

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

UNITED CORPORATION,

Plaintiff,

vs.

**WAHEED HAMED, a/k/a WILLY OR WILLIE
HAMED**

Defendant.

CASE NO. ST-13-CV-101

MEMORANDUM OPINION

Pending before the Court is Defendant's March 23, 2016, Motion for Summary Judgment¹ and Plaintiff's September 13, 2016, Motion to Dismiss Complaint without prejudice.² For the following reasons, Plaintiff's Motion to Dismiss will be granted.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff United Corporation filed a Complaint on March 5, 2013, and amended it on July 14, 2013, alleging that during Defendant Waheed Hamed's employment as a manager at Plaza Extra located in Tutu Park, St Thomas, Defendant converted and misappropriated substantial assets by secretly operating a separate wholesale grocery business called "5 Corner's Mini Mart" from at least some time in 1992. A similar case, *Hamed v. Yusuf et al.*, SX-12-CV-370, was commenced before this action on September 17, 2012, in the Superior Court, Division of St. Croix, involving claims by Mohammad Hamed against United Corporation and its President, Fathi Yusuf, for allegedly stealing Hamed's half of the Plaza Extra Partnership. On December 23, 2013, United

¹ Plaintiff responded on May 2, 2016, and Defendant replied on May 12, 2016.

² Defendant responded on September 15, 2016, and Plaintiff replied on October 3, 2016.

filed a counterclaim in Case No. SX-12-CV-370, asserting the same facts and causes of action as United pled in this action. In September 2014, this Court granted Defendant's Motion for Summary Judgment, finding there was no genuine issue of material fact regarding when the statute of limitations began to run, but found Defendant's Motion to Dismiss for Lack of Standing to be moot since United lacked standing to bring the action because it never had an ownership interest in Plaza Extra. Plaintiff filed a motion for reconsideration on September 29, 2014, and, before this Court could decide the motion, filed an appeal on February 24, 2015.³ On January 12, 2016, the Supreme Court of the Virgin Islands refused to address the challenge to the merits of United's lawsuit in the first instance, but reversed the Superior Court's summary judgment, finding Plaintiff's statute-of-limitations defense to be a genuine issue of material fact, and remanded the case.⁴

On March 17, 2016, United and Fathi Yusuf, moved to consolidate Case No. SX-12-CV-370 with this one.⁵ On March 23, 2016, Defendant filed a Motion for Summary Judgment, and on June 3, 2016, Plaintiff filed a Motion to Substitute Fathi Yusuf as Plaintiff. Then on August 25, 2016, Defendant filed a Motion for Leave of Court pursuant to LRCi 7.1(A) to file notice of supplemental authority in support of the motion for summary judgment, followed by Plaintiff's current motion to dismiss.

³ Defendant filed a motion to dismiss with the Supreme Court of the Virgin Islands arguing that United lacked standing, but the Supreme Court denied the motion on May 14, 2015.

⁴ For a comprehensive factual and procedural history of this case prior to the appeal see *United Corp. v. Hamed*, 64 V.I. 297, 300-02 (V.I. 2016).

⁵ Defendant replied on April 1, 2016, and Plaintiff responded on April 15, 2016. United also moved to consolidate Case No. SX-13-CV-003 and Case No. SX-13-CV-152.

STANDARDS

I. Motion to Dismiss

Under Federal Rule of Civil Procedure 41(a)(2), “except as provided for in Rule 41(a)(1), an action may be dismissed at the plaintiff’s request only by court order, on terms that the court considers proper.”⁶ “[T]he main purpose of this requirement is to prevent voluntary dismissals which unfairly affect the rights of the defendant.”⁷ Additionally, “if a defendant has pleaded a counterclaim before being served with the plaintiff’s motion to dismiss, the action may be dismissed over the defendant’s objection only if the counterclaim can remain pending for independent adjudication.”⁸

II. Summary Judgment

When deciding whether to grant or deny summary judgment under Fed. R. Civ. P. 56,⁹ the Supreme Court of the Virgin Islands instructs that the Superior Court is to employ the following standard:

⁶ FED. R. CIV. P. 41(a)(2) (made applicable through SUPER. CT. R. 7); *Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596, 618 (V.I. 2012) (discussing the purpose of Fed. R. Civ. P. 41(a)(2) and the Court’s discretion to accept, modify, or reject a stipulation for dismissal).

⁷ *Island Tile & Marble, LLC*, 57 V.I. at 618 (citations omitted).

⁸ FED. R. CIV. P. 41(a)(2).

⁹ FED. R. CIV. P. 56 is made applicable to the practice and procedure of the Superior Court through SUPER. CT. R. 7. However, while FED. R. CIV. P. 56, through SUPER. CT. R. 7, provides the procedural mechanism for filing motions for summary judgment in Superior Court proceedings, the standard of review derives from the precedent delineated by the Supreme Court of the Virgin Islands. *See Vanterpool v. Gov’t of the Virgin Islands*, 63 V.I. 563, 576 (V.I. 2015) (“[U]ncritical application of the rules of another court to a proceeding in the Superior Court is wholly inconsistent with our admonition that ‘the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Local Rules of the District Court should represent rules of last resort rather than first resort, and should be invoked only when a thorough review of applicable Virgin Islands statutes, Superior Court rules, and precedents from this Court reveals the absence of any other [applicable] procedure’”) (citing *Sweeney v. Ombres*, 60 V.I. 438, 442 (V.I. 2014)). In *Martin v. Martin*, 54 V.I. 379, 386-387 (V.I. 2010), the Supreme Court of the Virgin Islands “adopted the standard contained in a prior version of [FED. R. CIV. P. 56], [which] remains controlling in Virgin Islands courts” and does not include the amendments to FED. R. CIV. P. 56 that went into effect on December 1, 2010. *Vanterpool*, 63 V.I. at 583 n. 10 (“Effective December 1, 2010, Federal Rule of Civil Procedure 56 was rewritten substantially to incorporate some — but not all — aspects of local rules similar to District Court Rule 56.1. Nevertheless, this Court’s *Martin* decision, which adopted the standard contained in a prior version of the rule, remains controlling in

Because summary judgment is a drastic remedy, it should be granted only when the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.¹⁰

It is a basic principle . . . that trial judges should not weigh the evidence [or] make credibility determinations . . . when ruling upon summary judgment motions because these are the functions of the jury.¹¹

When reviewing the record, th[e] Court must view the inferences to be drawn from the underlying facts in the light most favorable to the nonmoving party, and we must take the non-moving party's conflicting allegations as true if supported by proper proofs. To survive summary judgment, the nonmoving party's evidence must amount to more than a scintilla, but may amount to less (in the evaluation of the court) than a preponderance. Importantly, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial.¹²

Further, the Supreme Court of the Virgin Islands requires this Court to consider the merits of a motion for summary judgment and grant summary judgment only when satisfied that “the evidence in the summary judgment records supports this relief.”¹³

ANALYSIS

Plaintiff seeks dismissal of this action according to Fed. R. Civ. P. 41(a)(2) to streamline the litigation involving the Hamed-Yusuf parties and to avoid duplicative or inconsistent judgments. Plaintiff argues this Court should dismiss the Complaint for the same reasons as those employed by the Court in Case No. SX-13-CV-003, which involved the same Plaintiff, but named

Virgin Islands courts”) (citations omitted); *but see Brodhurst v. Frazier*, 57 V.I. 365, 396 (V.I. 2012) (Swan, J., dissenting) (applying “the modern version of Rule 56(c)(1),” Fed. R. Civ. P. 56 as amended in 2010, when reviewing the Superior Court’s ruling on a motion for summary judgment).

¹⁰ *Simpson v. Golden Resorts, LLLP*, 56 V.I. 597, 605 (V.I. 2012) (internal quotation marks and citations omitted); *See also Pedro v. Ranger American of the Virgin Islands, Inc.*, 2015 V.I. Supreme LEXIS 19, *3-6 (V.I. 2015) *Bertrand v. Mystic Granite & Marble, Inc.*, 63 V.I. 772, 778 (V.I. 2015).

¹¹ *Anthony v. FirstBank V.I.*, 58 V.I. 224, 234 (V.I. 2012) (citations omitted); *See also Bertrand*, 63 V.I. at 778 (citations omitted).

¹² *Simpson*, 56 V.I. at 605.

¹³ *Vanterpool*, 63 V.I. at 583 (citing *Martin*, 54 V.I. at 389).

Waleed Hamed, Defendant's brother, as the Defendant. In Case No. SX-13-CV-003, the Court dismissed the action with prejudice because the Defendant was also a party in Case No. SX-12-CV-370, subject to the same claims as those alleged in the current proceedings.¹⁴ In the alternative, Plaintiff asks the Court to consolidate this proceeding with Case No. SX-12-CV-370. Further, Plaintiff contends that, although there is no pending motion seeking attorney's fees, the Court should dismiss the action without prejudice with each party bearing their own fees and costs. Plaintiff maintains that this action and appeal were properly initiated by Plaintiff to preserve claims, litigation has been limited with Defendant initiating some of the motions practice, and any discovery efforts can and have been utilized in the other pending litigation.¹⁵ Additionally, Plaintiff argues that, following remand, Plaintiff timely moved to consolidate and then to dismiss to end the litigation in this Court.

Defendant asserts that the sole purpose of the current proceedings in conjunction with the other actions with the same parties has been to intimidate, harass, and deplete the resources of the Hamed family. Defendant highlights that this action has been pending for approximately three and a half years with extensive discovery, significant motion practice, and a Supreme Court appeal, and that Plaintiff could have brought the current motion to dismiss as early as December 2013 when Plaintiff filed its counterclaims against Defendant in Case No. SX-12-CV-370. As a result,

¹⁴ Pl.'s Sept. 13, 2016, Mot. to Dismiss, Ex. 1, August 5, 2016, Order. This Court can take judicial notice of other Court's dockets. See *Farrell v. People*, 54 V.I. 600, 615-16 (V.I. 2011).

¹⁵ See Pl.'s Oct. 3, 2016, Reply, p. 2, listing some of the suits between the families. *Hamed v. Yusuf and United Corp., Inc.*, SX-12-CV-370; *Hamed v. Yusuf*, SX-14-CV-278; *Hamed v. United Corp., Inc.*, SX-14-CV-287; and *Hamed v. Yusuf et al.*, SX-12-CV-377.

Defendant argues that, if the Court grants the motion under Fed. R. Civ. P. 41(a)(2), the Court should do so with prejudice, with an award of costs.¹⁶

Further, Defendant contends that the current proceedings should not be consolidated or dismissed on Plaintiff's terms, but rather according to Defendant's motion for summary judgment with an award of costs and attorneys' fees. In the motion for summary judgment, Defendant argues that there are no genuine issues of material fact in terms of Plaintiff's claims against Defendant based on Plaintiff's admission in other proceedings that Plaintiff was never the appropriate party to prosecute this matter and the Court's November 7, 2014, Order in Case No. SX-12-CV-370 declaring that the partnership existed without Plaintiff as a partner.¹⁷ Plaintiff opposed the motion claiming that it failed to comply with local procedural rules for summary judgment, the argument regarding Plaintiff's standing was rejected by the Supreme Court of the Virgin Islands, and the appropriate action for the Court was to substitute Fathi Yusuf as the real party in interest.¹⁸ However, Defendant correctly noted in his reply that the Supreme Court recently reiterated that District Court Rule 56.1 does not apply to Superior Court proceedings¹⁹ and that, although "standing as that concept is understood in federal constitutional law — does not exist in any form

¹⁶ *Del Valle v. Officemax N. Am., Inc.*, Nos. 13-24, 13-34, 2015 U.S. Dist. LEXIS 29760, at *7-8 (D.V.I. Mar. 11, 2015) (internal quotations and citations omitted). Defendant urges the Court to consider the following factors for determining an award of attorney's fees upon a dismissal: "(1) any excessive and duplicative expense of a second litigation; (2) the effort and expense incurred by a defendant in preparing for trial; (3) the extent to which the pending litigation has progressed; (4) and the claimant's diligence in moving to dismiss." *Id.* However, these factors are not binding in this jurisdiction.

¹⁷ Def.'s March 23, 2016, Mot. for Summary Judgment, pp. 1-2. "When it filed this suit, United claimed it, rather than Fathi Yusuf, was a partner in the joint venture with Mohammad Hamed which owned and operated these supermarkets where Defendant was an employee. Since its filing, United has conceded in judicial pleadings filed in the Superior Court in another case that this allegation is not true- that a partnership between Hamed and Yusuf, not United, has owned Plaza Extra stores since 1986." The Court notes that at the time this suit was initiated in 2013, the legal status of the partnership and the agreement between Hamed and Yusuf was uncertain. *See* Pl.'s Oct. 3, 2016, Reply, p. 3.

¹⁸ Pl.'s May 2, 2016, Opp. to Def.'s Mot. for Summary Judgment, p. 1.

¹⁹ *Vanterpool v. Gov't of the V.I.*, 63 V.I. 563, 582-83 (V.I. 2015) (citation omitted).

in Virgin Islands courts”,²⁰ Defendant was not foreclosed from challenging the merits of United’s lawsuit.²¹

Notwithstanding the history of litigation between these parties, “[i]t is axiomatic that, as a matter of law, trial judges have the inherent power ‘to control the disposition of the causes on [the court’s] docket with economy of time and effort for itself, for counsel, and for litigants’ . . . [and, therefore,] the Superior Court c[an] consider motions in whichever order it cho[oses].”²² As a result, the Court will consider Plaintiff’s motion to dismiss first. The Court has discretion whether to grant a Rule 41(a)(2) motion, and typically a Court will grant the motion unless the Defendant will suffer prejudice.²³ Plaintiff and Fathi Yusuf, the “necessary party” who is the subject of Plaintiff’s Motion to Substitute²⁴, are named Defendants and Counterclaimants in Case No. SX-12-CV-370. In that case, Plaintiff and Fathi Yusuf are prosecuting their counterclaims against Defendant. In the current motion to dismiss and responses, both parties now agree that Defendant is subject to the same claims asserted in this matter in the case pending before Judge Brady, Case No. SX-12-CV-370.²⁵

Accordingly, to avoid duplicative litigation or inconsistent opinions and in the interests of judicial economy, Plaintiff’s Motion to Dismiss will be granted since these claims are being actively prosecuted in a separate action involving the same parties. Considering the volume of

²⁰ *United Corp. v. Hamed*, 64 V.I. 297, 304 (V.I. 2016).

²¹ *Id.*

²² *Pedro v. Ranger American of the Virgin Islands, Inc.*, 63 V.I. 511, 527 (V.I. 2015) (Gomez, J., dissenting in part) (citing *United States v. Colomb*, 419 F.3d 292, 299 (5th Cir. 2005)).

²³ See *Island Tile & Marble, LLC*, 57 V.I. at 618 (citations omitted) (“A trial court’s power to review a Federal Rule 41(a)(2) stipulation is even more circumscribed when a plaintiff seeks to dismiss a claim with prejudice, since there is no possibility that a dismissal with prejudice will harm the defendant because it serves as an adjudication on the merits that precludes re-litigation in another forum. Accordingly, under normal circumstances, ‘when a plaintiff wishes to dismiss with prejudice . . . the [trial] court has no discretion to refuse such a dismissal.’”).

²⁴ Pl.’s June 3, 2016, Mot. to Substitute Fathi Yusuf as the real party in interest.

²⁵ Pl.’s Sept. 13, 2016, Mot. to Dismiss, at 1; Def.’s Sept. 15, 2016, Opp. at 2.

pending litigation involving these parties and their families, because all parties will continue to incur substantial litigation costs including attorney's fees, and since the Court will dismiss this action without prejudice, so as not to limit other litigation, the Court will exercise its discretion and decline to award costs and attorney's fees.

CONCLUSION

For the forgoing reasons, Plaintiff's September 13, 2016, Motion to Dismiss Complaint without prejudice is granted, the Complaint is dismissed without prejudice, and Defendant's March 23, 2016, Motion for Summary Judgment is denied as moot. An Order consistent with this Memorandum Opinion shall issue.

Dated: October 24, 2016

ATTEST: Estrella H. George
Acting Clerk of Court

by:

Lori Boynes-Tyson

Court Clerk Supervisor


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

CERTIFIED A TRUE COPY

DATE:

Oct. 26, 2016
ESTRELLA H. GEORGE
Acting Clerk of the Court

By:


Camell A. Clarke
Court Clerk II