

In this motion, plaintiff seeks a finding of partial summary judgment as to the existence of a partnership between himself and Fathi Yusuf for the three Plaza Extra supermarkets (Sion Farm, Estate Plessen and St. Thomas) as well as a determination that as a result, he is entitled to a 50% interest in its profits and the right to fully participate in the management of the business operations of the three stores.

II. Facts Not In Dispute

Plaintiff has submitted a Statement of Undisputed Facts, as required by LRCi 56.1, which contains citations to the record for the facts asserted herein. References to exhibits are to the exhibits attached to the Rule 56.1 Statement.

First, defendants make the following admissions on page 3 of their memorandum in support of their Rule 12 motion (DE 29):

In 1986, due to financial constraints, **Defendant Yusuf and Plaintiff Hamed entered into an oral joint venture agreement.** The agreement called for Plaintiff Hamed to receive fifty percent (50%) of the net profits of the operations of the Plaza Extra supermarkets....Plaintiff Hamed received 50% of the net profits thereafter. (Emphasis added.)

Consistent with this admission, in 2000 there was a deposition in litigation before this Court where both Yusuf and United were the defendants -- and were jointly represented at the deposition by the same counsel. In that deposition the following statements were made under oath by Yusuf (**Exhibit 1** at pp. 14:5-15:14) (emphasis added):

When I was in the financial difficulty, when I was in financial difficulty, my brother-in-law, he knew. I shouldn't -- he started to bring me money. Okay? He own a grocery, Mohammed Hamed, while I was building, and he have some cash. He knew I'm tight. He started bring me money. Bring me I think 5,000, 10,000. I took it. After that I say, Look we Family, we want to stay family. I can't take no money from you because I don't see how I could pay you back. So he insisted, Take the money. If you can afford to, maybe pay me. And if you can't, forget about it. Okay. He

kept giving me. I tell him, Under this condition I will take it. I will take it. He kept giving me until \$200,000. **Every dollar he make profit, he give it to me. He win the lottery twice, he gave it to me. All right? That time the man have a little grocery, they call Estate Carlton Grocery. Very small, less than 1,000 square foot, but he was a very hard worker with his children.** And it was, you know, just like a convenience mom-and-pop stores. He was covering expenses and saving money.

. . . .
I say, Brother-in-law, **you want to be a partner too? He said, Why not?** You know, as a family, we sit down. Says, How much more can you raise. Say, I could raise 200,000 more. **I said, Okay. Sell your grocery. I'll take the two hundred, four hundred. You will become 25 percent partner. So we end up I'm 25 percent, my two nephew 25 each, and my brother-in-law, Mohammad Hamed, 25 percent. I don't recall the year, could be '83 or '84,** but at least thanks God in the year that Sunshine Supermarket opened, because his supermarket is the one who carries these two young men and my brother to go into supermarket with me. So I have their money, I finish the building.

Yusuf then continued by explaining how the other two partners decided to leave, resulting in plaintiff becoming his 50/50 partner in the supermarket operations, fully exposed to loss. (**Exhibit 1** at pp. 17-19:6-10) (emphasis added):

Then, but when I been denied [for loans], I have to tell my partner what's going on. I been entrusted to handle the job perfect, and I am obligated to report to my partner to anything that happened. I told my nephews and I told my partner, Hey, I can't get a loan, but I'm not giving up. So two, three days later **my two nephews split, say, We don't want to be with you no more, and we want our money.** I say I don't have no money to pay you. . . .

We come to an agreement, I pay them 12 percent on their money, and 150,000 default because I don't fulfill my commitment. I accepted that. We wait until my partner, which is my brother, came. He's an older man. And we came up to Mr. Mohammed Hamed, I say, You want to follow them? He say, Yeah, I will follow them, but do you have any money to give? **I say, Look, Mr. Hamed, you know I don't have no money.** It's in the building, and I put down payment in the refrigeration. But if you want to follow them, if you don't feel I'm doing the best I can, if you want to follow them, you're free to follow them. I'll pay you the same penalty, 75,000. I will give you 12 percent on your 400,000.

He says, Hey. If you don't have no money, it's no use for me to split. **I'm going to stay with you.**

All right. I say, Okay. You want to stay with me, fine. I am with you, I am willing to mortgage whatever the corporation own. Corporation owned by me and my wife at that time. **And my partner only put in \$400,000. That's all he put in, and he will own the supermarket.** I have no problem. I told my partner, Look, I'll take you under one condition. **We will work on this, and I'm obligated to be your partner as long as you want me to be your partner until we lose \$800,000. If I lose 400,000 to match your 400,000, I have all the right to tell you, Hey, we split, and I don't owe you nothing.**

They say, Mr. Yusuf, we knows each other. I trust you. I keep going. Okay. Now, I told him about the two partner left, **Mr. Hamed. You know, these two guys, they left, my two nephew, they was your partner and my partner. I give you a choice. If you pay penalty with me and pay the interest with me, whatever they left is for me and you.** But if I must pay them the one-fifty penalty and pay them 12 percent, **then Plaza Extra Supermarket will stay three-quarter for Yusuf and only one-quarter for you.**

He says, Do whatever you think is right. **I tell him, You want my advice? I be honest with you. You better off take 50 percent. So he took the 50 percent.**

Yusuf concluded this portion of his testimony stating (**Exhibit 1** at p. 20:10-12)

(emphasis added):

*Every single Arab in the Virgin Islands knew **that Mr. Mohammed Hamed is my partner, way before Plaza Extra was opened.***

Yusuf further explained in that 2000 deposition (1) what the partnership owned and (2)

why neither he nor plaintiff ever reduced the partnership agreement to writing, testifying

(**Exhibit 1** at pp. 23:18-24:1, 4-5) (emphasis added):

But I want you please to be aware that my partner's with me since 1984, and up to now his name is not in my corporation. And that -- excuse me and that prove my honesty. Because if I was not honest, my brother-in-law will not let me control his 50 percent. And I know very well, my wife knows, my children knows, that **whatever Plaza Extra owns in assets, in receivable or payable, we have a 50 percent partner.**

But due to my honesty . . . my partner, he never have it in writing from me.

In short, United and Yusuf testified to an agreement Yusuf had with his “partner” -- the plaintiff (his brother-in-law) — which included **sharing the assets as well as the receivables along with an obligation to be responsible for payables of Plaza Extra** on a 50/50 basis. The attorney representing them then made sure it was clear in his questioning that plaintiff, Mohammed Hamed, had a 50% interest in the operations and assets of the Plaza Extra supermarket operations *as distinct from* United Corporation -- even though Plaza Extra often appeared with the name United before the words “Plaza Extra” (See **Exhibit 1** at p. 69:13-21) (emphasis added):

Q. Okay. Okay. You were asked by Attorney Adams, when it says United Corporation in this [other, unrelated] Joint Venture Agreement, **in talking about Plaza Extra, talking about the supermarket** on St. Thomas, who owned or who was partners in **United Corporation Plaza Extra** at the time before you entered into that Joint Venture Agreement?

A. **It's always, since 1984, Mohammed Hamed.**

Q. Okay. So when it says United Corporation –

A. **It's really meant me and Mr. Mohammed Hamed.**

Consistent with the fact that United does not own the Plaza Extra supermarket operations and assets, defendants have continually sent rent notices to plaintiff regarding the Plaza Extra Store located in United's shopping center at Sion Farm, St. Croix. Such notices have continued to be sent even after this litigation arose. See **Exhibit 2.**

With these undisputed facts in mind, it is now appropriate to discuss why summary judgment is warranted as to Count I of the amended complaint after a brief discussion of the applicable standard under Rule 56.

III. Rule 56 Standard

This Court is well aware of the applicable Rule 56 standard. Summary judgment is appropriate if there are no genuine issues of fact in dispute, construing all facts in favor of the non-moving party, including all inferences that can be reasonably drawn therefrom. *See, e.g., McDonald v. Davis*, 2009 WL 580456, at *2 (D.V.I. 2009).

IV. Argument

In Count I, plaintiff alleges that there is a partnership between himself and Fathi Yusuf, which is governed by Title 26 of the Virgin Islands Code (enacting the Uniform Partnership Act.) While the Legislature adopted an amended version in 1998, it is not applicable to the issues related to the formation of the partnership because the partnership in question was formed in 1986. The provisions of the original act control the issues related to the formation of the partnership. *See Harrison v. Bornn, Bornn & Handy*, 200 F.R.D. 509, 514 (D.V.I. 2001) ("The amendment was enacted on February 12, 1998, and by its express terms took effect May 1, 1998. . . .The Court must therefore look to the previous statute for guidance.")

In this regard, the version of Title 26 applicable in 1986 makes *prima facie* proof of the existence of a partnership straightforward, as it provides in part as follows:

§ 22. Rules for determining the existence of a partnership

In determining whether a partnership exists, these rules shall apply -

...

(4) The receipt by a person of a share of the profits of a business **is prima facie evidence** that he is a partner in the business. . . . (Emphasis added).

Thus, the “prima facie” case is established by operation of law here where receipt of a share of profits is admitted. There are three separate sets of undisputed facts which independently prevent defendants from denying the existence and terms of this partnership in response to this motion -- as a matter of law. Each will be discussed separately for the sake of clarity before discussing the impact of those undisputed facts.

A. Defendants’ admissions in their Rule 12 motion

As the Third Circuit makes clear in *Taylor v. Mooney Aircraft Corp.*, 265 Fed.Appx. 87, 93, 2008 WL 490597, at *4 (3d Cir. 2008):

To the extent that [United and Yusuf] made statements of fact in prior court filings [in the same case, they are] barred from taking any position inconsistent with those statements under the doctrine of judicial admissions. *See Berkeley Inv. Group, Ltd. v. Colkitt*, 455 F.3d 195, 211 n. 20 (3d Cir. 2006).

See also Parilla v. IAP Worldwide Serv., VI, Inc., 368 F.3d 269, 275 (3d Cir. 2004).

In their Rule 12 memorandum (DE 29), defendants concede (on page 3) the facts plaintiff needs to prove to prevail in establishing a partnership under Count I, making the following admissions:

In 1986, due to financial constraints, Defendant Yusuf and Plaintiff Hamed **entered into an oral joint venture agreement**. The agreement called for Plaintiff Hamed to receive **fifty percent (50%) of the net profits** of the operations of the Plaza Extra supermarkets. . . . Plaintiff **Hamed received 50% of the net profits thereafter**. (Emphasis added.)

As the Third Circuit has also observed, the “well-settled rule that a party is bound by what it states in its pleadings” prevents the defendants from now trying to disprove what

it has admitted. *Berkeley Inv. Group, Ltd. v. Colkitt*, 455 F.3d 195, 211 (3d Cir. 2006).

Thus, the defendants are bound by their admissions that:

- A. there is an agreement to share 50/50 of the profits with plaintiff regarding the "operations of the Plaza Extra supermarkets,"
- B. made pursuant to an oral agreement (now affirmed in writing),
- C. which was entered into in or about 1986,
- D. which is still in effect,
- E. with payments of 50% of profits due to plaintiff from 1986 on.

The only apparent dispute remaining after these admissions is whether the relationship should be called a "partnership" or a "joint venture." This "semantic" dispute is irrelevant in the Virgin Islands, which follows the "fundamental rule of law" that a joint venture is a subspecies of partnership and is thus subject to the UPA. *Boudreaux v. Sandstone Group*, 1997 WL 289867, at *6 (Terr.Ct. 1997).¹

B. The deposition of Fathi Yusuf

In addition to the admissions in the Rule 12 memorandum supporting a finding that there is a partnership between Mohammed Hamed and his brother-in-law, Fathi Yusuf, are further admissions made in sworn deposition testimony in 2000. Yusuf and United were the joint defendants in that case. They were represented by the same

¹ See also *Seaboard Sur. Co. v. Richard F. Kline, Inc.*, 91 Md.App. 236, 247, 603 A.2d 1357, 1362 (Md.App. 1992) ("As a partnership, the Joint Venture's conduct is governed by the Maryland UPA"); *Austin v. Truly*, 721 S.W.2d 913, 920 (Tex.App.—Beaumont, 1986) ("It is a fundamental rule of law that a joint venture, such as this one is, is also a general partnership. Being a general partnership, this venture is subject to the Texas UPA"); *Stone-Fox, Inc. v. Vandehey Development Co.*, 290 Or. 779, 785, 626 P.2d 1365, 1368 (Or. 1981) ("This court has consistently held that partnership law controls joint ventures") and *Barrett v. Jones, Funderburg, Sessums, Peterson & Lee, LLC*, 27 So.3d 363, 372 (Miss. 2009) ("As a joint venture, SKG was governed by Mississippi's partnership law, the [UPA] of 1997")

counsel, and that counsel was present. The deposition testimony confirms that Mohammad Hamed has been his 50/50 partner in the Plaza Extra grocery business since before the first store opened in 1986. This deposition testimony also (1) explains exactly how this 50/50 partnership was formed, admits that plaintiff is Yusuf's 50/50 partner and (2) details those terms -- which includes the agreement to split profits, assets, receivable and payables — acknowledging on their behalf as follows:

A. Amount of Initial Contribution to Capital: “my partner [plaintiff] . . . put in . . . \$400,000.”²

B. Duration of Agreement and Splitting Future Risk of Loss: “I’m obligated to be your [plaintiff’s] partner as long as you want me to be your partner until we lose \$800,000. If I lose 400,000 to match your 400,000, I have all the right to tell you, Hey, we split, and I don’t owe you nothing.” Also “If you pay penalty with me [amount invested plus \$150,000 plus 12% interest to the two leaving partners] and pay the interest with me, whatever they left is for me and you. But if I must pay them the one-fifty penalty and pay them 12 percent, then Plaza Extra Supermarket will stay three-quarter for Yusuf and only one-quarter for you.”

D. Share: “*I tell him, You want my advice? I be honest with you. You better off take 50 percent. So he took the 50 percent.*” (Emphasis added).

E. Scope of business: “his name is not in my corporation [but]. . . whatever Plaza Extra owns in assets, in receivable or payable, we have a 50 percent partner.”

F. Form of Agreement (Oral): “my partner, he never have it in writing from me.”

G. Yusuf’s Contribution of the use of the corporation: “But I want you please to be aware that my partner’s with me since 1984, and up to now **his name is not in my corporation. And that -- excuse me and that prove my honesty. Because if I was not honest, my brother-in-law will not let me control his 50 percent.** And I know very well, my wife knows, my children knows, that **whatever Plaza Extra owns in assets, in receivable or payable, we have a 50 percent partner.** But due to my honesty . . . my partner, he never have it in writing from me.” (Emphasis added).

² This was the same value Yusuf ascribed to what he had contributed.

H. Distinction between owning the supermarket operations and owning United: Yusuf testified he owned "50 percent of Plaza Extra in 1986," and made the specific distinction that at the same time he owned 100% of the "United Shopping Plaza."

In short, this deposition establishes the formation of this partnership and its terms.

C. The rent notices

The fact of the existence of this partnership is further confirmed by the numerous eviction and rent notices sent by United -- addressed to "Mohammed Hamed" as "Plaza Extra" at the Plaza Extra store address -- regarding the Plaza Extra supermarket located in United's Sion Farm shopping center. (See **Exhibit 2**) The language in these notices is quite telling, using terms that acknowledge that United Corporation does not presently possess (or operate) the supermarket premises at United's Sion Farm shopping center, stating as follows (See **Exhibit 2**, p. 2):

During the month of September 2009, I had a discussion with your son Wally, and within two days I repeat the same request while you were present that United Corporation would like to have its location back. Unfortunately, up to now, I have not seen that you give up the keys. Therefore as of January 1, 2012 the rent will be \$200,000.00 per month, only for the coming three months. If you do not give up the keys before the three months, it will be \$250,000.00 per month until further notice.

In United's opposition to the TRO (DE 12), it confirmed this landlord-tenant relationship between United and the "supermarket operation" in the affidavit of United's president, Maher Yusuf, stating under oath (DE 11-2 at ¶ 17):

17. Most importantly, United has always charged rent for the use of part of its retail premises **by the Plaza Extra Supermarket operation** on Sion Farm, St. Croix. **Mohammed Hamed** has always understood that United would charge for the use of its retail space, **and would deduct the value of such rent in arriving at the net profits of the Plaza Extra Supermarkets.** (Emphasis added.)

This additional judicial admission is particularly significant, as it concedes that (1) Plaza Extra (the partnership) occupies the store's premises and (2) that United Corporation owns the building as landlord and therefore deducts rent from the gross profits **in determining the "net profits of the Plaza Extra Supermarkets"** (plural).³

In short, the fact that United sends Mohammed Hamed eviction notices and admits it charges the "Supermarket operation" rent for the space, which it deducts from that operation's profits in determining the Plaza Extra Supermarkets' "net profits" for division with plaintiff, is a clear admission that a partnership does exist with regard to the "Plaza Extra Supermarkets." This is all language **now** used by both United and Fathi Yusuf.

D. The impact of these admissions

Under Title 26, plaintiff's rights as a partner are given specific protections, including the following rights:

§ 71. Partner's rights and duties

(a) Each partner is entitled to an **equal share** of the **partnership profits**...

(f) Each partner has **equal rights in the management and conduct** of the partnership business. (Emphasis added.)

Thus, clearly partial summary judgment is appropriate under Count I, finding that plaintiff is entitled to Rule 56 relief. His equal share of the partnership and its assets should be declared -- as should his equal right to manage and control.

³ United sent additional rent notices on October 1 and November 1, 2012, to Mohammed Hamed at the "Plaza Extra Supermarket" (signed by Yusuf), which was after United was served with the pleadings in this case. Thus, this new admission that Plaza Extra Supermarket is a separate entity from United controlled by Hamed are particularly significant since they were sent after United and Yusuf were on notice of the claims asserted in this case. See **Exhibit 2** (last two pages).

V. Conclusion

For the reason set forth herein, it is respectfully submitted that this relief being sought as part of the total relief requested in Count I should be granted, with partial summary judgment being entered in favor of plaintiff on this aspect of Count I of the amended complaint as follows:

- 1) There is a partnership between Mohammad Hamed and Fathi Yusuf as to the supermarket operations, assets, receivable and payables of the three Plaza Extra supermarkets known as Plaza Extra East (Sion Farm, St. Croix), Plaza Extra West (Plessen/Grove, St. Croix) and Plaza Extra St. Thomas (Tutu Park, St. Thomas);
- 2) Pursuant to 26 V.I.C. § 71(a), plaintiff, Mohammad Hamed, is entitled to 50% of the partnership profits, assets and receivables generated by this partnership (and has a reciprocal obligation to pay 50% of all payables); and
- 3) Pursuant to 26 V.I.C. § 71(f), plaintiff, Mohammad Hamed, is entitled to fully and equally participate in the operations of this partnership.

A proposed Order has been submitted.

Dated: November 12, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November, 2012, I filed the foregoing with the Clerk of the Court, and delivered by ECF to the following:

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