>1</sup> In response, Yusuf filed an opposition and Hamed filed a reply thereto.

## **BACKGROUND**

Per the Master's order, the parties filed their respective accounting claims in 2016 and their respective amended accounting claims in 2017.<sup>2</sup> On October 17, 2016, Hamed filed his accounting claims and thereafter, on October 30, 2017, Hamed filed his amended accounting claims, whereby both filings included Hamed's claim for the reimbursement to the Partnership of Fathi Yusuf's matching draw in 2015 in the amount of \$1,288,602.64 (Hamed Claim No. H-146, formerly known as Hamed Claim No. H-400).<sup>3</sup>

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<sup>1</sup> The Master was appointed by the Court to "direct and oversee the winding up of the Hamed-Yusuf Partnership" (Sept. 18, 2015 order: Order Appointing Master) and "make a report and recommendation for distribution [of Partnership Assets] to the Court for its final determination." (Jan. 7, 2015 order: Final Wind Up Plan.) The Master finds that Hamed Claim No. H-72 falls within the scope of the Master's report and recommendation given that Hamed Claim No. H-72 involves an alleged debt Yusuf owes the Partnership.

<sup>2</sup> On July 25, 2017, the Court entered a memorandum opinion and order limiting accounting (hereinafter "Limitations Order"). In the Limitations Order, the Court "exercise[d] the significant discretion it possesses in fashioning equitable remedies to restrict the scope of the accounting in this matter and ordered, inter alia, that "the accounting in this matter, to which each partner is entitled under 26 V.I.C. §177(b), conducted pursuant to the Final Wind Up Plan adopted by the Court, shall be limited in scope to consider only those claimed credits and charges to partner accounts, within the meaning of 26 V.I.C. §71(a), based upon transactions that occurred on or after September 17, 2006." (Limitations Order, pp. 32, 34.) In light of the Limitations Order, the Master ordered the parties to file their amended accounting claims.

<sup>3</sup> In Hamed's accounting claims, Hamed included the expert opinion of Jackson Vizcaino Zomerfield, LLP, dated September 28, 2016, which provided in relevant part:

Item 400 – Unclear general ledger entries regarding "Fathi Yusuf matching draw"

*Summary of Description of Issue Identified:*

We noted check #208 with the description "M HAMED INVTRY SETTLE PD TO FATHI YUSUF" and check #209 with the description "FATHI YUSUF MATCHING DRAW" written on the Plaza West Claims Reserve Account ending 9091. Both checks were for \$644,301.32 and written to Fathi Yusuf.

*Work performed:*

We interviewed the Hameds regarding these checks to Fathi Yusuf. The Hamed states that they were not aware of the business purpose of these checks. We also provided John Gaffney a query dated February 15, 2016 (See Attachment VII) requesting an explanation of the business purpose and supporting documentation for entries.

We reviewed Partnership Claims Reserve Account ending 9091 bank statements and noted these checks cleared in July 2015.

*Gaffney's response:*

John Gaffney did not respond to our request.

*Opinion as to the Issue Identified:*

We did not find any sufficient reliable audit evidence, nor were we provided any audit evidence from John Gaffney, that these payments were for a valid business expense or served a business purpose. As

On August 17, 2018, Hamed’s counsel provided Partnership accountant John Gaffney (hereinafter “Mr. Gaffney”), inter alia, a document inquiring about Hamed Claim No. H-72. On August 28, 2018, Mr. Gaffney provided a report in response to the August 17, 2018 inquiries regarding Hamed Claim No. H-72, which indicated in relevant parts:

- A. [Date(s)] when the actual activity or delivery occurred: July 10, 2015
- B. Who the person/entities are: Fathi Yusuf
- C. What amounts were involved: \$644,301.32 plus \$644,301.32 adjusted by \$77,335.62 for a net total of \$1,211,267.02.
- D. What it was for (with reference to why the funds are allegedly properly charged to the Partnership): At midnight on March 8, 2015, control of Plaza East was awarded to the Yusufs and control of Plaza West was awarded to the Hameds. Just prior to March 8<sup>th</sup>, inventory valuations were provided based upon an independent physical count and just prior to July 2015 at a meeting between the families, valuations were assigned to fixtures & equipment in both stores. These transactions were needed to establish parity since the value of assets acquired by the Hameds on March 8<sup>th</sup> substantially exceeded the value of assets to the Yusufs on the same date.

On April 16, 2023, Hamed filed this instant motion for partial summary judgment.

#### **STANDARD OF REVIEW**

Rule 56 of Virgin Islands Rules of Civil Procedure (hereinafter “Rule 56”) governs motions for summary judgment and sets forth the procedures thereto. Under Rule 56, “[a] party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought” and “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” V.I. R. CIV. P. 56; *see also Rymer v. Kmart Corp.*, 68 V.I. 571, 575 (V.I. 2018) (“A summary judgment movant is entitled to judgment as

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such, we are not able to satisfy ourselves of the following management assertions: 1. Occurrence 2. Accuracy or 3. Classification, as described in AU-C 315.A128.

We concluded these amounts should be returned to the Partnership to confirm to the management’s assertions.

The total amount of the claim is \$1,288,602.64.

(Hamed’s Accounting Claims.)

a matter of law if the movant can demonstrate the absence of a triable issue of material fact in the record.”). “A factual dispute is deemed genuine if ‘the evidence is such that a reasonable jury could return a verdict for the nonmoving party[.]’” and a fact is material only where it “might affect the outcome of the suit under the governing law[.]” *Todman v. Hicks*, 70 V.I. 430, 436 (V.I. Super. Ct. April 17, 2019) (quoting *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008)). The reviewing court must view all inferences from the evidence in the light most favorable to the nonmoving party, and take the nonmoving party's conflicting allegations as true if properly supported. *Kennedy Funding, Inc. v. GB Properties, Ltd.*, 2020 V.I. 5, ¶14 (V.I. 2020). “The movant may discharge this burden simply by pointing out to the ... court that there is an absence of evidence to support the nonmoving party's case.” *Id.* (internal quotation marks and citation omitted). Once the moving party meets this burden, “the non-moving party then has the burden of set[ting] out specific facts showing a genuine issue for trial.” *Id.* (internal quotation marks and citation omitted). The non-moving party “may not rest upon mere allegations, [but] must present actual evidence showing a genuine issue for trial.” *Rymer*, 68 V.I. at 576 (quoting *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008)). “Such evidence may be direct or circumstantial, but the mere possibility that something occurred in a particular way is not enough, as a matter of law, for a jury to find it probably happened that way.” *Kennedy*, 2020 V.I. 5, ¶14. Moreover, the court “should not weigh the evidence, make credibility determinations, or draw ‘legitimate inferences’ from the facts when ruling upon summary judgment motions because these are the functions of the jury.” *Todman*, 70 V.I. at 437 (quoting *Williams*, 50 V.I. at 197); *see Kennedy*, 2020 V.I. 5, ¶14; *see also, Rymer*, 68 V.I. at 577 (“When considering a summary judgment motion, a trial judge may not weigh the credibility of evidence or witnesses.”). In deciding a motion for summary judgment, the court’s role “is not to determine the truth, but rather to determine whether a factual dispute exists that warrants trial on the merits.” *Todman*, 70 V.I. at 437 (citations omitted); *see Kennedy*, 2020

V.I. 5, ¶14 (noting that the court “decide only whether there is a genuine issue for trial such that a reasonable jury could return a verdict for the non-moving party”). Accordingly, “if a credibility determination is necessary as to the existence of a material fact, a grant of summary judgment would be improper.” *Rymer*, 68 V.I. at 577. Because summary judgment is “[a] drastic remedy, a court should only grant summary judgment when the ‘pleadings, the discovery and disclosure materials on file, and any affidavits, show there is no genuine issue as to any material fact.’” *Rymer*, 68 V.I. at 575-76 (quoting *Williams*, 50 V.I. at 194). The Court is required to “state on the record the reasons for granting or denying the motion.” V.I. R. CIV. P. 56(a).

### **DISCUSSION**

In his motion, Hamed moved for “a partial summary judgment that the described portion of his Claim H-72 be allowed”—to wit, “[a] unilateral, unapproved \$250,000 payment was made by Fathi Yusuf to himself—from the Partnership.” (Motion, pp. 1, 8.) Hamed made the following assertions in support of his motion: (i) “Hamed has shown that Fathi Yusuf created a \$250,000 credit for himself.” (Id., at p. 7); (ii) “It is undisputed that this was done against the advice of Mr. Gaffney, the objections of Attorney Holt, contrary to the Master’s accounting process—and on his own totally fabricated ‘guestimates’ of a 67% allocation.” (Id., at pp. 7-8); (iii) “It is also clear that Holt and the Master met with Mr. Gaffney – but that by that time, Mr. Yusuf had already proceeded to issue himself a check. Thus, this claim was preserved for dispute at this time.” (Id., at p. 8); (iv) “Hamed has met the requirements of Rule 56.” (Id.); and (v) “The accounting documents do not reflect that [the \$250,000 payment made by Fathi Yusuf to himself from the Partnership] was for a valid business purpose.” (Id.) Hamed included a section for his statement of undisputed facts.<sup>4</sup>

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<sup>4</sup> The parties are reminded that the movant’s section for statement of undisputed should only be used to state an undisputed fact and “each shall be supported by affidavit(s) or citations identifying specifically the location(s) of the material(s) in the record relied upon regarding such fact,” V.I. R. CIV. P. 56(c)(1), and not for arguments or

In his opposition, Yusuf argued that the Master should deny Hamed’s motion. Yusuf made the following assertions in support of his argument: (i) “Hamed attempts to mislead as to the nature of his claim”—to wit, “[t]here is no ‘Unilateral \$250,000 Check Taken by Yusuf.’” (Opp., p. 3); (ii) “At best, Hamed claims that Yusuf received an improper credit in the amount of \$250,000, when funds were allocated to Yusuf so as to equalize a disparity as to the value of certain inventory and equipment when the Plaza Extra East and Plaza Extra West stores were split and awarded to each family.” (Id.); (iii) “Yusuf should have received at least an additional \$340,000 according to Partnership Accountant John Gaffney” and “[t]he allocation which Yusuf accepted actually resulted in a net detriment to him of at least \$340,000 and thus, there is no claim by Hamed to recover anything from Yusuf relating to this equalization calculation.” (Id.); (v) “[T]here was no “unilateral” action and there was nothing ‘taken’ by Yusuf resulting in the issuance of the amounts payable to Yusuf, but instead, the allocation of the funds were described, explained and presented to Master Ross and Counsel for Hamed was made aware of the same and the method by which the amounts were calculated.” (Id., at p. 4); (vi) “Hamed misrepresents the events that transpired”—to wit, “Hamed attempts to contend that there was a secretive or nefarious action taken by Yusuf that was undisclosed and otherwise not approved” but “[t]his is not correct [because] [t]he amounts were presented to the Master and Counsel to Hamed and the amounts to equalize were in the form of checks issued by the Master.” (Id.); and (vii) “If anything, Yusuf should be awarded an additional allocation of \$340,000” since “Hamed is aware of this and yet, still filed this Motion despite the clear testimony and documentary evidence corroborating Yusuf’s loss.” (Id.) Yusuf included his response to Hamed’s statement of undisputed facts and also included a section for his statement of undisputed facts.<sup>5</sup>

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requests. For example, Hamed’s improperly argued that the credits made to Mr. Yusuf were “seemingly improper” in statement 4 of his undisputed fact.

<sup>5</sup> The parties are reminded that the opposing party has the option to include a section for statement of disputed facts, not a statement of undisputed facts. *See* V.I. R. CIV. P. 56(c)(2) (“In addition, a party opposing summary

In his reply, Hamed rebutted Yusuf argument with the following assertions: (i) “It is totally immaterial whether the term “check” is used as the reference title or whether it is referred to as an imbalanced, “improper credit”: Yusuf unilaterally changed the inventory calculations in his favor without a basis, contrary to the ordered, agreed process, and he got extra funds because of it.” (Reply, p. 1); (ii) “It is undisputed by John Gaffney that Yusuf unilaterally changed the agreed-on inventory method and the final amounts--solely on Yusuf’s own self-serving guesstimate -- after that official inventory was formally completed.” (Id.); and (iii) “The fact that other disputes about the inventory MIGHT have gone Yusuf’s way—if only Yusuf had followed the correct process to its completion--is completely irrelevant” because “Yusuf didn’t go through the full process as he should have...[and] never made a timely claim for those other amounts.” (Id.)

It is the Master’s understanding that Hamed’s instant motion for partial summary judgment did not seek a judgment as to Hamed Claim No. H-72 itself; instead, Hamed’s motion simply sought a judgment that Hamed’s claim that the \$250,000 credit Yusuf received from the Partnership was improper and should be reimbursed to the Partnership was part of Hamed Claim No. H-72. While Yusuf argued that Hamed does not have a claim for the \$250,000 credit Yusuf received from the Partnership as alleged because Yusuf himself sustained a greater net loss from that equalization calculation, the Master finds such an argument irrelevant at this juncture since the issue of whether Yusuf sustained a loss from that equalization calculation has no bearing on whether Hamed’s claim that the \$250,000 credit Yusuf received from the Partnership was improper and should be reimbursed to the Partnership was part of Hamed Claim No. H-72. Upon review of Hamed’s accounting claims and Hamed’s amended

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judgment may, if it elects to do so, **state additional facts that the party contends are disputed and material** to the motion for summary judgment, presenting one or more genuine issues to be tried.”) (emphasis added). Here, Yusuf improperly included a statement of undisputed facts in his opposition. Given that Rule 56 does not permit the opposing party to file a statement of undisputed facts, it was not necessary for Hamed to respond to Yusuf’s statement of undisputed facts.

accounting claims, there was no indication that Hamed Claim No. H-72 included Hamed's claim that the \$250,000 credit Yusuf received from the Partnership was improper and should be reimbursed to the Partnership. As such, the Master finds that Hamed failed to satisfy his burden of establishing that there is no genuine dispute as to any material fact that Hamed's claim that the \$250,000 credit Yusuf received from the Partnership was improper and should be reimbursed to the Partnership was part of Hamed Claim No. H-72, and the Master will deny Hamed's motion for partial summary judgment. With that said, if Hamed wishes to amend Hamed Claim No. H-72 to include Hamed's claim that the \$250,000 credit Yusuf received from the Partnership was improper and should be reimbursed to the Partnership, the Master will entertain the appropriate motion once it is properly briefed and filed.

#### **CONCLUSION**

Based on the foregoing, it is hereby:

**ORDERED** that Hamed's motion for summary judgment for Hamed Claim No. H-72, filed on April 16, 2023, is **DENIED**.

**DONE and so ORDERED** this 16<sup>th</sup> day of July, 2023.

  
EDGAR D. ROSS  
Special Master