

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

HISHAM HAMED , individually, and)	
Derivatively, on behalf of SIXTEEN)	
PLUS CORPORATION ,)	CIVIL NO. SX-16-CV-650
)	
Plaintiff,)	DERIVATIVE SHAREHOLDER
)	SUIT, ACTION FOR DAMAGES
vs.)	AND CICO RELIEF
)	
FATHI YUSUF, ISAM YOUSUF and)	JURY TRIAL DEMANDED
JAMIL YOUSEF ,)	
)	
Defendants.)	
)	
and)	
)	
SIXTEEN PLUS CORPORATION ,)	
)	
a nominal Defendant,)	
)	

MOTION OF DEFENDANTS ISAM YOUSUF AND JAMIL YOUSUF
TO STAY DISCOVERY
PENDING THE DISPOSITION OF THEIR MOTION TO DISMISS
PLAINTIFF’S FIRST AMENDED COMPLAINT

Defendants, Isam Yousuf (“Isam”) and Jamil Yousuf, incorrectly identified as Jamil Yousef (“Jamil”), by and through their undersigned counsel, hereby move to stay discovery until such time as the Court rules on their Motion to Dismiss Plaintiff, Hisham Hamed’s First Amended Complaint (“Motion to Dismiss”) and, in support, state as follows.

I. INTRODUCTION & BACKGROUND FACTS

Discovery is properly stayed given that a Motion for Leave to File Brief in Excess of Page Limit, with an attached Motion to Dismiss all counts of Plaintiff’s First Amended

Complaint against Isam and Jamil, is simultaneously filed with the Court. To move forward with discovery with respect to any, or all, of those counts when they may be dismissed is a waste of the parties' time and resources as well as the Court's, should it have to decide discovery disputes. Moreover, plaintiff will not suffer any harm if discovery is stayed until the Motion to Dismiss is adjudicated. Accordingly, the Court should properly exercise its "broad discretion" to stay discovery when a dispositive motion has been submitted.

As mentioned above, contemporaneously submitted herewith as an attachment to their Motion for Leave is Isam and Jamil's Motion to Dismiss on the grounds that all counts against them were: 1) barred by the statute of limitations; 2) insufficiently pled; 3) also properly dismissed for failure to join a required party; 4) subject to dismiss for lack of personal jurisdiction; and 5) should be dismissed for insufficient service of process particularly as to Isam. Isam and Jamil are not subject to personal jurisdiction in this Court because they did not act within this territory. Isam and Jamil challenge the sufficiency of service of process especially as to Isam, and leave plaintiff to his proof that service upon them in Sint Maarten is sufficient for this Court to exercise personal jurisdiction over them and in compliance with V.I. R. Civ. P. 4. Isam was not personally served with process and was not served at his dwelling or usual place of abode with someone of suitable age or discretion that resides therein.

As more fully set forth in the Motion to Dismiss, the counts against Isam and Jamil are flawed. First, they are all barred outright by the Statute of Limitations and the limitations bar is disclosed on the face of the First Amended Complaint, which reveals that plaintiff knew in 2005 that Sixteen Plus's interests in the Property were impacted by the "sham mortgage" when defendant Fathi Yusuf allegedly insisted that the mortgage be paid if the Property were to be sold.

Additionally, plaintiff has failed to plead actual facts—as opposed to conclusory allegations—sufficient to support his claims. For example, plaintiff has failed to meet the burden to plead facts which, if true, show that Defendants objectively manifested an agreement to participate, directly or indirectly, in the affairs of a CICO enterprise through the commission of two or more predicate criminal acts. Such facts are necessary to properly plead a CICO conspiracy. Plaintiff also fails to allege the necessary criminal enterprise—which enterprise must have an existence separate and apart from the “pattern of criminal activity”—and further fails to allege facts which, if true, would establish the “pattern of criminal activity” needed to properly plead a CICO conspiracy.

The claim for conversion is properly dismissed as none of Sixteen Plus’s assets has been converted, conversion cannot be asserted with respect to real property, and the claim is barred by the six (6) year statute of limitations.

The civil conspiracy claim is also properly dismissed for failure to state a claim upon which relief may be granted. Civil conspiracy cannot be prosecuted on the basis of conversion when there is no underlying conversion. There is no civil conspiracy premised upon a power of attorney to control a mortgage, as plaintiff alternatively argues, when there is no allegations that Defendants conspired to prosecute the power of attorney, the power of attorney has not been used and the civil action – ultimately dismissed by stipulation by the parties to that case – for corporate dissolution was brought by defendant Fathi Yusuf individually, and the power of attorney has not been used so there can be no requisite harm suffered as a result of a so-called conspiracy to prosecute a power of attorney.

The tort of outrage is properly dismissed as it is a claim for intentional infliction of emotional distress by another name. Sixteen Plus as a corporate entity cannot suffer or make a

claim for emotional distress, and there are no allegations that plaintiff, Hisham Hamed suffered any emotional distress. To the extent that plaintiff now claims that the “tort of outrage” is really a claim for “*prima facie* tort,” Defendants’ alleged actions fit into existing and defined torts—evidenced by the fact plaintiff has brought two other tort claims solely against defendant Fathi Yusuf: breach of fiduciary duty and usurpation of corporate opportunity—and has not alleged any facts in the claim for *prima facie* tort which are distinct from prior allegations. Thus, plaintiff’s claim for *prima facie* tort is properly dismissed on this basis as well. Finally, plaintiff’s First Amended Complaint should also be dismissed, in its entirety as to Isam and Jamil, due to plaintiff’s failure to join Manal Yousef, the holder of the Note and First Priority Mortgage at issue herein, who is both a necessary and indispensable party to this action.

Unless and until this Court determines that it may exercise personal jurisdiction over Isam and Jamil and decides plaintiff has not failed to state a claim as to applicable counts in the First Amended Complaint, judicial economy for the Court and the parties favors staying discovery in this matter. As the Court may know, there are numerous cases pending in the Superior Court between the Hameds and Yusufs arising out of disputes concerning their former or currently jointly held businesses. It appears it is reasonable to assume that each of those parties have already incurred attorneys’ fees in the seven figures in those cases. Moreover, there is already a case concerning the validity of the Manal Yousef mortgage pending before Judge Willocks. If potentially unnecessary additional expense to the parties—and burdens on the resources of the Court—can be avoided it makes sense to do so. As discussed below, the Court has broad discretion to stay discovery in order to promote the economies of the Court and the parties, and it should do so in this case.

II. THIS COURT SHOULD EXERCISE ITS BROAD DISCRETION TO STAY DISCOVERY PENDING A RULING ON ISAM AND JAMIL'S MOTION TO DISMISS.

Clearly, the Motion to Dismiss, once adjudicated by the Court, may completely resolve all the issues presented in this case as to Isam and Jamil as well as defendant Fathi Yusuf or substantially reduce the number of issues upon which discovery will be required. A court "is given broad discretion to stay discovery pending decision on a dispositive motion." *Jackson v. Northern Telecom, Inc.*, 1990 U.S. Dist. LEXIS 3572, at *1, 1990 WL 39311, at *1 (E.D.Pa. March 30, 1990); *see also, Scroggins v. Air Cargo, Inc.*, 534 F.2d 1124, 1133 (5th Cir. 1976); *Allstate Life Ins. Co. v. Estate of Miller*, 2004 U.S. Dist. LEXIS 1158, at *3-*4, 2004 WL 141698, at *1 (S.D.Fla. January 16, 2004) (pursuant to Fed. R. Civ. P. 26(b)(2), a Court has "discretion to stay or limit discovery pending the resolution of dispositive motions"); *Petrus v. Bowen*, 833 F.2d 581, 583 (5th Cir. 1987) ("A trial court has broad discretion and inherent power to stay discovery"); *Landis v. North American Co.*, 299 U.S. 248, 254, 57 S.Ct. 163, 166, 81 L.Ed. 153, 158 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants"). When a motion would resolve some or all of the issues in a particular case, "[t]he stay [of discovery] furthers the goal of efficiency for the court and litigants." *Little v. Seattle*, 863 F.2d 681, 685 (9th Cir. 1988); *see also, Weisman v. Mediq, Inc.*, 1995 U.S. Dist. LEXIS 5900, at *5, 1995 WL 273678, at *1-*2 (E.D.Pa. May 3, 1995) ("[A] stay is proper where the likelihood that such motion may result in a narrowing or outright elimination of discovery outweighs the likely harm to be produced by the delay.").

In particular, a stay of discovery pending resolution of a motion to dismiss avoids unnecessary expense and costs. *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1368 (11th

Cir. 1997). Accordingly, in *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353 (11th Cir. 1997), the Court emphasized many significant burdens associated with discovery:

Discovery imposes several costs on the litigant from whom discovery is sought. These burdens include the time spent searching for and compiling relevant documents; the time, expense, and aggravation of preparing for and attending depositions; the costs of copying and shipping documents; and the attorneys' fees generated in interpreting discovery requests, drafting responses to interrogatories and coordinating responses to production requests, advising the client as to which documents should be disclosed and which ones withheld, and determining whether certain information is privileged.

Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1367 (11th Cir. 1997). With these considerations in mind, the *Chudasama* court explained that “[i]f the district court dismisses a nonmeritorious claim before discovery has begun, unnecessary costs to the litigants and to the court system can be avoided. Conversely, delaying ruling on a motion to dismiss such a claim until after the parties complete discovery encourages abusive discovery and, if the court ultimately dismisses the claim, imposes unnecessary costs.” *Id.* at 1368. Accordingly, “[f]acial challenges to the legal sufficiency of a claim or defense ... should, however, be resolved before discovery begins.” *Id.* at 1367. Where a pending dispositive motion “may dispose of the entire action and where discovery is not needed to rule on such motion, the balance generally favors granting a motion to stay.” *Weisman*, 1995 U.S. Dist. LEXIS 5900 at *5, 1995 WL 273678 at *2; *see also, Masters v. Daniel Intern. Corp.*, 1990 U.S. Dist. LEXIS 1103, at *3-*4, 1990 WL 11037, at *2 (D.Kan. 1990) (“It is reasonable for a court to stay discovery until a decision on a dispositive motion where the case can be decided on the pending dispositive motion, where the facts sought through uncompleted discovery would not affect the resolution of the motion, and where discovery on all issues of the broad complaint would be wasteful and burdensome.”); *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396, 411 (1982)

(discovery may be stayed to determine the dispositive issue of immunity of government officials).

As discussed above, in the Motion to Dismiss of Isam and Jamil, they challenge the legal sufficiency of plaintiff's claims against them on the grounds that the counts are: 1) barred by the statute of limitations; 2) were insufficiently pled; 3) were also properly dismissed for failure to join a required party; 4) subject to dismissal based upon lack of personal jurisdiction; and 5) should be dismissed for insufficient service of process particularly as to Isam.

Courts are justified in staying or limiting discovery when—as in this case—doing so would facilitate increased efficiency in resolving the case. Indeed, the U.S. Supreme Court in *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979), referred to the fact that “the discovery provisions, like all of the Federal Rules of Civil Procedure, are subject to the injunction of Rule 1 that they ‘be construed to secure the just, speedy, and inexpensive determination of every action.’ ... With this authority at hand, judges should not hesitate to exercise appropriate control over the discovery process.” *Herbert v. Lando*, 441 U.S. 153, 177, 99 S.Ct. 1635, 1649, 60 L.Ed.2d 115, 134 (1979); *see also, Panola Land Buyers Ass'n v. Shuman*, 762 F.2d 1550, 1560 (11th Cir. 1985). It should be noted that V.I. R. Civ. P. 1 and Fed.R.Civ.P. 1 are almost verbatim in pertinent parts.

Moreover, as noted above, a stay of discovery will not cause any prejudice to plaintiff. Obviously, if the Court were to deny, in whole or in part, the Motion of Isam and Jamil to Dismiss, the Court could then enter an appropriate scheduling order allowing ample time for discovery. Thus, the substantial benefits of granting a stay greatly outweigh the negligible, if any, harm associated with a brief delay in discovery. Accordingly, Isam and Jamil submit the

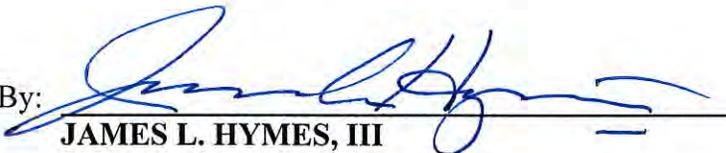
Court should exercise its "broad discretion" to stay discovery when a dispositive motion has been submitted.

WHEREFORE, on the basis of the foregoing, Defendants Isam Yousuf and Jamil Yousuf respectfully request that the Court stay discovery in this matter until the Motion of Isam Yousuf and Jamil Yousuf to Dismiss the First Amended Complaint has been ruled upon by the Court, and award them such other relief as the Court deems just and proper.

Respectfully Submitted,

DATED: June 14, 2017.

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By: 
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CERTIFICATE OF SERVICE

I hereby certify this document complies with the page or word limitation set forth in V.I. R. Civ. P. 6-1(e) and that on this the 14th day of June, 2017, I caused an exact copy of the foregoing "***Motion of Defendants Isam Yousuf And Jamil Yousuf To Stay Discovery Pending The Disposition Of Their Motion To Dismiss Plaintiff's First Amended Complaint***" to be served electronically by e-mail, and by mailing same, postage pre-paid, to the following counsel of record:

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the Disposition of their Motion to Dismiss Plaintiff's First Amended Complaint; and it is hereby further

ORDERED that a copy of this Order be directed to Joel H. Holt, Esq., Carl J. Hartmann, III, Esq., Gregory H. Hodges, Esq., Stephen Herpel, Esq., Lisa Michelle Kömives, Esq., and James L. Hymes, III, Esq.

ENTERED this _____ day of _____, 2017.

Judge, Superior Court of the Virgin Islands

A T T E S T:

THE HON. ESTRELLA H. GEORGE
Acting Clerk of the Court

By: _____
Deputy Clerk

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