

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

**HISHAM HAMED, individually, and
derivatively, on behalf of SIXTEEN PLUS
CORPORATION,**

Plaintiff,

v.

**FATHI YUSUF, ISAM YOUSUF and
JAMIL YOUSEF**

Defendants,

and

SIXTEEN PLUS CORPORATION,

a nominal Defendant.

Case No.: 2016-SX-CV-650

**DERIVATIVE SHAREHOLDER
SUIT, ACTION FOR DAMAGES
AND CICO RELIEF**

JURY TRIAL DEMANDED

**PLAINTIFF'S REPLY TO YUSUF'S OPPOSITION TO
MOTION FOR PARTIAL SUMMARY JUDGMENT**

The Plaintiff moved for partial summary judgment pursuant to Rule 56 on one count, Count III, of the First Amended Complaint ("FAC"). Count III is a claim brought only against one Defendant—Fathi Yusuf—for breach of his fiduciary duty to the nominal Defendant corporation, Sixteen Plus, Inc., of which he is an officer and director.

Yusuf responded, arguing first that his Rule 12(b)(6) motion should be decided before a summary judgment should be considered, but there is no rule prohibiting the filing of a Rule 56 motion while a Rule 12(b)(6) motion is pending. Indeed, Rule 56 specifically provides that a motion for summary judgment can be filed "at any time" before discovery is closed.

Yusuf complains next that a scheduling order has not yet been entered, but Rule 56 motions can be filed before one is issued as well, as Rule 56 does not specify a time period before one can be filed. Moreover, a proposed scheduling order has been sent to defense counsel, so it can be filed once they respond.

Finally, Yusuf argues that he needs time to do discovery before responding to the Partial Rule 56 Motion as to Count III, filing a Rule 56(d) motion. That argument is without merit for two reasons, First, the identified discovery allegedly needed has no relevance to undisputed facts raised in Count III. Second, the discovery listed in defense counsel's declaration involves facts solely within the control of its client or are matters in the public domain. Thus, this last argument—the alleged need for discovery—is insufficient to defeat summary judgment as to Count III.

I. The Facts Relevant to Count III

While a general statement of facts was submitted with the motion for partial summary judgment to give the Court a history of the events giving rise to this case, the **only** facts critical to the motion for partial summary judgment as to Count III were set forth on page 4 of the motion – and they are uncontested:

- 1) Yusuf has been an officer and director of Sixteen Plus since 1997 and remains so today.
- 2) Sixteen Plus purchased a 300-acre plot of real property known as Diamond Keturah in 1999, recording a mortgage against it in favor of Manal Yousef.
- 3) Yusuf has a real estate Power of Attorney (“POA”) from Manal Yousef giving him the power to release the Manal Yousef mortgage or convey the property to himself.
- 4) The POA also contained the following broad indemnity language, given by Manal Yousef to Fathi Yusuf, allowing him unfettered discretion to do whatever he wants with the mortgage without any fear of recourse:

I hereby agree to release, indemnify, defend and hold my attorney-in-fact harmless for all claims arising by reason of his acts he so performs in accordance with this instrument and the law. (Emphasis added).

- 5) To date, Yusuf has used his POA to act adversely to Sixteen Plus, hiring a lawyer to defend the action filed by Sixteen Plus to have the Manal Yousef mortgage declared void.
- 6) The POA remains in effect until a termination has been recorded against the property at the Recorder of Deeds, which has not happened.

In his opposition memorandum, **Yusuf did not submit a declaration to refute any of these salient facts**. Instead, one of his lawyers filed a Rule 56(d) declaration saying discovery was needed before a response could be submitted, stating in relevant part:

5. For example, discovery is needed concerning whether the allegedly "sham mortgage," was in fact a sham, which of the Hameds were aware of the allegedly "sham mortgage," which of the Hameds consented to the "sham mortgage," communications the Hameds have had with third parties about the "sham mortgage," etc.

6. Discovery is also needed with respect to the 2010 power of attorney executed by Manal Yousef, who procured it, who has the original, what uses, if any, to which it has been put, etc.

7. Discovery is necessary concerning Sixteen Plus's tax returns, the information provided to the preparer, by whom it was provided, amendments thereto, etc.

8. Notably, Hisham Hamed, the only individual Plaintiff, executed the Verified Complaint. Many "facts" which Hisham "verified" are outside of his personal knowledge and further represent "conclusory allegations" which are properly tested in the discovery process if the claim is not dismissed by the Court.

However, **none of those facts is salient to Count III**. Rule 56 (d) provides that a declaration can be filed in response to a summary judgment motion in certain circumstances, stating as follows:

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, **for specified reasons, it cannot present facts essential to justify its opposition**, the court may:

- (1) defer considering the motion or deny it;
- (2) allow time to obtain affidavits or declarations or to take discovery; or
- (3) issue any other appropriate order. (Emphasis Added).

In short, Rule 56(d) requires Yusuf to present to this Court “*specified reasons*” why he cannot present facts “*essential to justify its opposition*” to this limited Rule 56 motion.

Thus, with the narrow standard in mind, the Rule 56(d) declaration fails to list any discovery needed to address the limited facts submitted in support of the Partial Rule 56 Motion on Count III, which can be succinctly summarized as follows:

- Since 1997, Yusuf has been and still is an officer and director of Sixteen Plus, **which is a matter of public record**. This fact establishes Yusuf’s fiduciary duty to Sixteen Plus. *See, RC Hotels V.I., Inc. v. B&T Cook Family Ptnrs.*, 57 V.I. 3, 11 (Super. Ct. 2012).
- Sixteen Plus owns real property on St. Croix which has a mortgage against it in favor of Manal Yousef, **which is also a matter of public record**.
- Yusuf has a real estate Power of Attorney (“POA”) from Manal Yousef giving him the power to release the Manal Yousef mortgage, **which is attached to the FAC**.
- Manal Yousef has indemnified Yusuf in that POA from “all claims arising by reason of his acts he so performs in accordance with this instrument and the law,” so that he has no further legal obligations to her.
- The POA is still in effect, **which is a matter of public record, as any termination has to be recorded pursuant to the POA**.
- There is no dispute that it is in the best interest of Sixteen Plus that this mortgage be released, which Yusuf refuses to do, even though he has the power to do so, in violation of his fiduciary duty to the corporation of which he is an officer and director.

While Yusuf’s counsel swears in his Rule 56(d) declaration that further discovery is needed to determine *certain* matters, none of the identified discovery involves any of the foregoing undisputed facts relevant to the pending partial summary judgment motion as to Count III of the FAC, which is limited to Yusuf’s breach of his fiduciary duties to

Sixteen Plus. In this regard, the discovery identified in that declaration is limited to these subjects, none of which has any bearing on the Rule 56 motion as to Count III:

- Discovery concerning the creation of the "sham mortgage" and which of the Hamed shareholders knew about it.¹
- Discovery concerning the procurement of the 2010 power of attorney executed by Manal Yousef and how often it has been used.²
- Discovery concerning Sixteen Plus's tax returns, the information provided to the preparer, by whom it was provided, amendments thereto.³
- Which "facts" are outside of the Plaintiff's personal knowledge.

However, none of these issues has any bearing on the facts relevant to Count III, as it is irrelevant to deciding whether the mortgage is a sham, how the power of attorney came into existence or what the corporate tax returns say.

Moreover, the narrow facts relevant to this limited Rule 56 motion are not dependent on any personal knowledge of the Plaintiff, **as all relevant facts are easily verifiable public record, except for the POA which is attached to the FAC:**

- Sixteen Plus is a Virgin Islands corporation, of which Yusuf is an officer and director;
- Sixteen Plus owns real property on St. Croix that has a mortgage recorded against it in favor of Manal Yousef;

¹ If it were relevant as to whether the mortgage was a sham, Yusuf could just file his own declaration averring whether it is (or not) to defeat summary judgment. Moreover, what any Hamed knows about the sham mortgage is irrelevant, as this is a derivative action filed for the benefit of Sixteen Plus.

² The creation of the POA has no relevance to its use. How often it has been used is equally irrelevant, but if it were, only Yusuf would know this information since it is a POA for him to exercise.

³ The partial summary judgment motion made no reference to these returns. All were signed by Yusuf, so it is absurd to say he has no knowledge about them in any event.

- The POA, *which is attached to the FAC*, gives Yusuf the authority to release the Manal Yousef mortgage, without exposing Yusuf to any liability, as she indemnified him for all acts done pursuant to the POA.

In short, the **only** issue is whether Yusuf is breaching a fiduciary duty to the corporation of which he is an officer and director by not using the POA to release the mortgage recorded against the corporation's primary asset. Thus, the identified discovery allegedly needed by Yusuf is all irrelevant to the facts relevant to resolving the pending Rule 56 motion relevant to Count III.

II. All Information Sought in is Yusuf's Knowledge and Control

In his Rule 56 declaration, defense counsel asserts:

9. Therefore, it is plain that information crucial for Mr. Yusuf to properly defend against the Motion **is needed from both the Hameds and, potentially, third parties.** (Emphasis added)

While such a sworn averment may be needed in a Rule 56(d) declaration, it is disingenuous in this case for counsel to swear under oath that she needs to do discovery to do determine (1) whether the mortgage is a sham, (2) learn how the power of attorney was obtained (and how often it has been used) or (3) state her client needs to do discovery on the preparation of Sixteen Plus corporate tax returns.

In this regard, all counsel had to do is to ask *her client* about these points, as it is undisputed that Yusuf has all of the necessary, direct knowledge regarding all of this information, including:

- How the sham mortgage was created, as he orchestrated it;
- How the POA was obtained, as he had a Virgin Islands lawyer draft it and the sent to his nephew in St. Martin to have it signed before a notary there,
- Yusuf had the tax returns prepared, **which he, not Hamed, then signed** and had filed.

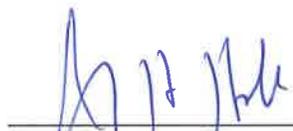
Indeed, if Yusuf contends otherwise, **he** (not his lawyer) should simply file a declaration to this effect. Of course, that filing would have to be under oath, with facts to support it, which explains why he has tried to hide behind his counsel's alleged lack of knowledge, rather than file another perjurious declaration himself.

Thus, it is untrue that discovery from the Hamed's or some unidentified third party is needed to learn these facts, as counsel's own client has all of this information within his own control and knowledge. In short, even if this identified information were relevant to the pending Rule 56 motion on Count III, there would be no need to do any discovery to learn what Yusuf already knows.

III. Conclusion

In summary, partial summary judgment is warranted pursuant to Rule 56 as to Count III of the FAC, **as there are no genuine issues of fact in dispute as to the elements giving rise to Count III.**

Dated: February 13, 2017



Joel H. Holt, Esq. (Bar # 6)
Counsel for Plaintiffs
Law Offices of Joel H. Holt
2132 Company Street,
Christiansted, VI 00820
Email: holtvi@aol.com
Tele: (340) 773-8709
Fax: (340) 773-8677

Carl J. Hartmann III, Esq.
Co-Counsel for Defendants
5000 Estate Coakley Bay, L-6
Christiansted, VI 00820
Email: carl@carlhartmann.com

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February, 2017, I served a copy of the foregoing by mail and email, as agreed by the parties, on:

Greg Hodges

Stefan Herpel

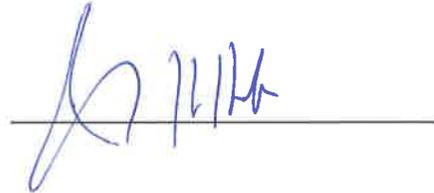
Lisa Komives

Law House, 10000 Frederiksberg Gade

P.O. Box 756

St. Thomas, VI 00802

ghodges@dtflaw.com

A handwritten signature in blue ink is written over a horizontal line. The signature is stylized and appears to be 'L. Komives'.