

**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 OPPOSITION TO MOTION TO STAY DISCOVERY

The Defendant, Fathi Yusuf, has moved to stay discovery pending a decision on his Rule 12(b)(6) motion to dismiss. However, Rule 12(b)(6) does not provide for such a stay or the postponement of any of the obligations imposed under Rule 26 designed to get a case moving. In addressing an identical stay request after the filing of a Rule 12(b)(6) motion, the court in *Turner v. Nationstar Mortg.*, 2015 WL 12763510, at *2 (N.D. Tex. Mar. 6, 2015) held:

The BDFTE Defendants' motion to abate is based only on their position that their pending motion to dismiss "has the potential to dispose of some or all of the claims asserted against them." But, as this Court has noted before, "no federal rule, statute, or binding case law applies to automatically stay discovery pending a ruling on ... a 12(b)(6) motion to dismiss." The BDFTE Defendants essentially "are seeking to invoke a rule that a pending motion to dismiss stays discovery—but no such rule applies in these circumstances," and, "[i]n fact, such a stay is the exception rather than the rule." "[H]ad the Federal Rules contemplated that a motion to dismiss under Fed.R.Civ.P. 12(b) (6) would stay discovery,

the Rules would contain a provision to that effect. (Citations omitted).(Emphasis added)

In short, motions to stay discovery should rarely be granted simply because a Rule 12(b)(6) motion has been filed.¹

Moreover, Yusuf's argument that a stay should be granted because his Rule 12(b)(6) motion if meritorious is no different than what any proponent of such a motion would assert. Of course, the Plaintiff has filed an opposition to that motion and conversely asserts that Yusuf's Rule 12(b)(6) motion is frivolous.² In short, a court cannot rely on such summary assertions in addressing a motion to stay.

Likewise, a re-hashing of the Rule 12(b)(6) motion in a motion to stay is simply a further burden on this Court's otherwise overly crowded docket, as the merits of the motion are already before the Court in the pending Rule 12(b)(6) pleadings. Needless to say, rehashing the same argument again is not helpful to the Court since those arguments are in the Rule 12(b)(6) pleadings. Indeed, repeating those arguments, as was done by Yusuf here, is nothing more than filing an impermissible sur-reply

¹ The draft Virgin Islands Rules of Civil Procedure scheduled to be implemented April 1st state in proposed Rule 26 (d)(4) as follows:

(4) Effect on the Discovery Process of Motions Filed. The filing of any motion—including potentially dispositive motions such as a motion to dismiss or a motion for summary judgment— shall not stay discovery in the action unless the judge so orders.

Likewise, to further limit the scope of Rule 12(b)(6) motions, proposed Rule 8 reverts to only requiring notice pleadings, abolishing the more stringent *Iqbal/Twombly* standards.

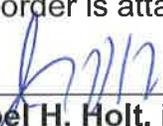
² In fact, the Plaintiff has filed a partial motion for summary judgment on Count III, now fully briefed, which demonstrates the Plaintiff's belief in the merits of his case.

prohibited by existing District Court Rule 7.1 (which notes “counsel will be sanctioned for violation of this limitation”), applicable here pursuant to Superior Court Rule 7.

Finally, arguing that there is no prejudice to the opposing party is simply not true. Any delay in moving a case forward is prejudicial.³ In fact, this Court has adopted a plan to make sure cases move expeditiously. **Moreover, Yusuf has not even attached an affidavit in support** setting forth **any** prejudice to him if discovery proceeds, as his counsel simply repeats the mantra the Yusuf may incur some unidentified expenses and costs. To the contrary, Yusuf admits on page 5 of his motion that the parties to this suit have already expended millions of dollars in fees, so it would be unfair to allow Yusuf to select the ones he wants to prosecute while trying to avoid litigating the one he fears.

In summary, to seek a stay, one must have a specific reason other than the assertion that his or her motion is somehow more meritorious than other Rule 12(b)(6) motions. Likewise, the incurring of expenses and costs is not a valid reason either, unless the party can demonstrate it has limited resources. As Yusuf has failed to offer any reason specific to this case that would warrant a stay of discovery, it is respectfully submitted that the motion should be denied. A proposed order is attached.

Dated: March 9, 2017



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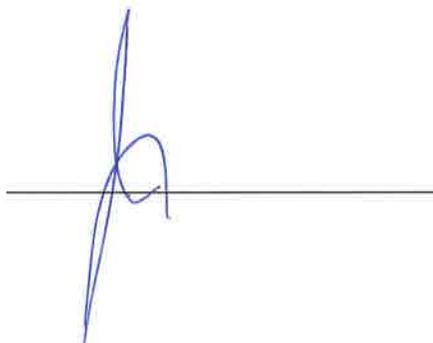
³ The Defendant has tried to delay this case by not responding to the Plaintiff's proposed scheduling order, so a motion asking the Court to enter such an order is being filed with the filing of this opposition memorandum.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of March, 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 the name 'G. Hodges'.

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ORDER

This matter is before the Court on the Defendant, Fathi Yusuf's motion to stay discovery pending a decision on his Rule 12(b)(6) motion to dismiss. Upon consideration of the matters before the Court, it is hereby

ORDERED THAT the Motion Is Denied.

Dated:

HONORABLE ROBERT A. MOLLOY
Judge, Superior Court

ATTEST: ESTRELLA GEORGE
Acting Clerk of Court

By: _____
Deputy Clerk

Dist: Joel H. Holt, Carl Hartmann, Gregory Hodges, Stephen Herpel. Lisa Komives