

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

UNITED CORPORATION,)
)
 Plaintiff,)
)
 vs.) **CASE NO. ST-13-CV-101**
 WAHEED HAMED, a/k/a WILLY OR WILLIE)
 HAMED)
)
 Defendant.)
 _____)

ORDER

The Court having issued a Memorandum Opinion on this date, it is
ORDERED that Defendant's February 5, 2014, Motion for Summary Judgment is
GRANTED; and it is
ORDERED that Plaintiff's Amended Complaint is DISMISSED with prejudice in
its entirety; and it is
ORDERED that Defendant's April 28, 2014, Motion to Dismiss for Lack of
Standing is DENIED as moot; and it is
ORDERED that copies of this Order shall be directed to counsel of record.

Dated: September 2, 2014

ATTEST: Estrella H. George
Acting Clerk of Court ___/___/___


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

for by: Paula Clayton
Lori Boynes-Tyson
Court Clerk Supervisor 9/4/2014

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UNITED CORPORATION,)
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 Plaintiff,)
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 vs.) **CASE NO. ST-13-CV-101**
 WAHEED HAMED, a/k/a WILLY OR WILLIE)
 HAMED)
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 Defendant.)
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MEMORANDUM OPINION

Pending before the Court is Defendant's February 5, 2014, Motion for Summary Judgment¹ and Defendant's April 28, 2014, Motion to Dismiss for Lack of Standing.² For the following reasons, Defendant's Motion for Summary Judgment will be granted and Defendant's Motion to Dismiss for Lack of Standing will be denied as moot.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff United Corporation filed a Complaint on March 5, 2013, amended on July 14, 2013, alleging that during Defendant Waheed Hamed's employment with Plaintiff as a manager at Plaza Extra located in Tutu Park, St Thomas, Defendant secretly converted and misappropriated substantial assets by secretly operating a separate wholesale grocery business called "5 Corner's Mini Mart" from at least some time in 1992.

¹ Plaintiff responded on April 7, 2014. Defendant replied on April 23, 2014.

² Despite an Order directing Plaintiff to respond by May 23, 2014, Plaintiff has failed to respond to date.

STANDARD

Rule 56 of the Federal Rules of Civil Procedure, made applicable to the Virgin Islands Superior Court through Superior Court Rule 7, provides that summary judgment is appropriate only

if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.³

In considering a motion for summary judgment, a court must “draw ... all reasonable inferences from the underlying facts in the light most favorable to the non-moving party.”⁴

Once the movant demonstrates that no genuine issue of material fact exists, the burden shifts to the non-moving party to demonstrate that a genuine issue of material fact exists.⁵

Nevertheless, in some instances where a nonmoving party has not had adequate time for discovery, a Court may find the motion premature and defer ruling on the motion until further discovery may be conducted.⁶

ANALYSIS

Defendant submits that Plaintiff’s Amended Complaint should be dismissed in its entirety because the statutory periods for Plaintiff’s claims have expired. Specifically, Defendant argues that Plaintiff had notice of Defendant’s alleged conduct by at least 2003

³ FED. R. CIV. P. 56. See *V.I. Housing Auth. v. Santiago*, 57 V.I. 256, 264 (V.I. 2012).

⁴ *Battaglia v. McKendry*, 233 F.3d 720, 722 (3d Cir. 2000); see *Arlington Funding Services, Inc. v. Geigel*, 51 V.I. 118, 127 (V.I. 2009).

⁵ See, e.g., *Galloway v. Islands Mechanical Contractor, Inc.*, 2012 WL 3984891 (D.V.I. Sept. 11, 2012); *Andersen v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (noting an issue is “genuine” if a reasonable jury could possibly hold in the nonmovant’s favor with regard to that issue).

⁶ See FED. R. CIV. P. 56(c)(d); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (“In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.”).

when Defendant had access to discoverable documents - including Defendant's 1992 tax returns - in a federal criminal investigation in *U.S. v. United Corporation, et al.*, Crim. No. 2003-147.⁷ Plaintiff claims that the statute of limitations was tolled until October 2011 when some of the documents seized by the Federal Bureau of Investigation related to *U.S. v. United Corporation, et al.* - including Defendant's 1992 tax returns - were turned over to Plaintiff. While Plaintiff does not dispute that it had access to documents related to its prosecution in *U.S. v. United Corporation, et al.* in 2003, Plaintiff argues that at this stage of litigation Plaintiff does not have sufficient information to demonstrate whether Defendant's 1992 tax returns were included in those discoverable documents. As a result, Plaintiff requests the Court to either deny Defendant's Motion or defer judgment on the Motion pursuant to Fed. R. Civ. P. 56(d).

I. Plaintiff fails to satisfy its burden to demonstrate the Court should defer judgment on Defendant's Motion for Summary Judgment.

The Court finds that Plaintiff has failed to show that the Court should further delay its decision in this matter pending additional discovery. Pursuant to Fed. R. Civ. P. 56(d), the Court may "defer considering the motion or deny" the motion if the "nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to

⁷ Defendant failed to provide this Court with a separate statement of undisputed material facts in accordance with Loc. R. Civ. P. 56.1(a)(1), which is sanctionable conduct pursuant to Loc. R. Civ. P. 11.2. The Court strongly cautions counsel in this regard. Despite the parties' failure to abide by the rules of procedure that govern practice before this Court, the Court finds the briefs sufficiently clear - particularly regarding which facts are in dispute - in order to make a determination on the merits of the summary judgment motion. See FED. R. CIV. P. 56(f)(3).

justify its opposition.”⁸ To satisfy Fed. R. Civ. P. 56(d), the Plaintiff must make a showing of the following three elements by affidavit or declaration:

- (1) what particular information is sought;
- (2) how, if uncovered, it would preclude summary judgment; and
- (3) why it has not previously been obtained.⁹

If these elements are met, it is commonly accepted that, if the information needed to defend against the summary judgment motion is solely in the possession of the movant, a continuance should be granted as a matter of course. However, that is not necessarily the case where a party seeking discovery can obtain the information from a source other than the movant.¹⁰

Here, the Court finds that Plaintiff did not demonstrate compliance with the third element. The Affidavit of Fathi Yusuf, the treasurer and secretary of United Corporation, simply establishes that Plaintiff had no *actual* knowledge of Defendant’s 1992 tax returns until 2011. The Affidavit does not establish that Defendant’s 1992 tax returns were not among the discoverable documents to which Plaintiff’s defense team had access in 2003 in *U.S. v. United Corporation, et al.* On April 25, 2014, without deciding the Motion, the Court ordered Plaintiff to supplement its Response “with proof by affidavit from the United States Attorney’s Office that it no longer has access to review documents held by the federal government, as opposed to the facts set forth in Special Agent Thomas L. Petri’s July 8, 2009, Declaration.” While the deadline for this supplement was May 12, 2014, the

⁸ FED. R. CIV. P. 56(d).

⁹ *Pennsylvania, Dep’t of Pub. Welfare v. Sebelius*, 674 F.3d 139, 157 (3d Cir. 2012) (citing *Dowling v. City of Philadelphia*, 855 F.2d 136, 139 (3d Cir. 1988)).

¹⁰ *See, e.g., Contractors Ass’n of E. Pennsylvania, Inc. v. City of Philadelphia*, 945 F.2d 1260, 1263 (3d Cir. 1991).

Court received no response from Plaintiff. Considering it has been over six months since Defendant's Motion for Summary Judgment was filed and the Court has received no indication that Plaintiff may not obtain the necessary information from the U.S. Attorney's Office in order to respond to Defendant's Motion for Summary Judgment on the merits, the Court finds that Plaintiff has failed to demonstrate why the information was not previously obtained. As a result, the Court shall make a determination on the merits of Defendant's Motion for Summary Judgment.

II. The Court finds it undisputed for the purposes of Defendant's Motion for Summary Judgment that Defendant's 1992 tax returns were included in the documents to which Plaintiff had access during discovery in 2003 in *U.S. v. United Corporation, et al.*

Pursuant to Fed. R. Civ. P. 56(e), the Court gave Plaintiff "an opportunity to properly support or address the fact" of whether Plaintiff has access to the necessary information to determine whether Defendant's 1992 tax returns were among the documents available for review in 2003 in *U.S. v. United Corporation, et al.* by Plaintiff's defense team. Plaintiff failed to respond. While Plaintiff's failure to respond is insufficient for the Court to conclude that the 1992 tax returns were among the documents available for review in 2003,¹¹ the Court finds the Declarations of Special Agent Thomas L. Petri and Special Agent Christine Zieba, both filed July, 8, 2009 in *U.S. v. United Corporation, et al.*,

¹¹ See FED. R. CIV. P. 56, 2010 Advisory Committee Notes ("Subdivision (e)(3) recognizes that the court may grant summary judgment only if the motion and supporting materials—including the facts considered undisputed under subdivision (e)(2)—show that the movant is entitled to it. Considering some facts undisputed does not of itself allow summary judgment. If there is a proper response or reply as to some facts, the court cannot grant summary judgment without determining whether those facts can be genuinely disputed. Once the court has determined the set of facts—both those it has chosen to consider undisputed for want of a proper response or reply and any that cannot be genuinely disputed despite a procedurally proper response or reply—it must determine the legal consequences of these facts and permissible inferences from them.")

dispositive. Neither Declaration specifically states that Defendant's 1992 tax returns were among the documents. However, both Declarations demonstrate that Plaintiff's defense team was granted "unfettered" access to discovery, although the access and the nature of the access was closely regulated and monitored by the FBI for security reasons.¹² Considering the indictment in *U.S. v. United Corporation, et al.* charged both Plaintiff and Defendant with conspiring to defraud the Virgin Islands by filing false personal income tax returns, territorial gross receipts taxes, and corporate income taxes for a period from approximately 1996 to 2001 and thereby Defendant's tax returns would be essential in the prosecution of that matter,¹³ the Court may logically conclude that Defendant's 1992 tax return, only four (4) years prior to 1996, was among the discoverable documents available in 2003. In fact, while Plaintiff argues the sequential *Bates* numbers of the collected documents is not evidence that the 1992 tax returns were in the government's possession in 2003 and available for Plaintiff's defense team's review, the Court finds that this stamp is relevant and provides corroborating support that the 1992 tax returns were in the government's possession in 2003 and available for Plaintiff's defense team's review. Furthermore, Plaintiff concedes that it obtained Defendant's tax return in 2011 from the FBI as a *part* of the records collected for the purposes of the United States' prosecution of Plaintiff and Defendant in *U.S. v. United Corporation, et al.*, also suggesting the 1992 tax

¹² See Defendant's Motion for Summary Judgment, Feb. 5, 2014, at Exhibits 1-¶9, 2 ¶9. Plaintiff argues that these "Declarations are not evidence, and *could* be false, inaccurate, and/or erroneous." However, Plaintiff has not provided the Court with any evidence that these Declarations are inaccurate representations of the Declarations filed in *U.S. v. United Corporation, et al.*, and thus, the Court accepts them as true representations of the FBI's original Declarations filed on July 8, 2009.

¹³ *U.S. v. Yusuf, et al.*, 2003-147, Third Superseding Indictment, Sept. 9, 2004.

returns were part of the documents available for review in 2003. Considering all the above evidence, the Court finds no genuine issue of material fact exists because, even construing the facts in a light most favorable to Plaintiff, no reasonable jury could find that Defendant's 1992 tax returns were not among the documents available for review in 2003 in *U.S. v. United Corporation, et al.*, as asserted by Defendant in his Motion for Summary Judgment.¹⁴ It appears that no other material fact necessary to the Court's determination on the merits here is in dispute.

As the Court previously stated in its June 24, 2013, Opinion, ordinarily "a statute of limitation begins to run upon the occurrence of the essential facts which constitute the cause of action" unless the statute of limitations has been tolled.¹⁵ Here, Plaintiff argues that both the discovery rule and the doctrine of equitable tolling apply. Specifically,

Under the law of the Virgin Islands, application of the equitable 'discovery rule' tolls the statute of limitation[s] when the injury or its cause is not immediately evident to the victim. Thus, the discovery rule provides that the statute of limitations period begins to run when the plaintiff has discovered, or by *exercising reasonable diligence*, should have discovered (1) that she has been injured, and (2) that this injury has been caused by another party's conduct. The discovery rule is to be applied using an objective reasonable person standard.¹⁶ (emphasis added)

On the other hand, equitable tolling may apply "where the defendant has actively misled the plaintiff," as Plaintiff here alleges in the Complaint.¹⁷ However, similarly to the discovery rule, for a Plaintiff to invoke equitable tolling, the Plaintiff must demonstrate

¹⁴ See FED. R. CIV. P. 56(e)(2)(3).

¹⁵ *Whitaker v. Merrill Lynch, Pierce Fenner, & Smith, Inc.*, 36 V.I. 75, 81 (Terr. V.I. Apr. 21, 1997).

¹⁶ *In re Equivest St. Thomas, Inc.*, 2010 WL 4343616, at *5 (Bankr. D.V.I. Nov. 1, 2010) (quoting *Joseph v. Hess Oil*, 867 F.2d 179, 182 (3d Cir.1989) and *Boehm v. Chase Manhattan Bank*, 2002 WL 31986128, at *3 (D.V.I.2002)).(internal citations and quotations omitted).

¹⁷ *Id.* at *6.

“that he or she could not, by the *exercise of reasonable diligence*, have discovered essential information bearing on his or her claim.”¹⁸ (emphasis added) To determine whether a person has exercised reasonable diligence under either the discovery rule or doctrine of equitable tolling, courts employ an “objective reasonable person standard.”¹⁹

Here, the Court finds that under both the discovery rule and doctrine of equitable tolling, Plaintiff should have discovered Defendant’s alleged conduct by at least 2003 by exercising reasonable diligence, when all documents – including Defendant’s tax returns from 1992 and later – related to the United States’ prosecution in *U.S. v. United Corporation, et al.* were made available to Plaintiff for review.

III. The statutes of limitations on all Counts alleged in Plaintiff’s Amended Complaint have expired.

Considering the Court finds that Plaintiff knew or should have discovered Defendant’s alleged conduct around 2003, the statute of limitations for breach of fiduciary duty (Count I), constructive trust or recoupment (Count II), conversion (Count III), breach of contract (Count IV), and accounting (Count V) alleged in Plaintiff’s Amended Complaint have long expired. Pursuant to 5 V.I.C. § 31(3) and (5), a breach of fiduciary duty claim carries a two (2) year statute of limitations if it is “based on a breach of a legal duty imposed by law that arises out of the performance of the contract” or otherwise carries a six (6) year statute of limitations if it is “based upon a breach of specific provisions in the

¹⁸ *Id.* (citing *In re Mushroom Transp. Co., Inc.*, 382 F.3d 325, 339 (3d Cir.2004) (quoting *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1390 (3d Cir.1994))).

¹⁹ *Id.*; see also *Riley v. Medtronic, Inc.*, 2011 WL 3444190 (W.D. Pa. Aug. 8, 2011) (“[T]he applicable standard is not whether the Plaintiff subjectively knew of the cause of the injury. Rather, it is whether a diligent investigation would have revealed it.”) (internal citations and quotations omitted).


contract.”²⁰ Under 5 V.I.C. § 31(3)(D), conversion carries a six (6) year statute of limitations,²¹ and a breach of contract claim carries a six (6) year statute of limitations pursuant to 5 V.I.C. § 31(3)(A).²² While Plaintiff lists “accounting”²³ and “constructive trust or recoupment” as separate counts, those are equitable remedies and therefore not separate causes of action. Thus, they do not carry a statute of limitations apart from the independent causes of action upon which they rely.²⁴ As a result, considering over ten (10) years has passed between the time Plaintiff knew or should have known of Defendant’s alleged conduct and the date Plaintiff filed the Complaint in 2013, Plaintiff’s Amended Complaint shall be dismissed in its entirety.

For the foregoing reasons, the Court will grant Defendant’s Motion for Summary Judgment and will deny Defendant’s Motion to Dismiss for Lack of Standing as moot. An Order consistent with this Opinion shall follow.

Dated: September 2, 2014

ATTEST: Estrella H. George
Acting Clerk of Court ___/___/___

by: Paula Clayton
Lori Boynes-Tyson
Court Clerk Supervisor 9/4/2014


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
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²⁰ *Whitaker*, 36 V.I. at 79.

²¹ *Id.* at 84 (“[A]n action for conversion of property is considered complete when the property is first tortiously taken or retained by the defendant.”)

²² See, e.g., *Arlington Funding Services, Inc. v. Geigel*, 51 V.I. 118, 134 (V.I. 2009).

²³ *Gov’t Guarantee Fund of Republic of Finland v. Hyatt Corp.*, 935 F. Supp. 441, 466 (D.V.I. 1997).

²⁴ See generally 1A C.J.S. Accounting § 6.