

**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 RESPONSE TO YUSUF'S REQUEST TO FILE A SUR-REPLY RE
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

The Plaintiff moved for partial summary judgment on Count III of the FAC, which is a claim brought only against one Defendant—Fathi Yusuf—for breach of his fiduciary duties as an officer and director to the nominal Defendant corporation, Sixteen Plus, Inc.

Yusuf responded, arguing (1) his pending Rule 12(b)(6) motion should be decided first, (2) the Rule 56 motion was premature, as there was no scheduling order yet¹ and (3) that he needed more time to do discovery before responding to the motion.

As Hamed pointed out in his reply, however, there is no rule prohibiting a Rule 56 motion from being filed while a Rule 12(b)(6) motion is pending or prior to a scheduling

¹ Indeed, a proposed scheduling order was promptly sent to defense counsel on February 9th, which the defense counsel then ignored, resulting in a motion requesting this Court to enter one being filed on March 9th.

order being entered. As for the request to take discovery, Hamed noted that the identified discovery allegedly needed had (1) no relevance to undisputed facts raised in the Rule 56 motion and (2) were facts already in Yusuf's possession in any event.

Indeed, Yusuf's response was so deficient, that a Rule 11 motion was sent to counsel pursuant to the requirements of that rule, which is now ripe for filing and has been filed with this response. The deficiencies noted in the Rule 11 motion raise the same problem that exists in the motion to file a sur-reply and the attached proposed sur-reply---**there is no declaration from Yusuf refuting the facts critical to the pending Rule 56 motion, nor can these specific facts be disputed based on the public records that exist.** Thus, the sur-reply can be deemed filed and then ignored.

To reiterate this point, the only facts relevant to the partial Rule 56 Motion on Count III are as follows, all of which are clearly within the Plaintiff's personal knowledge:

- 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).²
- 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 for Manal Yousef giving him the power to release the Manal Yousef mortgage, **which is attached to the FAC.** Indeed, Yusuf has not challenged its existence or validity.
- The POA attached to the FAC confirms that Manal Yousef has indemnified Yusuf 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 pursuant to its express terms.

² Yusuf's argument that the statute of limitations has run on Count III, already raised in his Rule 12(b)(6) motion, is absurd. Yusuf remains an officer and director even now, so the statute runs every day he continues to breach his fiduciary duties to Sixteen Plus.

- The POA is still in effect, **which is a matter of public record, as any termination has to be recorded pursuant to the express terms of the POA.**
- There is no dispute that it is in the best interest of Sixteen Plus that this mortgage be released, which Yusuf continues to refuse 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.

There were no facts submitted in Yusuf's opposition memorandum that refuted any of these undisputed facts, **nor are there any facts in the proffered sur-reply that address any of these facts either.**

Finally, as noted in the reply memorandum, **Yusuf has never even submitted a declaration asserting that the Manal Yousef mortgage is not a sham mortgage,** nor has anyone else. Moreover, counsel's reference to alleged facts in the proffered sur-reply are totally improper since they are not accompanied by a supporting declaration from their client—which is required by Rule 56(c). For example:

- On page 3-Counsel says Yusuf denies he has retained counsel or is paying her fees in the case brought by Sixteen Plus against Manal Yousef-where is that fact in this record?
- On page 8, Counsel suggests the Manal Yousef mortgage is valid and not a sham mortgage-how would they know about the details of that transaction?
- On page 9, Counsel argues that the Plaintiff has no knowledge of the relevant facts--a point that can only be refuted by a counter-affidavit.

In short, **Counsel cannot testify and should be admonished for trying to assert facts that their client has not verified under oath.**

In summary, the proffered sur-reply can be deemed filed and then ignored, as there are no facts in it or anywhere else in the record that create a genuine issue of fact sufficient to defeat summary judgment as to Count III. Pursuant to Rule 56(e)(3), the failure to submit such evidence justifies the entry of summary judgment on Count III.

Dated: March 14, 2017



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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March, 2017, I served a copy of the foregoing by mail and email, as agreed by the parties, on:

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