

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

**MOHAMMAD HAMED, BY HIS
AUTHORIZED AGENT WALEED HAMED,**

PLAINTIFF/COUNTERCLAIM DEFENDANT,

v.

**FATHI YUSUF AND UNITED
CORPORATION,**

DEFENDANTS/COUNTERCLAIMANTS,

v.

**WALEED HAMED, WAHEED HAMED,
MUFEEED HAMED, HISHAM HAMED,
AND PLESSEN ENTERPRISES, INC.,**

COUNTERCLAIM DEFENDANTS.

**WALEED HAMED, AS EXECUTOR OF THE
ESTATE OF MOHAMMAD HAMED,**

PLAINTIFF,

v.

UNITED CORPORATION,

DEFENDANT.

MOHAMMAD HAMED,

PLAINTIFF,

v.

FATHI YUSUF,

DEFENDANT.

Civil No. SX-12-CV-370

**ACTION FOR INJUNCTIVE
RELIEF, DECLARATORY
JUDGMENT, PARTNERSHIP
DISSOLUTION, WIND UP, and
ACCOUNTING**

CONSOLIDATED WITH

Civil No. SX-14-CV-287

**ACTION FOR DAMAGES and
DECLARATORY JUDGMENT**

CONSOLIDATED WITH

Civil No. SX-14-CV-378

**ACTION FOR DEBT and
CONVERSION**

ORDER

THIS MATTER came before the Special Master (hereinafter “Master”) on Hamed’s motion to strike Yusuf Claim No. Y-13: loss of “going concern” value of Plaza Extra-West.¹ Yusuf filed an opposition and Hamed filed a reply thereafter.

BACKGROUND

In 2012, Hamed filed a complaint against Yusuf and United requesting judicial intervention in the determination of Hamed and Yusuf rights in connection with the Plaza Extra Stores: Plaza Extra-East, Plaza Extra-West, and Plaza Extra-Tutu Park. Plaza Extra-West occupies the premises owed by Plessen Enterprises, Inc. (hereinafter “Plessen”), a closely held corporation jointly and equally owned by the Hamed and Yusuf families. Since Plaza Extra-West’s opened in 2000, it never paid any rent to Plessen and a lease agreement was never executed between Plaza Extra-West and Plessen. (Opp., Ex. D: Yusuf’s response to Hamed’s comments concerning the Court’s proposed wind-up plan, dated October 28, 2014, p.11) In April 2014, KAC357, Inc., an entity wholly owned by Hamed’s sons, entered into a lease agreement with Plessen for the premises occupied by Plaza Extra-West.

In an order dated November 7, 2014, the Court found and declared that “a partnership was formed in 1986 by the oral agreement between Plaintiff [Hamed] and Defendant Yusuf for the ownership and operation of the three Plaza Extra Stores, with each partner having a 50% ownership interest in all partnership assets and profits, and 50% obligation as to all losses and liabilities.”² (Nov. 7, 2014 Order, p. 3) Subsequently, Hamed and Yusuf entered into a Final

¹ The Master was appointed by the Court to “direct and oversee the winding up of the Hamed-Yusuf Partnership” (Sept. 18, 2015 order: Order Appointing Master) and “make a report and recommendation for distribution [of Partnership Assets] to the Court for its final determination.” (Jan. 7, 2015 order: Final Wind Up Plan) The Master finds that that Hamed’s instant motion to strike Yusuf Claim No. Y-13 falls within the scope of the Master’s report and recommendation given that Yusuf Claim No. Y-13 is an alleged debt owed by Hamed to the Partnership (or in other words, potential Partnership Assets).

² Yusuf has also conceded the existence of a partnership between him and Hamed. (Nov. 7, 2014 Order, p. 2) (“In his Motion re Master, Defendant Yusuf conceded the existence of a partnership by operation of law between himself and Plaintiff Hamed, and requested that this Court dissolve said partnership”); Id. (“In subsequent filings and in open court, Defendants have reiterated their concession as to the existence of the partnership.”)

Wind Up Plan for the winding up of the Partnership, which was approved by the Court in an order dated January 7, 2015. Per the Final Wind Up Plan:

Plaza Extra-West:

Hamed will purchase from the Partnership the following elements of the existing business operation known as Plaza Extra-West: inventory at one half of the landed cost and the equipment at its depreciated value, as mutually determined by the Partners. In the event the Partners cannot agree, such value shall be determined by a qualified appraiser selected by the Master. In the event that Hamed is unwilling to pay the appraised value of the equipment, the same shall be sold at public auction under the direction and supervision of the Master. Upon payment for the inventory, and upon payment (or auction and distribution of the proceeds) for the equipment, Hamed will assume full ownership and control and may continue to operate Plaza Extra-West without any further involvement of Yusuf, Yusuf's sons or United, and free and clear of any claims or interests of Yusuf or United. (Jan. 7, 2015 order: Final Wind Up Plan, p. 6)

On May 9, 2015, the Master entered an order whereby the Master declared that “Hamed has lawfully and rightfully assumed full and sole ownership and control and may continue to operate Plaza Extra West without further involvement of any other person or entity, using the trade name ‘Plaza Extra West’” (hereinafter, “Plaza Extra-West Transfer Order”). (May 9, 2015 order: Plaza Extra-West Transfer Order, p. 3)

In September 2016, Integra Realty Resources – Caribbean prepared a business valuation report of Plaza Extra-West for Yusuf, dated September 26, 2016, with April 30, 2014 as the effective date of the appraisal (hereinafter “Integra Report”). The Integra Report stated that Plaza Extra-West's fair market value as of April 30, 2014 was \$8,770,000.³ Subsequently, Hamed filed a motion to strike the Integra Report whereby Hamed challenged the Integra Report for failing the last two of the three-prong test for admissibility: qualifications, reliability

³ Exhibit 2 to Hamed's motion included: first page of the Integra Report; and the 3-page letter from James Andrews of Integra Realty Resources – Caribbean to Gregory Hodges of Dudley Topper and Feuerzeig, LLP, dated September 26, 2016). The corrected Exhibit A to Yusuf's opposition included: James Andrews' declaration, dated January 11, 2018; the first page of the Integra Report; the 3-page letter from James Andrews of Integra Realty Resources – Caribbean to Gregory Hodges of Dudley Topper and Feuerzeig, LLP, dated September 26, 2016; and the Integra Report in its entirety.

and fit. In an order dated July 21, 2017 (hereinafter “July 21, 2017 Order”), the Court, *inter alia*, denied without prejudice Hamed’s motion to strike the Integra Report. On October 30, 2017, Yusuf filed his amended accounting claims limited to transactions occurring on or after September 17, 2006⁴ (hereinafter “Amended Accounting Claims”). In Yusuf’s Amended Accounting Claims, Yusuf asserted, *inter alia*, Yusuf Claim No. Y-13: loss of “going concern” value of Plaza Extra-West and explained:

As equal Partners, both Hamed and Yusuf had ownership interests in the "going concern" value of Plaza Extra-West. A "going concern" value recognizes the many advantages that an existing business has over a new business, such as avoidance of start-up costs and improved operating efficiency. In this sense, the "going concern" value of a business represents the difference between the value of an established business and the value of a start-up one. "Going concern" value also indicates the value of a business as an operating, active whole, rather than merely as distinct items of property.

Both Hamed and Yusuf had fiduciary obligations to each other to maintain the "going concern" value of Plaza Extra-West and to behave in such a way as to promote and not diminish its value as an on-going business. An essential component to Plaza Extra-West's on-going business operations was its ability to continue to operate out of its existing location in Estate Plessen. By orchestrating an April 30, 2014 lease of the premises occupied by Plaza Extra-West to a competing business (wholly owned by Hamed's sons), KAC357, Inc., which then took over the operation of the Plaza Extra-West supermarket formerly owned by the Partnership, Hamed effectively appropriated for the benefit of three of his sons the "going concern" value to the Partnership of the supermarket. Hence, Hamed's actions operated to substantially decrease the value of Partnership Assets. Plaza Extra-West's value as a "going concern" at the time that Hamed took such actions was \$8,770,000. *See* Valuation Report of Plaza Extra-West, prepared by Integra Realty Resources, attached as Exhibit P to the Original Claims, at page 55. Hamed's actions thus diminished the value of the Partnership Assets at the time of dissolution by \$8,770,000. As half owner of the Partnership, such actions decreased the value of Yusuf’s Partnership interests by \$4,385,000. As a result, \$4,385,000 should be awarded to Yusuf to compensate him for such loss of value. (Yusuf’s Amended Accounting Claims, pp. 19-20)

On December 18, 2017, Hamed filed this instant motion to strike Yusuf Claim No. Y-13.

⁴ In a memorandum opinion and order dated July 21, 2017, the Court ordered, *inter alia*, that “the accounting in this matter, to which each partner is entitled under 26 V.I.C. § 177(b), conducted pursuant to the Final Wind Up Plan adopted by the Court, shall be limited in scope to consider only those claimed credits and charges to partner accounts, within the meaning of 26 V.I.C. § 71(a), based upon transactions that occurred on or after September 17, 2006. *Hamed v. Yusuf*, 2017 V.I. LEXIS 114, *44-45 (V.I. Super. Ct., July 21, 2017).

DISCUSSION

In his motion, Hamed claimed that there are two independent reasons to strike Yusuf Claim No. Y-13: loss of “going concern” value of Plaza Extra-West. (Motion, pp. 2-4) First, Hamed argued that Yusuf Claim No. Y-13 is “meritless” because Yusuf signed the Final Wind Up Order whereby Yusuf agreed to transfer Plaza Extra-West “free and clear of any claims of Yusuf” and Plaza Extra-West was transferred accordingly pursuant to the Plaza Extra-West Transfer Order. (Id., p. 3) Second, Hamed argued that “even if such a claim survived, it would have no value, as the Plaza [Extra]-West store had no lease, and hence, nothing to sell, other than its inventory and equipment, which was sold with the [Plaza Extra-West Transfer Order].” (Id.) Hamed pointed out that the Integra Report that Yusuf relied upon is “contingent on one pivotal assumption that is false”—namely, the Integra Report “assumed that the entity operating the business leases the property from a separate entity at market rent” but “this assumption is false, as there was never a lease for the Plaza [Extra-West] store, as Yusuf conceded in his pleadings in this case.” (Id.) (Emphasis omitted) In support of his argument, Hamed referenced to Yusuf and United’s memorandum in support of motion to appoint master for judicial supervision of Partnership winding up or, in the alternative, to appoint receiver to wind up Partnership, dated April 7, 2014, whereby Yusuf and United stated that “[t]he Plaza Extra Stores cannot be sold as a going concern because of the absence of commercial leases for Plaza Extra-East and Plaza Extra-West and the existence of only a short term (less than 5 years) remaining on the lease between United and Tutu Park Mall, Ltd.. for Plaza [Extra-Tutu Park]” and “[h]ence, liquidation of the Plaza Extra Stores is warranted.” (Motion, Ex. 4) As such, Hamed argued that the Master should grant his motion and strike Yusuf Claim No. Y-13.

In his opposition, Yusuf responded to Hamed’s arguments. First, Yusuf argued that the language of the Final Wind Up Order—that Plaza Extra-West would be transferred “free and clear of any claims of Yusuf”—does not prevent Yusuf from “asserting his claim as partner for one half of the going concern value of [Plaza Extra-West]” because “[i]t says nothing about partnership claims by Yusuf against Hamed for his taking of the [Plaza Extra-West] business without payment of any consideration for his half of the business.” (Opp., pp. 2-3) In support of his argument, Yusuf pointed out that the Final Wind Up Order had “similar language that Plaza Extra-Extra would be transferred ‘free and clear of any claims or interest of Hamed’” and yet, Hamed is still pursuing partnership claims by Hamed against Yusuf with regards to Plaza Extra-East—to wit, Hamed Claim Nos. H-11, H-12, H-23, and H-25.⁵ (Id., at p. 3) Thus, Yusuf conclude that the Final Wind Up Order “contemplated that these stores would be transferred ‘free and clear’ of any competing claim of ownership but without prejudice to the accounting claims that the Court expressly contemplated would be filed in the future” as stated in the Final Wind Up Order.”⁶ (Id.) Second, Yusuf argued that “Hamed’s second argument, which attacks the validity of the Integra Report, is also devoid of merit.” (Id.) Yusuf pointed out that “[t]he Integra Report determines, by methods consistent with common appraisal practice that the market value of the Plaza Extra-West supermarket business was \$8,770,000 as of April 30, 2014.” (Id., at p. 4) Yusuf further pointed out that the Integra Reports used the “income capitalization approach as one of the methods to determine value” and “[u]nder that method, the annual earnings generated by the business are multiplied by a capitalization rate to determine value...[and] [t]o determine those earnings, Integra made the eminently reasonable

⁵ Hamed Claims Nos. H-11: 100 shopping carts purchased for Plaza Extra-East; H-12: 2 new condensers purchased for Plaza Extra-East; H-23: 2015 Workers’ Compensation payment for Plaza Extra-East; H-24: 2015 Health permit payment for Plaza Extra-East; and H-25: 2015 Business License payment for Plaza Extra-East.

⁶ In support of his argument, Yusuf pointed out that Step 6, Section 9 of the Final Wind Up Plan provides that “[w]ithin forty-five (45) days after the Liquidating Partner completes the liquidation of the Partnership Assets, Hamed and Yusuf shall each submit to the Master a proposed accounting and distribution plan...” (Opp., p. 3)

and necessary assumption that whoever operated the store would have to pay rent to Plessen (i.e., they would not get to occupy the premises free of charge), thereby reducing the store’s annual income.” (Id.) Yusuf also pointed out that “despite the absence of a lease, ‘common appraisal practice required [Integra] to determine a fair market rental value for the property occupied by Plaza Extra-West and to reflect that as an expense under the income approach that was utilized (along with the asset value approach) to determine the value of the business.’” (Id., at p. 5) Moreover, Yusuf also pointed out that Hamed made “precisely the same attack on the Integra Report” in his previous motion to strike, which the Court denied without prejudice in its July 21, 2017 Order. (Id.) Lastly, Yusuf noted in a footnote that “[w]hile Yusuf did take that position [that Plaza Extra-West could not be sold as a going concern because of the absence of a commercial lease], he later recognized that his position was incorrect, and instead argued that both stores should be sold in a close bid between Hamed and Yusuf.”⁷ (Id.) As such, Yusuf requested the Master to deny Hamed’s motion to strike Yusuf Claim No. Y-13.

In his reply, Hamed pointed out that Yusuf “raise[d] several arguments that are both factually and legally incorrect.” (Reply, p. 2) First, Hamed argued that “Yusuf incorrectly argue[d] that the [Final Wind Up Order] does not bar this claim” because “while Judge Brady’s [Final Wind Up Order] allowed for the valuation of assets being purchased from the Partnership, including the [Plaza Extra-Tutu Park] because it had a lease, no such valuation was ordered for either [Plaza Extra-East or Plaza Extra-West] since neither had a lease, so there was nothing to buy from the Partnership.” (Id.) (Emphasis omitted) Second, Hamed argued that the “Integra [Report’s] ‘assumption’ is worse than totally speculative, it fails to acknowledge controlling facts established by this Court—that a third party had a lease for this store so the Partnership could not have even ‘theoretically’ obtained one and then sold the store as a ‘going

⁷ In support of his argument, Yusuf referenced his response to Hamed’s comments concerning the Court’s proposed wind-up plan, dated October 28, 2014 (Opp. Ex. D).

concern.” (Id.) Additionally, Hamed noted that, if a lease could be created where none existed, “Hamed would have the exact same claim on the Plaza [Extra-East].” (Id.) (Emphasis omitted) Finally, Hamed argued that “Yusuf has already conceded in pleadings filed in this Court that the Plaza [Extra-]East [sic] could not be sold as a ‘going concern,’ directly refuting the critical ‘extraordinary assumption’ that [the Integra Report] relies upon” and Yusuf did not dispute this in his opposition. (Id., at pp. 2-3) Hamed further noted that, although Yusuf included a footnote indicating that Yusuf realized this position was incorrect, per his response to Hamed’s comments concerning the Court’s proposed wind-up plan, dated October 28, 2014, “[a] review of the referenced... document shows this representation is false” since Yusuf, in said document, only referenced a ‘closed bid sale’ for Plaza [Extra-]West, not Plaza [Extra-]East, and was contingent on the Court (1) voiding the already approved [KAC357, Inc.] lease and then (2) forcing the (non-party) owner of that property, Plessen Enterprises, to sell the property at an auction.” (Id., at p. 3) Thus, Hamed concluded that “there was no such ‘change of position’ as suggested by Yusuf, as his ‘new proposal’ still required the buyer to be able to get title to the property in order to possess it, just like a lease” and “if that could happen, then Plaza [Extra-]East would have the identical ‘going concern’ value too, allowing an off-set for any claim on the Plaza [Extra-]West store.” (Id.) As such, “Yusuf cannot now assert that the Plaza [Extra-]West store could have been sold as a going concern, as the Partnership had no lease for the premises,” and thus, Hamed requested the Master to grant his motion. (Id.)

1. Final Wind Up Order

The Master finds Hamed’s argument that the Final Wind Up Order bars Yusuf’s claim for loss of “going concern” value of Plaza Extra-West to be unpersuasive. The Final Wind Up Order provided that “[u]pon payment for the inventory, and upon payment (or auction and distribution of the proceeds) for the equipment, Hamed will assume full ownership and control

and may continue to operate Plaza Extra-West without any further involvement of Yusuf, Yusuf's sons or United, and free and clear of any claims or interests of Yusuf or United.” (Jan. 7, 2015 order: Final Wind Up Plan, p. 6) The Final Wind Up Order had similar language regarding Plaza Extra-East, that “[u]pon payment for such inventory, and upon payment (or auction and distribution of proceeds) for the equipment, Yusuf will assume full ownership and control and may continue to operate the business Plaza Extra-East without any further involvement of Hamed or the Hamed Sons, and free and clear of any claims or interest of Hamed.” (Jan. 7, 2015 order: Final Wind Up Plan, p. 6) When Hamed and Yusuf submitted the Final Wind Up Plan for the Court to approve, they were well aware that they have both claims against each other on behalf of the Partnership. For example, Hamed argued in its Hamed Claim Nos. H-11 and H-12 that Yusuf should reimburse the Partnership for the 100 shopping carts and the 2 condensers purchased for Plaza Extra-East that was paid with the Partnership fund or alternatively, the Partnership should pay Hamed the equal value for the Partnership paid for the 100 shopping carts and the 2 condensers purchased for Plaza Extra-East. Thus, it is reasonable to assume the aforementioned language in the Final Wind Up Plan only intended that the ownership of Plaza Extra-West would be transferred “free and clear of any claims or interests of Yusuf or United.” It is disingenuous for Hamed to now argue that the language precluded all claims of Yusuf and United generally because by that logic, that same language pertaining to Plaza Extra-East would similarly preclude all claims of Hamed generally.

Here, Yusuf Claim No. Y-13 did not challenge Hamed's ownership of Plaza Extra-West; rather, Yusuf Claim No. Y-13 claimed that Hamed appropriated “for the benefit of three of his sons the ‘going concern’ value to the Partnership of the [Plaza Extra-West]” and “substantially decrease[d] the value of Partnership Assets.” (Yusuf's Amended Accounting

Claims, p. 19) As such, the Master finds that the Final Wind Up Plan did not bar Yusuf Claim No. Y-13.

2. Integra Report

Yusuf uses the Integra Report to support Yusuf Claim No. Y-13: loss of “going concern” value of Plaza Extra-West. However, in Yusuf’s proposed plan for winding up the Partnership in 2014,⁸ Yusuf clearly stated that:

Section 8. PLAN OF LIQUIDATION AND WINDING UP

A. Sale of Plaza Extra Stores as Going Concern vs. Liquidation.

The Plaza Extra Stores cannot be sold as a going concern because of the absence of commercial leases for Plaza Extra - East and Plaza Extra - West and the existence of only a short term (less than 5 years) remaining on the lease between United and Tutu Parle Mall, Ltd. for Plaza Extra - Tutu Park. Hence, liquidation of the Plaza Extra Stores is warranted. (Emphasis added)

Yusuf claimed in his opposition that “he later recognized that this position was incorrect, and instead argued [in his response to Hamed’s comments concerning the Court’s proposed wind-up plan, dated October 28, 2014] that both stores should be sold in a closed bid between Hamed and Yusuf.” (Opp., p. 6) However, Yusuf never stated that he “recognized that this position was incorrect” in the October 28, 2014 document; instead, the October 28, 2014 document shows that Yusuf suggested a close bid sale for Plaza Extra-West without any discussion of his alleged change of position with regards to the “going concern” value of Plaza Extra-West. As such, the Master finds that Yusuf has already conceded that Plaza Extra-West cannot be sold as a going concern.


CONCLUSION

Based on the foregoing, the Master will grant Hamed’s motion to strike Yusuf Claim No. Y-13: loss of “going concern” value of Plaza Extra-West. Accordingly, it is hereby:

⁸ Attached as Exhibit A to Yusuf’s memorandum in support of motion to appoint master for judicial supervision of Partnership winding up or, in the alternative, to appoint receiver to wind up Partnership, dated April 7, 2014.

ORDERED that Hamed's motion to strike Yusuf Claim No. Y-13: loss of "going concern" value of Plaza Extra-West is **GRANTED**. Yusuf Claim No. Y-13 shall be and is hereby **STRICKEN**.

DONE and so **ORDERED** this 13th day of November, 2018.



EDGAR D. ROSS
Special Master