

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

COPY

YUSUF YUSUF, derivatively on behalf of  
PLESSEN ENTERPRISES, INC.,

*Plaintiff,*

v.

WALEED HAMED, WAHEED HAMED,  
MUFEEED HAMED, HISHAM HAMED  
and FIVE-H HOLDINGS, INC.,

*Defendants,*

and

PLESSEN ENTERPRISES, INC.,

*Nominal Defendant.*

Case No. SX-13-CV-120

CIVIL ACTION FOR DAMAGES  
AND INJUNCTIVE RELIEF

JURY TRIAL DEMANDED

15 APR 30 AM 1:00

**DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS'  
PARTIAL SUMMARY JUDGMENT MOTION**

On April 1, 2015, the Defendants moved for partial summary judgment pursuant to Rule 56 as to Counts I, V, and VII of the Complaint, which are the equitable counts in the Complaint (Count I-Constructive Trust; Count V-Unjust Enrichment; and Count VII-Accounting). In support of that Rule 56 motion, Defendants filed all of the required Rule 56 pleadings, including a Statement of Facts that was fully supported by affidavits as required by Rule 56.

On April 21, 2015, the Plaintiff responded to this Rule 56 motion by filing an "opposition" entitled "Motion To Strike Defendants' Motion For Summary Judgment, Or In The Alternative To Extend Time For Filing Of Response." That pleading asserted that more time was needed to do discovery, but that pleading was not supported an affidavit or declaration. It should ne noted that this response was not even served on Plessen's counsel, Jeffrey Moorhead, as noted in the certificate of service.

Pursuant to Rule 56(d), formally designated as Rule 56(f), a party who seeks more time to respond to a summary judgment motion is required to file an affidavit or declaration in support of the extension request, setting forth specific information that explains what further discovery is needed and why that discovery may lead to evidence that would support a viable defense to the Rule 56 motion. Of course, the Plaintiff failed to file any such affidavit or declaration.

More importantly, however, even if this Court treated that pleading as proper request under Rule 56(d), the filing fails to satisfy the specific requirements of that Rule, which states:

- (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 *Rivera–Mercado v. General Motors Corp.* 51 VI 307 (V.I. 2009), the Supreme Court addressed this specific issue, holding:

As a general rule, to obtain a Rule 56(f) continuance, a party must explain “what particular information is sought; **how, if uncovered, it would preclude summary judgment**; and why it has not previously been obtained.” (Emphasis added)(Citations omitted).

In this regard, while the Plaintiff explained what discovery he would like to do—depose the Defendants---as well as why it has not yet happened, **he failed to explain why these depositions would lead to any information that would defeat this limited Rule 56 request.**

In this regard, the Defendants’ motion carefully explained why the deposit of the entire \$460,000 previously removed from Plessen’s account into this Court’s treasury mooted the three equitable claims. In essence, citing the recent Supreme Court holding in *Cacciamani & Rover*

*Corp. v. Banco Popular De Puerto Rico*, No. S.CT.CIV. 2013-0063, 2014 WL 4262098, at \*2 (V.I. Aug. 29, 2014)

Because unjust enrichment is an equitable remedy, **it—like all equitable remedies—is inappropriate where a legal remedy is available.**

Thus, as the Plaintiff still has several counts left that still seek a remedy at law for the Defendants' alleged misdeeds the equitable counts must be dismissed.

Moreover, as these equitable counts all must be dismissed, there is no need to delay any rulings just because the Plaintiff wants an extension to do discovery. Indeed, simultaneous with the filing of the partial motion for summary judgment, the Defendants also filed a supplemental memorandum in support of their pending motion for a protective order, seeking to limit any deposition testimony to only the remaining counts that do not seek equitable relief. In this regard, as noted in that filing, the issues related to these three equitable counts are now resolved by the deposit of these funds into the Court treasury, so there is no reason to allow further discovery on these three counts.

In short, there is nothing to “discover” regarding these equitable accounts, which is why the Plaintiff did not even try to satisfy the Rule 56(d) requirement that the Plaintiff show why the needed discovery would lead to information that would make any of the three equitable causes of action viable claims.

Thus, the three equitable counts are ripe for summary judgment, as the Plaintiff has several adequate remedies at law to seek redress for the alleged actions of the Defendants. No amount of further discovery can overcome the maxim set forth in *Cacciamani & Rover Corp. v. Banco Popular De Puerto Rico*, No. S.CT.CIV. 2013-0063, 2014 WL 4262098, at \*2 (V.I. Aug. 29, 2014) that equitable relief is unavailable when there is an adequate remedy at law.



As such, it is respectfully submitted that the Defendants' partial motion for summary judgment on these three equitable counts (Counts I, V and VII) should be granted and these counts dismissed.

Respectfully submitted,

**ECKARD, P.C.**



Dated: April 30, 2015

By:

Mark W. Eckard, Esquire  
P.O. Box 24849  
Christiansted, VI 00824  
Telephone: (340) 514-2690  
Email: [mark@markeckard.com](mailto:mark@markeckard.com)  
Direct Dial: 340.514.2690  
Office: 340.642.USVI (8784)  
Facsimile: 855.456.USVI (8784)

Counsel for Waleed Hamed, Waheed Hamed,  
Mufeed Hamed and Hisham Hamed

**CERTIFICATE OF SERVICE**

I hereby certify that on this 30<sup>th</sup> day of April 2015, I served a copy of the foregoing document via email, as agreed by the parties, on the following person:

Nizar A. DeWood, Esquire  
2006 Eastern Suburb, Suite 101  
Christiansted, VI 00820  
[dewoodlaw@gmail.com](mailto:dewoodlaw@gmail.com)

Jeffrey B.C. Moorhead, Esquire  
1132 King Street,  
Christiansted, VI 00820  
[jeffreymlaw@yahoo.com](mailto:jeffreymlaw@yahoo.com)

Andrew L. Capdeville, Esq.  
8000 Nisky Shopping Center, Suite 201  
St. Thomas, VI 00802-5844  
[capdeville@alcvilaw.com](mailto:capdeville@alcvilaw.com)

Joseph A. DiRuzzo, III  
1001 Brickell Bay Drive, 32<sup>nd</sup>. Fl.  
Miami, FL 33131  
[jdiruzzo@fuerstlaw.com](mailto:jdiruzzo@fuerstlaw.com)

