

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

LORENZO FLEMMING	)	
	)	CASE NO: ST-16-CV-501
Plaintiff,	)	
v.	)	ACTION FOR WRONGFUL
	)	TERMINATION, BREACH
CULUSVI, INC. d/b/a COST-U-LESS,	)	OF CONTRACT, and
	)	DAMAGES
Defendant.	)	

MEMORANDUM OPINION

THIS MATTER comes before the Court on a Motion to Dismiss, filed by Defendant CULUSVI, Inc. ("CUL"), pursuant to 9 U.S.C. § 206 and, in the alternative, Fed. R. Civ. P. 12(b)(5). For the reasons set forth herein the Court will deny CUL's Motion to Dismiss.

FACTS AS ALLEGED¹

CUL owns and operates a retail grocery store on St. Thomas. Lorenzo Flemming ("Flemming") applied for employment with CUL in September 2009. During the application process, Flemming allegedly signed an arbitration agreement ("Arbitration Agreement") that was presented to him by CUL. CUL employed Flemming as a maintenance person from September 2009 until September 12, 2015, when he was terminated. Flemming alleges that CUL terminated him because an ex-employee of CUL falsely accused him of theft.

¹ The Court notes that the description of facts in this section are not findings of fact but rather have been culled from the Complaint to provide context for the discussion.

DISCUSSION

CUL argues that this Court must dismiss this action because Flemming signed a binding arbitration agreement in the process of applying for employment with CUL. In the alternative, CUL moves for dismissal pursuant to Fed. R. Civ. P. 12(b)(5) on grounds that Flemming failed to properly serve a registered agent of CUL. The Court will consider each ground for dismissal in turn.

I. FAILURE TO EFFECTUATE PROPER SERVICE

CUL moves to dismiss Flemming's Complaint on grounds that Flemming failed to properly serve CUL's registered agent.

A. Legal Standard

If service of process on a defendant does not comply with SUPER. CT. R. 27—which requires that service of process be served in the same manner as required by Fed. R. Civ. P. 4—then a defendant may seek dismissal pursuant to Fed. R. Civ. P. 12(b)(5).² Rule 12(b)(5) permits the dismissal of a complaint for "insufficiency of service of process."³ "Once a defense of insufficient service is raised, it is Plaintiffs' burden to prove that service was proper."⁴ "When considering a Rule 12(b)(5) Motion to Dismiss for insufficient service of process, the Plaintiffs enjoy

² See *Ross v. Hodge*, 58 V.I. 292, 310 (V.I. 2013) (citing Fed. R. Civ. P. 4(m)).

³ FED. R. CIV. P. 12(b)(5) is applicable to the practice and procedure in the Superior Court through Super. Ct. R. 7.

⁴ *Epstein v. Fancelli Paneling, Inc.*, 2011 V.I. LEXIS 32, *6 (V.I. Super. Ct. 2011) (citing *Grand Entm't Grp., Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 488 (3d Cir. 1993)).

the benefit of any factual doubts.”⁵ “[A]bsent proper service, a case must be dismissed for lack of personal jurisdiction over the defendant.”⁶ But, “if the plaintiff shows good cause for the failure [to effectuate proper service], the court must extend the time for service for an appropriate period.”⁷ And, “[e]ven if the [C]ourt finds no good cause exists to warrant an extension [of the time period to serve Defendants under Fed. R. Civ. P. 4(m)], the [C]ourt must at least consider whether any other factors warrant a discretionary extension.”⁸

B. Analysis

Defendants argue the Court lacks personal jurisdiction over CUL because Flemming failed to serve a registered agent of CUL. Specifically, CUL argues that Flemming served Johanna Harrington, Esq. on September 7, 2016, however effective August 8, 2016, Johanna Harrington, Esq. was no longer CUL’s registered agent. Thus, CUL posits Flemming failed to serve the registered agent of CUL. CUL attached an exhibit to its Motion to Dismiss purporting to demonstrate that Kyle R. Waldner, Esq. became the registered agent for CUL on August 8, 2016.⁹

Here, Flemming bears the burden of demonstrating that process was properly served on CUL. Flemming argues that it contacted the Office of the Lieutenant

⁵ *Id.* (citing *McClellan v. Bd. of Cty. Comm’rs*, 261 F.R.D. 595, 603 (N.D. Okla. 2009)).

⁶ *Ross*, 58 V.I. at 310 (citing *Friedman v. Estate of Presser*, 929 F.2d 1151, 1155-56 (6th Cir. 1991)).

⁷ Fed. R. Civ. P. 4(m).

⁸ *Ross*, 58 V.I. at 310-311.

⁹ See Defendant’s Motion To Dismiss, Ex. B.

Governor to determine the registered agent for CUL on August 25, 2016.¹⁰ And, on August 26, 2016, the Office of the Lieutenant Governor responded via email, disclosing that Johanna Harrington, Esq. was the registered agent of CUL.¹¹

By all appearances, it seems that CUL updated its filing with the Office Lieutenant Governor of the Virgin Islands on August 8, 2016 but the Office Lieutenant Governor failed to convey the updated information to Flemming on August 25, 2016. The Court finds that the Office of the Lieutenant Governor's miscommunication to Flemming constitutes a significant factor warranting a discretionary extension of time for Flemming to properly serve CUL. Thus, this Court will exercise its discretion to extend the time for service to allow Flemming to serve CUL's current registered agent in light of the Office Lieutenant Governor's mistaken communication on August 25, 2016.

I. FAILURE TO STATE A CLAIM

CUL argues that this Court must dismiss Flemming's Complaint because Flemming's claims are subject to a binding arbitration agreement.

A. Legal Standard

To begin, the Court must flesh out the legal standard it will apply to CUL's Motion to Dismiss. While CUL cites 9 U.S.C. § 206 ("Section 206") and "the other

¹⁰ See Plaintiff's Opposition To Defendant's Motion To Dismiss Complaint And Memorandum Of Law In Support, 7 & Ex. B.

¹¹ See *id.*

applicable rules of civil procedure” as the procedural vehicles for its Motion,¹² its Motion to dismiss does not present any particular legal standard to apply. Consequently, the Court must determine the applicable legal standard.

“The U.S. Virgin Islands, unlike most other jurisdictions, does not have an independent statute explicitly allowing local courts to force the parties to enter binding arbitration pursuant to the terms of their agreement[.]”¹³ “However, this does not mean that Virgin Islands local courts do not have the power to compel arbitration[.]”¹⁴ “[C]ourts traditionally have entertained pre-answer motions that are not specifically provided for in the Federal Rules of Civil Procedure, *including*

¹² Defendant’s Motion to Dismiss, at 1. Interestingly, though the territorial courts of the Virgin Islands have a considerable body of law regarding compelled arbitration under the FAA, CUL cites solely to federal court opinions in its Motion to Dismiss. To the extent that CUL’s Motion to Dismiss argues that the FAA applies to all contracts containing mandatory dispute resolution clauses, that argument is patently incorrect—at least within the Virgin Islands. See *Allen v. HOVENSA, L.L.C.*, 59 V.I. 430, 442, n.2 (V.I. 2013) (“[I]t appears that the parties and the Superior Court both accepted HOVENSA’s *incorrect* assumption that the FAA applies to all arbitration agreements.”). *Allen* clarifies that only employment agreements affecting interstate commerce are subject to the FAA. *Id.* Consequently, this Court summarily rejects CUL’s argument that this Court *must* dismiss Fleming’s case in favor of arbitration because CUL failed to present any argument as to how the employment agreement between Fleming and CUL affects interstate commerce. *Id.* (“It is the burden of the party seeking to compel arbitration to prove that the contract at issue involves [interstate] commerce.”). The Court hastens to add that nothing herein shall be construed as a finding that the matter may not be referred to arbitration upon proper motion.

¹³ *Martinez v. Colombian Emeralds, Inc.*, 51 V.I. 174, 184 (V.I. 2009); but see, e.g., *Chassen v. Fid. Nat’l Fin., Inc.*, 836 F.3d 291, 295 (3d Cir. 2016) (acknowledging that arbitration is an affirmative defense); and *Joseph v. Bureau of Corrections*, 54 V.I. 644, 654 (V.I. 2011) (stating that trial courts should refrain from dismissing claims based on affirmative defenses and instead should wait until defendants move under Fed. R. Civ. P. 56 because the facts necessary to establish an affirmative defense generally come from materials external to the complaint); and *United Corporation v. Hamed*, 64 V.I. 297, 305 (V.I. 2016) (reversing superior court for relying on public documents not affixed to the pleadings when dismissing a complaint pursuant to 12(b)(6) and stating unequivocally that the superior court is precluded from “consider[ing] evidence from any source outside of the pleadings and the exhibits attached to the pleadings” at the 12(b)(6) stage).

¹⁴ *Martinez*, 51 V.I. at 184.

*motions to stay pending arbitration.*¹⁵ In the Virgin Islands, *motions to dismiss* in favor of arbitration are treated as motions to dismiss under Fed. R. Civ. P. 12(b)(6).¹⁶

When considering a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the Court conducts its analysis under the assumption that all facts (as opposed to mere legal conclusions) pleaded by the non-movant are true.¹⁷ In evaluating a motion to dismiss under the 12(b)(6) standard, all material allegations in the complaint are taken as true, and the Court must construe all facts in a light most favorable to the non-moving party.¹⁸ When considering if there are facts in the Complaint sufficient to show plausible entitlement to relief, the Court disregards any allegations in the Complaint which are merely “labels and conclusions [or] a formulaic recitation of the elements.”¹⁹ If the remaining facts are sufficient enough for the court to draw a reasonable inference that the defendant is liable based on the elements the plaintiff must plead, then the claim is considered plausible.²⁰ Determining whether a complaint states “a plausible claim for relief” is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”²¹

¹⁵ *Id.* at 189. (internal quotations omitted) (emphasis added). CUL did not present any argument requesting that this Court stay Fleming’s claims pending arbitration.

¹⁶ *Id.*

¹⁷ See, e.g., *Joseph v. Bureau of Corrections*, 54 V.I. 644, 650 (V.I. 2011).

¹⁸ *L’Henri, Inc. v. Vulcan Materials Co.*, 53 V.I. 794, 798 (D.V.I. 2010) (citing *Christopher v. Harbury*, 536 U.S. 403, 406 (2002)).

¹⁹ *Twombly*, 550 U.S. at 555.

²⁰ *Id.*

²¹ *Iqbal*, 556 U.S. at 679.

B. Analysis

CUL attached a copy of the alleged Arbitration Agreement to its Motion to Dismiss. Flemming attached a copy of the same agreement to his Opposition to CUL's Motion to Dismiss. But, this Court is bound by the precedent of the Virgin Islands Supreme Court with regard to evidentiary and procedural rules.²² And, the Supreme Court has conclusively held that when deciding a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the Superior Court is prohibited from considering any documentary evidence other than the pleadings and exhibits attached to the pleadings.²³ Thus, this Court may not consider the documents attached to CUL's Motion to Dismiss or Flemming's brief in opposition when ruling on CUL's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Consequently, the Court will deny CUL's Motion to Dismiss because CUL's argument relies exclusively on the agreement attached to the motion.²⁴

²² *Vanterpool v. Gov't of the Virgin Islands*, 63 V.I. 563, 583 (V.I. 2015).

²³ *United Corporation v. Hamed*, 64 V.I. 297, 305 (V.I. 2016) (reversing superior court for relying on public documents not affixed to the pleadings and stating unequivocally that the superior court is precluded from "consider[ing] evidence from any source outside of the pleadings and the exhibits attached to the pleadings" at the 12(b)(6) stage).

²⁴ Though this Court is permitted to convert the Motion to Dismiss to a motion for summary judgment under Fed. R. Civ. P. 56, the parties have not had the opportunity to conduct sufficient discovery sufficient to move for summary judgment under Rule 56, and as such, the Court will not convert the Motion to Dismiss to a motion for summary judgment. See *Martinez*, 51 V.I. at 188, n.7.

CONCLUSION

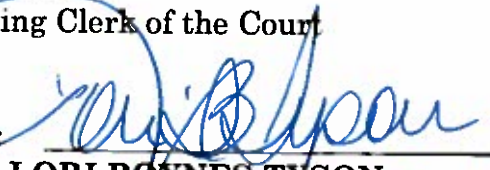
As a result of the foregoing analysis, the Court will deny CUL's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). And, the Court will grant an extension of time for Flemming to serve CUL's registered agent. An order consistent with this opinion will follow.

DATED: March 7, 2017



Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Acting Clerk of the Court

By: 

LORI BOYNES TYSON
Court Clerk Supervisor 3/7/17