

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

UNITED CORPORATION,)	
)	S. Ct. Civ. No. 2015-0021
Appellant/Plaintiff,)	Re: Super. Ct. Civ. No. ST-13-CV-101
)	
v.)	
)	
WAHEED HAMED,)	
)	
Appellee/Defendant.)	
_____)	

**APPELLEE WAHEED HAMED'S
MOTION TO DISMISS FOR LACK OF JURISDICTION**

This Court is well aware of its own jurisdictional requirements, so Appellee's motion will be brief. Indeed, while Hamed does not wish to engage in a significant argument over jurisdiction, he is mindful that two parties cannot acquiesce to jurisdiction where there is none, even if they might prefer to do so just to be done with a matter.

I. FACTS

This appeal involves Appellant United's claims as Appellee Hamed's employer "arising out of Defendant Hamed's [employment] at the Plaza Extra Supermarket store...."

See United's First Amended Complaint, at 1. JA 63 (emphasis added).¹

This is a civil action. . . against Defendant **Waheed Hamed, an employee** of Plaintiff United. This complaint includes causes of action against Defendant Waheed Hamed for defalcating, and misappropriating significant funds belonging to Plaintiff United, **arising out of Defendant Hamed's tenure as manager of the operations of the Plaza Extra Supermarket store** in St. Thomas, V.I. as well as other locations.

¹ References to the *Joint Appendix* of April 20, 2015, are denoted "JA___."

United alleges (i) a 1992 conversion and breach of fiduciary duty arising out of Hamed's operation of a mini-market that may have competed with Plaza Extra Supermarket, as well as (ii) a 1995 conversion whereby Hamed used a \$70,000 cashier's check to "skim" and then transfer Plaza Extra's funds to a third party for his own benefit. *Id.*

However, in April of 2014, United admitted (in an action before another Superior Court judge²) that it had no ownership interest whatsoever in the Plaza Extra Supermarkets and was *not* Willie Hamed's employer. See United's April 7, 2014 "*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.*" JA 126-137 ¶ 7, at JA 128-129 (emphasis added).

7. Given the animosity between the parties noted by this Court, Yusuf's complete lack of trust in Hamed, and Yusuf's unwillingness to continue to carry on any business relationship whatsoever with Hamed, Yusuf now concedes for the purposes of this case that **he and Hamed entered into a partnership to carry on the business of the Plaza Extra Stores** and to share equally the net profits from the operation of the Plaza Extra Stores.

In that motion, United also asked that the partnership between Fathi Yusuf and Mohammad Hamed, which United conceded was the real owner of the Plaza Extra Supermarkets from 1986 to the present, be wound up. *Id.* Pursuant to United's own motion, Judge Brady issued a winding-up order³ and appointed a Special Master (Hon.

² *Mohammad Hamed v. Fathi Yusuf and United Corp.*, SX-12-cv-370 (Brady, J.).

³ Which order Fathi Yusuf has already appealed to this Court. That appeal was dismissed for lack of jurisdiction. *Yusuf v. Hamed*, S. Ct. Civ. No. 2015-0001, 2015 WL 877879 (V.I. Feb. 27, 2015.)

Edgar Ross) to carry out the division of the stores between the partners. *See, e.g., Yusuf v. Hamed*, 2015 WL 877879, at *1.

Also before the trial court was email correspondence sent on April 8, 2014, the day after United's motion to wind up the partnership was filed, from George Dudley, counsel for United. Dudley reiterated United's new position to all other counsel: United was not and *never had been* a partner in Plaza Extra. JA 138 (emphasis added).

Gentlemen....**Since United is not and has never been a partner in the Plaza Extra “partnership”** between Fathi Yusuf and Mohammad Hamed, this discussion is misplaced. United’s tax returns for 2013 and thereafter will not reflect anything having to do with the business of the “partnership” (except the rent owed to **United as landlord of Plaza - East**) and the two partners have to select an accountant to prepare the partnership income tax return and the related K-1s to be issued to each partner. * * * *
---Regards, *George H.T. Dudley*. Dudley, Topper and Feuerzeig, LLP

As a result of these admissions of record, on April 28, 2014, Hamed filed a motion below to dismiss the case due to United's obvious lack of standing. *See*, JA 139. On May 12, 2014, Judge Dunston ordered United to respond regarding standing (JA 139) **however, United ignored the order.**⁴ Months passed and United never opposed the standing motion prior to the issuance of the summary judgment decision. Although United's April 2014 concessions were of record, Judge Dunston did not have a dispositive judgment from Judge Brady or a United response to Hamed's motion regarding

⁴ On May 12th, 2014, United was ordered (JA 139) to respond to the Hamed's motion to dismiss for lack of standing by May 23rd—but simply ignored the Order, which stated:

Defendant having filed a Motion to Dismiss for Lack of Standing on April 28, 2014; it is

ORDERED that Plaintiff shall respond to Defendant's Motion by May 23, 2014, and Defendant may reply by June 2, 2014; and it is

ORDERED that copies of this Order shall be directed to counsel of record.

standing—and in these Plaza Extra cases *anything* might have happened. Lacking both clarity from that other court and a response from United, after months of waiting⁵, Judge Dunston moved on and entered summary judgment on September 2, 2014.

Soon thereafter, on November 7, 2014, Judge Brady entered summary judgment as to United's express concessions regarding the true ownership of the Plaza Extra Supermarkets from 1986 to date.⁶ Order, *Hamed v. Yusuf and United Corp.*, SX-12-cv-370 at 3 (V.I.Super. Nov. 7, 2014):

ORDERED that the Court finds and declares that a partnership was formed in 1986 by the oral agreement between Plaintiff [Mohammad] and Defendant [Fathi] 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. . . .

Thus, while United may have once legitimately argued that it did have standing and there was arguable jurisdiction *when the orders at issue here were entered*—United's lack of any ownership interest subsequently became a settled, uncontested matter of law and fact. As of November 7, 2014, United was acknowledged to be nothing more than Plaza Extra Supermarket's landlord. To paraphrase Attorney Dudley, United was not and *never had been* Willie Hamed's employer when he was an employee working for the Plaza Extra Supermarkets.

⁵ As a consequence of its September 2, 2014 Summary Judgment Order, the court simultaneously denied Hamed's motion as to United's lack of standing as moot. JA 4.

⁶ Both United Corporation and Appellee Waheed Hamed are parties to that proceeding.

II. ARGUMENT

The first question that might occur to a reasonable person after reading the facts above could be: "How can United possibly have submitted the *Statement of Facts* in its Brief-in-Chief?" How could it possibly aver to this Court in the second paragraph:

In 1986, **Appellant United employed Appellee Waheed Hamed in its Plaza Extra Store** in Sion Farm, St. Croix, Virgin Islands (known as Plaza Extra – East). In 1993, another Plaza Extra store was opened in Tutu Park, St. Thomas, Virgin Islands, and Appellee was re-assigned to work there as an employee manager (JA 31). As manager, Appellee was entrusted with significant managerial duties and responsibilities, including daily cash collections, deposits, and inventory acquisition (JA 33, ¶9). (Emphasis added)

There is simply no conceivable explanation for such an assertion at this late date.⁷

The applicable law is equally clear and unambiguous. "Although this Court and the Superior Court are not Article III courts, Article III's requirement that a litigant have standing to invoke a court's authority has been incorporated into Virgin Islands jurisprudence." *Arlington Funding Servs., Inc. v. Geigel*, 51 V.I. 118, 2009 WL 357944, at *2 (V.I. Feb. 2, 2009) citing *Dennis v. Luis*, 741 F.2d 628, 630 (3d Cir. 1984) (holding

⁷ Nor is it clear why this appeal is being pursued at all. Although it is not a crucial point, or perhaps relevant at this stage, for the sake of perspective Hamed wishes this Court to know that following discovery, the record before the court below contained an email from one of the joint defense attorneys to the Yusufs, United and others. The attorney reported that his investigation of the \$70,000 check found that it was Fathi's son, Yusuf Yusuf, who sent that check. That attorney attached the confirming email from the 'recipient' private school. JA 59-60.

Similarly, with regard to conversion and breach of duty in 1992, the only Plaza Extra Supermarkets store in existence during 1992 was the 'East' store located at Sion Farm on St. Croix, which was out of business due to a devastating fire on January 4, 1992, and did not re-open until May of 1994. (The St. Thomas store did not open until October of 1993 and the 'West' store years after that.) As a result there *was no* Plaza Extra Supermarket to 'misappropriate' *from* during the time of the alleged operation of the competing entity.) JA 76 at ¶ 18.

that traditional concept of standing applies to the Virgin Islands) and *Turnbull v. Twenty-Sixth Legislature of Virgin Islands*, No. Civ. 394/2006, 2006 WL 4158729, at *2 (V.I.Super.Ct. November 13, 2006) (citing *Dennis*).

This Court also held in *Arlington Funding* that: "The United States Supreme Court has held that a litigant, to meet the minimum constitutional requirements necessary to establish standing, must demonstrate (i) an actual or threatened injury that was (ii) caused by the defendant's actions and is (iii) capable of judicial redress. *Id.*, citing *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982).

A party can initially have standing at the trial level, but lose it (or have it determined not to exist any longer) after the final order is entered. Even if one argues that United actually believed in good faith that it *thought* it had standing below *prior* to United's concessions and the November 2014 summary judgment (a questionable proposition) "[t]he standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64, 117 S. Ct. 1055, 1067, 137 L. Ed. 2d 170 (1997). "All parties, whether defendants or plaintiffs below, must meet the requirements of Article III standing when appealing....." *Goldin v. Bartholow*, 166 F.3d 710, 720 (5th Cir. 1999).

It is now undisputed that United can collect nothing from Hamed. United admitted it never had any protectable ownership interest in Plaza Extra Supermarkets or its assets. Based on that admission, a court where both Appellant and Appellee were parties subsequently determined that United never had an ownership interest in Plaza Extra

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CLERK OF THE COURT

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Supermarkets or its assets. More to the point: (i) United has no an actual or threatened injury that was (ii) caused by the Hamed's actions and is (iii) capable of judicial redress.

III. CONCLUSION

Appellant United lacks standing to appeal. Even if such standing arguably existed at the time of the entry of judgment, United lacks standing now. Thus, the appeal is moot and must be dismissed for lack of jurisdiction.

Dated: April 30, 2015

/s/ Carl J. Hartmann, III, Esq.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 30, 2015, I electronically filed the foregoing motion with the Clerk of the Court using the VISCEFS system, which will send a notification of such filing (NEF)--and I caused a true and exact copy of the foregoing to be served by email, by agreement of the parties, to:

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Dated: April 30, 2015

/s/ Carl J. Hartmann III