

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS/ST. JOHN

UNITED CORPORATION,

Plaintiff,

v.

WAHEED HAMED,
(a/k/a Willy or Willie Hamed),

Defendant.

Case No.: ST-13-CV-101

MEMORANDUM OF LAW IN
SUPPORT OF PLAINTIFF'S
RESPONSE IN OPPOSITION TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ORAL ARGUMENTS REQUESTED

14 APR -7 P5:00

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S RESPONSE IN
OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

COMES NOW Plaintiff United Corporation ("United") and respectfully opposes Defendant Waheed Hamed's Summary Judgment Motion. Defendant's summary judgment motion repeats the same rejected argument as to Plaintiff's second cause of action previously raised in his Rule 12(c) Motion. Just as that argument was rejected then, it should be rejected now. The court should also deny Defendant Hamed's Summary Judgment Motion on the following additional grounds:

- 1) Pursuant to Fed. R. Civ. 56(d), this honorable court should 1) defer considering the [summary judgment] motion or deny it, or 2) allow time to obtain affidavits or declarations or to take additional discovery. In opposition to Defendant's summary judgment Motion, Plaintiff United attaches a Rule 56(d) Declaration from Fathi Yusuf, treasurer and secretary of United Corporation.
- 2) Contrary to Defendant's assertion, a genuine issue of material fact exists as to whether Plaintiff had possession, access, or even reason to know of Defendant Hamed's tax returns.

- 3) Plaintiff has received absolutely no responsive discovery to Plaintiff's Interrogatories, Request for Production of Documents, and Request for Admissions. A Rule 37 conference was held on March 28th, 2014, and a Rule 37 Letter will follow shortly. Therefore, discovery is nowhere near complete. As such, Defendant's summary judgment motion is both premature and should be denied at this stage.

- 4) Plaintiff is awaiting the release of substantial document from the United States Attorney's Office in the case of *United States v. United Corporation (1:05-CR-15)*. See *Affidavit of Fathi Yusuf*, **EXHIBIT A**; Those documents are critical to rebut Defendant's grounds for summary judgment. As such, the court should deny at this point Defendant's Motion for Summary Judgment.

For the reasons outlined above and fully addressed below, it is respectfully requested that Defendant's Motion for Summary Judgment be denied.

II. FACTS RELEVANT TO THIS MOTION

On March 5th, 2013, Plaintiff United sued Defendant Waheed Hamed for breach of contract, conversion, and breach of various fiduciary duties. The original complaint sought recoupment and accounting regarding two known financial improprieties: the first, an unauthorized money order in the amount of \$70,000 discovered in Waheed Hamed's FBI folder, the second, a full accounting of all funds used by Defendant Waheed Hamed to operate a retail grocery business called 5 Corners Mini Market using Plaintiff United's funds. The Court dismissed the first cause of action concerning the \$70,000 check United alleged was purchased by Defendant from Plaintiff United's funds. The court memorandum opinion cited Defendant's acquisition of

checks and other negotiable instruments for cash in the various criminal counts of the indictment against Defendant Waheed Hamed as reasonable notice to Plaintiff United. As to the second cause of action, the court rejected Defendant's argument as premature that Plaintiff had reason to know of Waheed Hamed's tax returns.

On November 15th, 2013, Plaintiff served upon Defendant Waheed Hamed its interrogatories, request for production of documents, and request of admissions. On February 12th, 2014, Defendant Waheed Hamed responded to Plaintiff's discovery requests. Unfortunately, no responsive discovery was received. Defendant Hamed discovery responses can be summarized as follows: "I cannot recall" and "Objection due to relevance."

On March 28th, 2014, counsel for the parties conducted a Rule 37 conference. Due to the complete non-responsiveness of Defendant to Plaintiff's discovery request, Plaintiff is in the process of serving a voluminous Rule 37 demand letter upon Defendant. **As such, discovery here is simply not complete.** Additionally, during the course of this matter, Plaintiff has been awaiting the release of tens of thousands of financial documents seized by the U.S. Government in the case of *United States v. United Corporation (05-cr-15)*. Waheed Hamed who is a co-indictee is fully aware of the existence, location, and custody of these documents; however, in a race against time, Defendant Hamed seeks to dismiss this matter on statute of limitations grounds notwithstanding that discovery is not complete and that the documents in the possession of the U.S. Attorney's Office were never received by the Plaintiff. Thus, a separate Motion to Extend Scheduling Order to address the serious discovery issues in this matter will be filed shortly.

In his Summary Judgment Motion, Defendant Hamed repackages the same rejected arguments raised in his previous Rule 12(c) Motion to Dismiss - mainly that 1) the time period for

the bringing of an action based on an act in 1992 has long passed, and 2) that Plaintiff had full and complete access to all of the documents in possession of the U.S. Government for many years prior to the physical return of the documents in 2011. Defendant's assertions are sadly misleading and based on speculation. Based on the grounds below Defendant's Motion for Summary Judgment should be denied.

III. ISSUES BEFORE THE COURT

- 1. Whether Defendant's Summary Judgment Motion should be denied because of the existence of a genuine issue of material facts as to Plaintiff's lack of knowledge, access, or reason to know about Defendant Waheed Hamed's tax returns?**
- 2. Whether the doctrine of equitable tolling applies such that the statute of limitations for the various causes of action in Plaintiff United's complaint are tolled?**

IV. ARGUMENTS

- I. THE COURT SHOULD DENY DEFENDANT'S SUMMARY JUDGMENT MOTION BECAUSE GENUINE ISSUES OF MATERIAL FACT EXISTS AS TO PLAINTIFF'S LACK OF ACCESS, KNOWLEDGE AND/OR REASON TO KNOW OF DEFENDANT'S TAX RETURNS.**

Background: Summary Judgment

Summary judgment is appropriate when the materials of record "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." A fact is "material" only if it might affect the outcome of the suit under the applicable rule of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Summary judgment will not be denied based on mere allegations or denials in the pleadings; instead, some evidence must be produced to support a material fact. *U.S. v. Premises Known as 717 S. Woodward Street*,

Allentown, Pa., 2 F.3d 529, 533 (3d Cir.1993). However, the Court will view the evidence and draw any reasonable inferences in the light most favorable to the nonmoving party. *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999). In response to a motion for summary judgment, the nonmoving party can file a Rule 56(d) declaration. Fed. R. Civ. P. 56(d) provides: If a non-movant 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.

In the declaration, a party must specify: (1) what particular information is sought; (2) how, if uncovered, it would preclude summary judgment; and (3) why it has not previously been obtained. *Pa., Dept. of Pub. Welfare v. Sebelius*, 674 F.3d 139, 157 (3d Cir.2012)(citing *Dowling v. City of Phila.*, 855 F.2d 136, 139–40 (3d Cir.1988)). If a party opposing summary judgment files an affidavit that specifically addresses these requirements, the Third Circuit has held that “a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course,” especially when particular information is in the sole possession of the moving party. *Malouf v. Turner*, 814 F.Supp.2d 454, 459–60 (D.N.J.2011) (quoting *Sames v. Gable*, 732 F.2d 49, 51 (3d Cir.1984)).

Here, the facts as outlined in Plaintiff's Declaration meet the requirements of a Rule 56(d); as such, this court should continue or deny the motion for summary judgment, at this point, as a matter of course.

1. The Particular Information Sought

As stated previously, Plaintiff is seeking all documents seized by the United States Attorneys' office in the case of United States v. United Corporation (05-cr-15). These documents may reveal when, where, and how Defendant Waheed Hamed's tax returns were made available to Plaintiff or its counsels. Despite repeated efforts by United to bring this matter to conclude this matter and to release the tens of thousands of documents currently held by the U.S. Attorney's Office, the court should continue the Summary Judgment motion. Thus, because Plaintiff has no control over these documents, and is at the mercy of the District Court's calendar, this honorable court should defer adjudication or deny Defendant's Motion for Summary Judgment.

The information being sought, if uncovered, would preclude summary judgment;

Defendant Hamed's Summary Judgment motion reasserts the previously rejected argument that Plaintiff United had reason to know of Defendant Waheed Hamed's tax returns. However, the only thing that Defendant can only point to are general Affidavits of FBI agents that do not specify which documents were made available to Plaintiff United. Also these Declarations do not identify which attorney copied what, and whether Waheed Hamed's tax returns were in any of the boxes that were inspected by the defense attorneys. None of the Affidavits of the FBI agents specifically mention Waheed Hamed's tax returns or any other information regarding his operations of the grocery retail business called "5 Corner Mini Mart." To address Defendant's speculations and insinuation that Plaintiff had reasonable access to Defendant Waheed Hamed's tax returns, Plaintiff will need to review all the records seized as they pertain to Defendant Waheed Hamed. Finally, it is worth repeating that because Plaintiff has received virtually no responsive discovery, and Rule 37 discussions are ongoing, the Court should deny the Summary Judgment at this point.

Reason Why Information Was Not Previously Available.

As to the third requirement of a Rule 56(d) declaration, the reason why the required information to rebut Plaintiff's Motion was not previously available and remains unavailable is because these documents are in the possession of the United States Attorney's Office. See Affidavit of Fathi Yusuf, as EXHIBIT B.

II. THE DOCTRINE OF EQUITABLE TOLLING, AND THE DISCOVERY RULE APPLIES AS TO TOLL THE STATUTE OF LIMITATIONS FOR PLAINTIFF'S CAUSE OF ACTION.

The Equitable Tolling of the Statute of Limitations of Plaintiff's Claims.

Defendant argues that the statute of limitations applies in this case since the action is based on an act in 1992, and that "Plaintiff had complete access to all of the documents in possession of the U.S. Government." *Def. SJM*, p 3. Despite this sweeping and unsupported allegation, Defendant fails to cite any proof of how, when, and where the Plaintiff, through its counsel, had access specifically to Waheed Hamed's 1992 tax returns. Defendant attaches the Declaration of FBI Agents Thomas L. Petri and Christine Zieba. These Declarations make general claims of access to evidence or documents by defense attorneys. However, these allegations are vague and general in nature, and do not specifically address Waheed Hamed's tax returns. Also, these FBI agents are unavailable witnesses at this point. Plaintiff cannot properly depose them, or obtain an information by way of subpoenas. Those Declarations are not evidence, and could be false,

inaccurate, and/or erroneous. Thus, Plaintiff cannot be constrained by Declarations made five (5) years ago that do not address Waheed Hamed's tax returns.

Moreover, both Declarations refer to attorney Randall Andreozzi's request to review documents, and his failure to "pursue the matter." In his arguments, Defendant conveniently omits

¶11, which states the following:

"During the document review in January 2009, Randall Andreozzi requested to review all documents obtained via subpoena. I explained to him that **I could not produce all evidence** at once. That evidence comprises approximately 40 boxes. I asked him for a specific list of documents, or category of documents that he wished to review. He declined to identify the records that he wished to review and **did not pursue the matter.**"

See Declaration of FBI Agent **Thomas L Petri, ¶11, Exhibit D (relevant portion highlighted)**
See Declaration of FBI Agent **Christine Zieba, ¶11, Exhibit E (relevant portion highlighted)**.

The Declarations show that Attorney Andreozzi needed a "subpoena" in 2009 to request documents. This begs the question of why would Andreozzi need a subpoena if as Defendant contends the documents were always available to Plaintiff through its attorneys. Clearly, these documents were not available for inspection without a subpoena. Defendant's cherry picking and selective presentation of evidence is calculated to present a misleading view of the real facts. Both Declarations demonstrate that in fact no review and/or identification of documents was done by Attorney Andreozzi. If anything both of these Declarations clearly state that Attorney Andreozzi did not "pursue the matter" i.e., the documents that he was seeking. This directly contradicts Defendant Waheed Hamed's assertion that Plaintiff knew or had to reason to know of Waheed Hamed's tax returns. *Affidavit of Fathi Yusuf, ¶¶ 3, 5, 6.* It was only when the FBI returned on a hard drive a small portion of the documents they seized that Plaintiff United became aware in October of 2011 of the existence of Waheed Hamed's financial improprieties. *Affidavit of Fathi*

Yusuf, ¶2. Indeed when afforded the chance to review documents, Plaintiff took immediate action to review the documents that were provided by the FBI. *Affidavit of Fathi Yusuf*, ¶2. However, prior to the release of the documents in October 2011, Plaintiff simply had no way of knowing or reason to know that such documents ever existed. Defendant of course would have the court believe that these documents were ready for inspection and review because they were "bate stamped." Defendant engages in pure speculation, and declines to include paragraph 11 of both FBI Agent's Declarations in his Motion.

Additionally, nothing in the attached Declarations provide an inventory of what documents were available at the time for inspection. In other words, we don't know if Waheed Hamed's tax returns would have been available for inspection on January 2009, or whether another agent placed those documents on a hard drive from another source in 2010 or 2011. No one even knows which attorneys were present at the evidence review meetings with the FBI, and what documents in fact were available for inspection. Defendant Waheed Hamed of course assumes that his tax returns existed somewhere in these 40 boxes of documents and were available for inspection by attorney Andriozzi since the indictment in 2003. Not only is this pure speculation, but is inconsistent with ¶11 of the Declarations.

V. CONCLUSION

For the reasons stated above, the Court should either continue the Summary Judgment Motion or deny it at this point pending additional discovery.

Dated: April 7, 2014

Respectfully Submitted,
THE DEWOOD LAW FIRM
Counsel for Plaintiff

By: _____

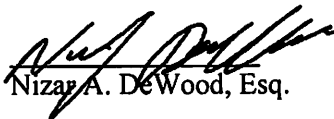


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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT a true and exact copy of the foregoing was served
via electronic mail on this 7th day of April 2014:

Carl J. Hartmann III, Esq.
5000 Estate Coakley Bay Unit L-6
Christiansted, USVI 00820
Email: carl@carlhartmann.com


Nizar A. DeWood, Esq.

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS & ST. JOHN

UNITED CORPORATION)	CIV. NO. SX-13-CV-101
)	
Plaintiff)	
)	
VS.)	ACTION FOR DAMAGES
)	CIVIL ACTION
)	
)	JURY TRIAL DEMANDED
)	
WAHEED HAMED)	
<i>(a/k/a Willy, Willy Hamed)</i>)	
)	
Defendant)	
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AFFIDAVIT OF FATHI YUSUF

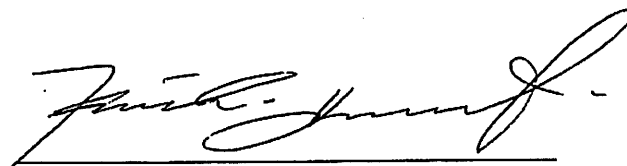
I, Fathi Yusuf, duly sworn and under oath pursuant to 28 USC ¶1746, and Super. Ct. R. 18, under the penalties of perjury, hereby attest that following is true and correct:

1. I am the treasurer and secretary of United Corporation. I am the person in charge of the overall operations of Plaza Extra. I supervise the various managers at the Plaza Extra stores.

2. I received a hard drive sometime in October of 2011 from the FBI with thousands of scanned documents. That was only a small part of the file the FBI had in this case. As the treasurer, I reviewed the documents on the hard drive shortly after I received it. During my review, I found scanned copies of Waheed Hamed's tax returns. The returns showed a business called 5 Corner Mini Mart. United never knew of this business, and where Defendant got the money to operate it, and buy the necessary inventory.

3. Since the indictments in 2003, I have never had access to any of the documents that the Office of the U.S. Attorney and FBI had. Waheed Hamed was represented by Attorney Pamela Colon. Attorney Colon never shared with me any documents regarding Waheed Hamed.
4. None of my attorneys or any other attorney that was part of the joint defense team ever produced Waheed Hamed's tax returns to United Corporation.
5. The allegation that Waheed Hamed's tax returns were available for inspection by my attorney or by the attorneys of United Corporation, is not true. At no time did any corporate officer of United receive or have any knowledge of Waheed Hamed's tax returns.
6. Even the Declarations of both FBI agents that Waheed Hamed used to support his summary judgment motion shows that the documents were required to be subpoenaed as late as January 2009. Both agents said that attorney Randall Andriozzi never followed up, and that no documents were identified.
7. I do not know whether the agent's version of the story is true, or not. However, until I received the hard drive from the FBI, I along with the officers of United Corporation never knew or had any reason to know of the existence of Waheed Hamed's tax returns.
8. To date, United Corporation is waiting for its sentencing so that it can receive back the tens of thousands of seized documents from the U.S. Attorney's office. The sentencing has been delayed due to the tax obligations of Waheed and Waheed Hamed. The United States Attorneys' Office agreed to release all of the documents seized during the criminal case beginning in 2001 once sentencing is completed.
9. The documents seized by the FBI were never returned to United Corporation since 2001. Because of that United Corporation still does not have all the financial documents regarding Waheed Hamed, including additional information regarding the 5 Corner Mini Mart grocery retail business Defendant Waheed was operating.
10. I attest the information here is correct.

Date: April 7, 2014

A handwritten signature in black ink, appearing to read 'Fathi Yusuf', written over a horizontal line.

Fathi Yusuf,
United Corporation
Treasurer and Secretary

14 APR -7 15:01

SUPERIOR COURT
IN THE VIRGINIA AND
ST. CROIX ISLANDS