

DIVISION OF ST. THOMAS AND ST. JOHN

Defendants.

) CIVIL NO. ST-17-CV-384

Before the Court are Defendants' motions to transfer venue and to dismiss for failure to state a claim, and Plaintiffs' motion to amend the complaint. The Court will *sua sponte* consolidate this action with *Hamed v. Yusuf, et al.*, which is itself a consolidation of Cases Nos. SX-12-CV-370, SX-14-CV-287, and SX-14-CV-278, because all actions involve common questions of fact regarding the dissolution, accounting, and wind up of the partnership between Mohammed A. Hamed and Fathi Yusuf. Accordingly, venue will be transferred to the Division of St. Croix. Further, Defendants' motion to transfer venue will be denied as moot, and Defendants' motion to dismiss for failure to state a claim and Plaintiffs' motion to amend the complaint will be held in abeyance, to be ruled upon by the Hon. Douglas A. Brady, to whom the other cases are assigned.

FACTUAL & PROCEDURAL HISTORY

According to the Complaint, in 1986, Mohammad A. Hamed (deceased June 16, 2016) and Fathi Yusuf formed a partnership¹ that is undergoing dissolution, wind up, and accounting in *Hamed v. Yusuf, et al.* (SX-12-CV-370; SX-14-CV-287; SX-14-CV-278).² On August 24, 2017, Plaintiffs filed the instant Complaint to set aside fraudulent transfers. Specifically, the Complaint alleges that Hamed concurrently executed a trust and a last will and testament on September 12, 2012,³ and that the trust directed substantially all of Hamed's assets, with the exception of his partnership interests with Yusuf, to the trust, while the will bequeathed his interest in the partnership and all of the remaining assets of his estate to the trust upon his death.⁴ Plaintiffs contend that the assets were transferred to the trust in an effort to render the estate insolvent so as to avoid liability for any partnership debts.⁵ As a result, Plaintiffs ask that the transfer of Hamed's assets to his trust be voided to the extent needed to satisfy Plaintiffs' claims as creditors and that the Court appoint a receiver to take charge of the assets subject to the transfers.⁶

On November 17, 2017, Defendants timely filed a Motion to Dismiss for Failure to State a Claim and a Motion to Transfer Venue.⁷ On March 15, 2018, Plaintiffs filed a Motion to Amend the Complaint and Proposed Amended Complaint that asks for a judgment declaring

¹ Complaint, ¶¶ 5, 9.

² See *Hamed v. Yusuf, et al.*, 2017 V.I. LEXIS 113, at *6-7 (V.I. Super. Ct. July 21, 2017) ("Pursuant to the Court's Order entered April 15, 2016, civil cases SX-12-CV-370, SX-14-CV-287, and SX-14-CV-278 were consolidated and accordingly there are three operative Complaints in this matter"); see also *id.* at *20-21 (adjudicating claims for partnership dissolution, wind up, and accounting). Additionally, Mohammad A. Hamed's estate commenced in probate on August 26, 2016, in *In the Matter of Mohammad A. Hamed*, Case No. SX-16-PB-76 (Complaint, ¶ 5).

³ See Complaint, ¶¶ 18, 19.

⁴ See *id.* ¶¶ 18-20.

⁵ See *id.* ¶ 21.

⁶ See *id.* ¶ 45.

⁷ Defendants were served on October 27, 2017, and filed their responsive motions 21 days later, on November 17, 2017. On January 8, 2018, Plaintiffs filed an Opposition to Defendants' Motion to Transfer and an Opposition to Defendants' Motion to Dismiss. Defendants filed a Reply in support of the two motions on January 29, 2018.

that the trust assets can be used to satisfy any future judgment against the estate, trust, or Executor Waleed Hamed.⁸

STANDARDS

I. Jurisdiction

4 V.I.C. § 76(a) confers original jurisdiction upon the Superior Court in civil actions, including to supervise and administer estates and fiduciary relations.

II. Consolidation of Cases under V.I. R. Civ. P. 42(a)

V.I. R. Civ. P. 42(a) provides: “If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay.” Recognizing that V.I. R. Civ. P. 42(a) is identical to F. R. Civ. P. 42(a) and lacking Virgin Islands precedent, the Court looks to federal case law for guidance.

“The purpose of consolidation is to streamline and economize pretrial proceedings so as to avoid duplication of effort, and to prevent conflicting outcomes in cases involving similar legal and factual issues.”⁹ “[C]onsolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another.”¹⁰

⁸ Proposed First Amended Complaint, ¶ 55.

⁹ *St. Croix Fed'n of Teachers v. Gov't of the V.I.*, 2011 U.S. Dist. LEXIS 82358, at*3 (D.V.I. July 25, 2011) (quoting *In re § TMI Litigation*, 193 F.3d 613, 724 (3d Cir. 1999) (citation omitted)).

¹⁰ *Hall v. Hall*, 2018 U.S. LEXIS 2062, at *18-19 (Mar. 27, 2018) (quoting *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-497 (1933)).

“A court may consolidate cases *sua sponte* or on motion of [a] party[.]”¹¹ and “[c]onsiderations of convenience and economy must yield to a paramount concern for a fair and impartial trial.”¹² In determining whether consolidation is appropriate, the Court must consider:

[W]hether the specific risks of prejudice and possible confusion [are] overcome by the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives.¹³

As examples, consolidation may be disfavored if two actions are at disparate stages of litigation,¹⁴ working against judicial economy, or if the evidence in one case is not relevant to the issues in the other, resulting in juror confusion.¹⁵ “When considering consolidation, a court should also note that the risks of prejudice and confusion may be reduced by the use of cautionary instructions to the jury and verdict sheets outlining the claims of each plaintiff.”¹⁶

III. Mootness

“A motion becomes moot when something occurs after a motion is filed that resolves the issues raised in that motion”¹⁷ so that a “court’s decision on [the] pending motion [would] be ‘hypothetical or academic’ or without any ‘practical significance[.]’”¹⁸ “In that instance, the

¹¹ *St. Croix Fed’n of Teachers v. Gov’t of the V.I.*, 2011 U.S. Dist. LEXIS 82358 at*3 (citing *Ellerman Lines, Limited v. Atlantic & Gulf Stevedores, Inc.*, 339 F.2d 673, 675 (3d Cir. 1964)).

¹² *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990) (citing *Flintkote Co. v. Allis-Chalmers Corp.*, 73 F.R.D. 463 (S.D.N.Y. 1977)).

¹³ *Id.* at 1285 (quoting *Arnold v. E. Air Lines, Inc.*, 681 F.2d 186, 193 (4th Cir. 1982)).

¹⁴ See *KGK Jewelry LLC v. ESDNetwork*, 2014 U.S. Dist. LEXIS 177137, at *6, 2014 WL 7333291, *2 (S.D.N.Y. Dec. 24, 2014) (“Courts have routinely denied consolidation motions where there is a stark difference in the procedural posture of the actions, finding that judicial economy would not be served”).

¹⁵ See *Farahmand v. Rumsfeld*, 2002 U.S. Dist. LEXIS 22473, at *4-5 (E.D. Pa. Nov. 20, 2002) (citation omitted).

¹⁶ *Johnson v. Celotex Corp.* at 1285 (citation omitted).

¹⁷ *Der Weer v. Hess Oil V.I. Corp.*, 2014 V.I. LEXIS 22, at *11 (V.I. Super. Ct. 2014) (citations omitted).

¹⁸ *Id.* at *12 (citing BLACK’S LAW DICTIONARY 1099 (9th ed. 2009)); see also *id.* at *12-13 (citing *Oparaji v. N.E. Auto-Marine Terminal*, 437 Fed. Appx. 190, 193, n.1 (3d Cir. 2011) (“A motion is moot when a court is unable to

motion should be dismissed or denied as moot because a decision [would] have no practical impact in the case however the court decides the motion.”¹⁹

ANALYSIS

I. Consolidation of this action with *Hamed v. Yusuf, et al.* is appropriate.

As a preliminary matter, the Court determines that V.I. R. Civ. P. 42(a) envisions the consolidation of a case pending in the Division of St. Thomas & St. John with one in the Division of St. Croix, because the Virgin Islands Rules of Civil Procedure refer to the Superior Court as one court,²⁰ and V.I. R. Civ. P. 42(a) provides, in pertinent part, that “[i]f actions before the court involve a common question of law or fact, the court may . . . consolidate the actions”.

Upon review of *Hamed v. Yusuf, et al.* (SX-12-CV-370; SX-14-CV-287; SX-14-CV-278), and the instant Complaint, the Court deems it appropriate to consolidate the two actions. First, the two cases arise from the same set of facts regarding the wind up and accounting of the partnership, payment of its debts, and separate claims against Hamed by Yusuf and United Corporation. Plaintiffs’ allegations of fraudulent transfers in violation of 28 V.I.C. § 174²¹—the

fashion any form of meaningful relief”) and *Carlock v. Kmart Corp.*, 227 Ga. App. 356, 489 S.E.2d 99, 104 (1997) (“A motion is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.”)).

¹⁹ *Id.* at *13.

²⁰ See e.g., V.I. R. Civ. P. 1 (“These rules govern the practice and procedure in all civil actions and proceedings in the Superior Court of the Virgin Islands (the ‘Superior Court’ or the ‘court’), except as otherwise stated in these rules, or other rules promulgated by the Supreme Court, and except as otherwise provided by law.”); V.I. R. Civ. P. 82 (“These rules do not extend or limit the jurisdiction of the Superior Court or the venue of actions in those courts”).

²¹ 28 V.I.C. § 174 of the Virgin Islands Uniform Fraudulent Transfer Act governs fraudulent transfers as to present and future creditors, providing in pertinent part:

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor’s claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or
(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
(A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

first, through a trust provision directing most of the estate assets to the trust, and the second, via a pour-over provision in the will directing the remaining assets from the estate to the trust upon the death of Hamed²²—invoke questions of fact regarding whether Hamed’s estate owes any partnership debts to Yusuf or unpaid rent to United Corporation,²³ and thus, whether Plaintiffs are creditors, as defined by 28 V.I.C. § 171(4),²⁴ whom the transfers defrauded. Second, because the cases are in relatively early stages of litigation,²⁵ consolidation would avoid the duplication of discovery and inconsistent adjudication of common factual issues. Third, there appears to be no risk of juror confusion of evidence, since the Court, and not a jury, will determine the various claims and counterclaims between the parties in *Hamed v. Yusuf, et al.* per the terms of the Final

(B) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

(b) In determining actual intent under subsection (a)(1), consideration may be given, among other factors, to whether:

- (1) the transfer or obligation was to an insider;
- (2) the debtor retained possession or control of the property transferred after the transfer;
- (3) the transfer or obligation was disclosed or concealed;
- (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
- (5) the transfer was of substantially all the debtor’s assets;
- (6) the debtor absconded;
- (7) the debtor removed or concealed assets;
- (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
- (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
- (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and
- (11) the debtor transferred the essential assets of the business to a lien or who transferred the assets to an insider of the debtor.

²² See Complaint, ¶¶ 18-20, 33-45.

²³ See *Hamed v. Yusuf, et al.*, 2017 V.I. LEXIS 113 at *20-21 (“Yusuf has . . . presented . . . a single, tripartite action for the equitable dissolution, wind up, and accounting of the partnership Count XII of the Counterclaim (Rent) presents a claim for rent allegedly owed to Defendant United As this is a claim made solely by United against Hamed, it cannot be said to be included in or subsumed by the accounting claim between the partners as with Yusuf’s nominal claims for damages presented in Defendants’ Counterclaim”).

²⁴ 28 V.I.C. § 171(4) defines “creditor” as a person who has a “claim”, which 28 V.I.C. § 171(3) defines as “a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.”

²⁵ The instant case and *Hamed v. Yusuf, et al.* remain in the pre-trial stages of litigation.

Wind Up Plan.²⁶ Accordingly, consolidation will facilitate the administration of justice and increase judicial efficiency.

Further, Wright & Miller opine that “[w]hen an action for declaratory relief is filed to determine a central issue of an already pending affirmative lawsuit between the same parties, consolidation is appropriate.”²⁷ Because in their Proposed Amended Complaint, Plaintiffs ask for a judgment declaring that the assets of the trust can be used to satisfy any judgment obtained by Plaintiffs against the estate, trust, or Executor Waleed Hamed,²⁸ and because a central issue in *Hamed v. Yusuf, et al.* is whether any judgments against the estate will be obtained by Plaintiffs,²⁹ consolidation is proper.

II. Transfer to the Division of St. Croix is proper.

While jurisdiction “is the power of the court to hear and determine the particular cause,” “venue refers to the geographical area in which the defendant has the right to be sued or tried.”³⁰ Recognizing that, here, consolidation necessitates a change of venue, the Court determines that, because V.I. R. Civ. P. 42(a) allows the Court to “issue any other orders to avoid unnecessary cost or delay”, in addition to ordering consolidation, and since 4 V.I.C. § 78(b) permits a Superior Court judge to transfer an action to another judicial division “for the convenience of parties and witnesses and in the interest of justice,”³¹ the Court may direct venue to be placed in the Division of St. Croix.

²⁶ See *Hamed v. Yusuf, et al.*, 2017 V.I. LEXIS 113 at *25.

²⁷ 9A Charles Alan Wright, et al., *Federal Practice and Procedure* § 2384, pp. 55-57 (3d ed. 2010) (citing *Carolina Clipper, Inc. v. Axe*, 902 F.Supp. 680 (E.D. Va. October 27, 1995)).

²⁸ See Proposed First Amended Complaint, ¶ 55.

²⁹ See *Hamed v. Yusuf, et al.*, 2017 V.I. LEXIS 113 at *20-21.

³⁰ *Deeb, Inc. v. Bd. of Pub. Instruction*, 196 So. 2d 22, 24 (Fla. Dist. Ct. App. 1967).

³¹ 4 V.I.C. § 78 provides:

(a) All civil actions shall be initiated in the judicial division where the defendant resides or where the cause of action arose or where the defendant may be served with process. Criminal actions shall be brought in the judicial

Though the Virgin Islands Supreme Court has not yet addressed whether the Superior Court, in consolidating cases filed separately in the two geographical divisions of the Virgin Islands, must conduct a change of venue analysis with respect to the procedural rights of the defendants, and while there appears to be no statutory requirement for the Superior Court to justify a transfer of venue between the St. Thomas & St. John Division and the St. Croix Division upon consolidation, the Court nonetheless finds that the convenience of the parties, judicial economy, and the ends of justice are promoted by the placement of venue in the Division of St. Croix. In their motion to transfer venue to the Division of St. Croix, Defendants argue that St. Croix is the only proper venue under 4 V.I.C. § 78(a) and that the only relevance that the Division of St. Thomas & St. John has to this action is that Plaintiffs' law firm is located in St. Thomas.³² Further, Defendants allege, and Plaintiffs do not dispute, these facts indicating that all of the Defendants reside in and the cause of action arose in St. Croix:³³

- Plaintiff United Corporation's principal place of business is located in St. Croix;
- Plaintiff Yusuf and Defendant Waleed Hamed reside in St. Croix;
- Mohammad A. Hamed was a resident of St. Croix;
- The Mohammad A. Hamed Living Trust was formed in St. Croix;
- The probate proceeding of the administration of the Estate of Mohammad A.

Hamed is pending in the Division of St. Croix;

division in which the alleged criminal offense was committed. Actions of criminal conspiracy may be brought in either division in which any of the alleged overt acts were committed.

(b) For the convenience of parties and witnesses and in the interest of justice, a judge of the Superior Court may, with the approval of the presiding judge of such court, transfer any action or proceeding pending in one judicial division to the other judicial division for hearing and determination.

³² Reply in Further Support of Defendants' Motion to Transfer Venue, pp. 1-2.

³³ *Id.* at 2.

Additionally, Hamed's last will and testament was executed in St. Croix.³⁴ Accordingly, the Court determines that transfer of this action to the St. Croix Division is proper, rendering Defendants' Motion to Transfer Venue moot.

CONCLUSION

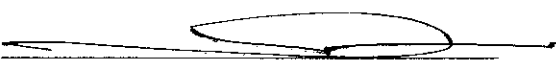
For the foregoing reasons, the Court will consolidate this action with *Hamed v. Yusuf, et al.* (SX-12-CV-370; SX-14-CV-287; SX-14-CV-278), and venue will be transferred to the Division of St. Croix. Further, Defendants' motion to transfer venue will be denied as moot, and Defendants' motion to dismiss for failure to state a claim and Plaintiffs' motion to amend the complaint will be held in abeyance.

Dated: April 5, 2018

ATTEST: Estrella George
Clerk of Court

by:

Lori Boynes-Tyson
Court Clerk Supervisor


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

³⁴ See Complaint, Exhibit B: Last Will and Testament, p. 4.