IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

UYEN LE, Plaintiff,	)	SX-16-CV-316
v.	)	ACTION FOR DAMAGES
TREASURE BAY VI CORP. d/b/a DIVI CARINA BAY RESORT & CASINO, Defendant.	)	JURY TRIAL DEMANDED

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Defendant Treasure Bay VI Corp. d/b/a/ Divi Carina Bay Resort & Casino's (TBVI) Motion to Dismiss Complaint for Arbitration (Motion); Plaintiff's Opposition thereto and Motion for Leave to File Opposition Out of Time; and Defendant's Reply. For the reasons that follow, Plaintiff's Motion for Leave to File Opposition Out of Time will be granted and Defendant's Motion to Dismiss will be granted.

Background

On May 12, 2016, Plaintiff filed her Complaint alleging that she was injured when she was struck by a chair after a fight broke out at a black jack table at TBVI's casino. Complaint ¶¶ 7-8. Plaintiff alleges that her injuries were the result of TBVI's negligence with regard to: (1) overserving alcohol to unruly patrons; (2) failing to properly train its employees to diffuse potentially threatening situations and to eject unruly or aggressive customers; (3) failing to provide adequate security; and (4) failing to eject unruly patrons. *Id.* ¶ 9.

TBVI filed its Motion on June 9, 2016, alleging that the parties' February 21, 2012 Beachcomber's Gold Club Membership Agreement (Membership Agreement) required that, upon the election of either party, any dispute between them must be resolved exclusively by binding arbitration through the American Arbitration Association (AAA).[1] Rather than filing a response to TBVI's Motion, Plaintiff on August 9, 2016 mailed her Demand for Arbitration to AAA, together with a check in payment of the filing fee, a copy of her Complaint filed herein, and a copy of the parties' Membership Agreement. TBVI responded by email to AAA and objected to Plaintiff's invocation of AAA's Consumer Rules, rather than its Commercial Rules. Instead of engaging that

[1] In pertinent part, the Membership Agreement provides under the Agreement to Arbitrate provision: "If either party asserts a Claim against the other, either party may elect to have that Claim resolved by arbitration."

dispute before AAA regarding the applicable arbitration rules, Plaintiff returned to the Court (apparently without withdrawing her Demand for Arbitration) and filed her Opposition to Defendant's Motion on September 22, 2016, some three and one half months after it was filed.

Discussion

TBVI argues that Plaintiff's Opposition was untimely and, therefore, the Motion should be considered unopposed. Alternately, TBVI argues that Plaintiff has waived her right to oppose the Motion by initially voluntarily submitting her claims to arbitration pursuant to the arbitration provision within the Membership Agreement; and that arbitration is required in any event as Plaintiff admits that she signed and voluntarily consented to the terms of the Membership Agreement's arbitration provision, which is not unconscionable.

<u>Leave to File Opposition Out of Time</u>

Superior Court Rule 10(a) sets forth the standard for seeking leave to file out of time:

> When an act is required or allowed to be done at or within a specified time--
> (a) The court for cause shown may at any time in its discretion:
> 1. With or without notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order of the court.
> 2. On motion, permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect.

Superior Court Rules do not set the timeframe within which a party must respond to a motion to dismiss filed in response to a plaintiff's complaint. However, Local Rule of Civil Procedure 12.1(b), applicable in the absence of other controlling procedural authority pursuant to Superior Court Rule 7, requires that a response brief be filed within 20 days of filing of the dispositive motion.

TBVI's Motion was filed June 9, 2016 and Plaintiff's Opposition was filed September 22, 2016. Within her Opposition, Plaintiff seeks leave to file the Opposition out of time. She contends that good cause exists for the untimeliness of her response because Defendant did not assert in its Motion that AAA's Commercial Rules were applicable to the arbitration it sought, requiring Plaintiff to pay a filing fee "almost over $7,000 to initiate the arbitration proceedings." Further, "Plaintiff has done some additional research" to conclude that the Federal Arbitration Act does not apply because the parties' Membership Agreement "cannot meet the interstate commerce test."

Opposition, at 4. Plaintiff also contends that TBVI has suffered no prejudice by allowing the Court to consider Plaintiff's Opposition. *Id.*

> "Excusable neglect" and "good cause" are essentially synonyms, and the determination of excusable neglect is at bottom an equitable one, where the court should take into account all relevant circumstances surrounding the omission including the danger of prejudice to the opposing party, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether or not it was within the reasonable control of the movant, and whether the movant acted in good faith.

Fuller v. Browne, 59 V.I. 948, 954 (V.I. 2013) (internal quotations and citations omitted).[2]

The Supreme Court of the Virgin Islands has repeatedly expressed that "there is a strong preference for trial courts to decide doubtful cases on their merits rather than dismiss them for a failure to strictly follow purely procedural rules." *Joseph v. Bureau of Corrections*, 54 V.I. 644, 650 (V.I. 2011) (citations omitted). This is especially true in the context of a motion to dismiss a plaintiff's claims, such that the opposing party should be provided the opportunity to be heard on the merits of the motion. *See Fuller*, 59 V.I. at 956.

Further, TBVI has not alleged and the Court does not find any prejudice to TBVI in permitting consideration of Plaintiff's Opposition. Given the preference for deciding cases on substance rather than procedural defects and taking into account all relevant surrounding circumstances, the Court finds that it is appropriate to consider Plaintiff's Opposition even though Plaintiff's evidence of good cause or excusable neglect for her late filing is weak, bordering on nonexistent. Plaintiff's Motion for Leave to File Opposition Out of Time will be granted.

<u>Motion to Dismiss</u>

TBVI's Motion cites no rule upon which it seeks dismissal, but argues, in essence, that Plaintiff has failed to state a claim upon which relief can be granted, as her sole remedy according to the Membership Agreement is through binding arbitration. Accordingly, the Motion is deemed filed pursuant to Fed. R. Civ. P. 12(b)(6). *See Martinez v. Colombian Emeralds, Inc.*, 51 V.I. 174, 188-89 (V.I. 2009).

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[2] *Fuller* addressed a matter arising "under Super. Ct. R. 322.5(b)(2) which authorizes the Appellate Division to 'consider a motion to set aside a dismissal order and to reopen the matter that is dismissed … upon a showing of good cause or excusable neglect.' " However, the definition of "excusable neglect" outlined therein is equally applicable to the present Rule 10(a)(2) analysis.

"Pursuant to Federal Rule of Procedure 12(d), if, on a motion under Rule 12(b)(6) matters outside the pleadings are presented to and not excluded by the court, the motion *must* be treated as one for summary judgment under Rule 56." *Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596, 612 (V.I. 2012) (emphasis in original) (internal citations and quotations omitted). "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." *Walters v. Walters*, 60 V.I. 768, 775 (V.I. 2014).

Plaintiff admits that she joined the Beachcomber's Gold Club in 2012, and executed the Membership Agreement, which included a clause mandating that, on the election of either, the parties shall arbitrate any dispute that arises between them relating to Plaintiff's use of TBVI's facilities. Plaintiff further concedes that, following the filing of Defendant's Motion, pursuant to the Membership Agreement, she initially submitted her Demand for Arbitration to AAA.

Plaintiff devotes much of her Opposition to arguing that TBVI cannot compel arbitration because the Federal Arbitration Act (FAA) does not apply, in that the Membership Agreement reveals no nexus to interstate commerce.[3] Opposition, at 5. However, this argument is futile because irrespective of the applicability of the FAA, arbitration agreements are enforceable as a matter of Virgin Islands law. *See Gov't of the V.I. v. United Indus., Svc., Transp., Prof. & Gov't Workers of N.A.*, 64 V.I. 312, 330 (2016) (discussing the "basic principle that parties are generally free to structure their arbitration agreements as they see fit and they may limit by contract the issues which they will arbitrate"). In fact, the primary purpose of the FAA is to ensure "that private agreements to arbitrate are enforced according to their terms." *Id.*

It is well settled that an enforceable contract requires an offer, acceptance, consideration, and a manifestation of mutual assent. *Codrington v. Gov't of the V.I.*, 2016 V.I. LEXIS 190, at *12-13, n.41 (V.I. Super. Ct. 2016) (quoting *Terrace v. Williams*, 52 V.I. 225, 241 (V.I. 2009) (Swan, J., concurring)). Plaintiff concedes that she accepted the terms of the Membership Agreement: "Plaintiff decided to accept the request for arbitration and submitted a demand for arbitration under the Consumer Arbitration Rules." Opposition, at 2.

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[3] The Membership Agreement states: "This Agreement is governed by the Federal Arbitration Act, 9 U.S.C. §1, *et seq.*, and not by any state or Virgin Islands law concerning arbitration."

As in *Allen v. HOVENSA, L.L.C.*, the arbitration provision within the parties' Membership Agreement was "clearly meant to encompass any controversy or claim arising out of or relating to 'Employee's presence at the facility, including tort claims," and "the agreement is clear as to what claims are subject to arbitration and the type of claim brought in this case is specifically identified within the agreement as being subject to arbitration." 59 V.I. 430, 438-39 (V.I. 2013).[4]

Historically, the FAA was created to overcome judicial hostility to the enforcement of arbitration agreements by placing arbitration clauses on equal footing with other contractual provisions. *Prentice v. Seaborne Aviation, Inc.*, 2016 V.I. LEXIS 127, *10 (V.I. Super. Ct. 2016). No determination is required here as to an interstate commerce nexus or the applicability of the FAA. Rather, the Court is simply called upon to recognize and enforce the parties' contractual agreement which requires that any dispute between the parties be determined by arbitration at the election of either party, without resort to or application of any provision of the FAA.[5]

Therefore, applying basic principles of contract law, the Court looks to the language of the Membership Agreement which provides that upon the election of either party, arbitration is mandatory and provides the exclusive forum for the resolution of any dispute that arises in connection with the member's use of the casino. As Plaintiff confirms that she voluntarily agreed to the terms of the Membership Agreement, she is bound by those terms and must submit her claims against TBVI to arbitration.

Plaintiff argues that she may litigate her claims in the Superior Court because the Membership Agreement is procedurally and substantively unconscionable. Opposition, at 10.[6] "It

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[4] The Membership Agreement defines a "Claim" that is subject to arbitration as "any dispute between you and us that arises from or relates in any way to the Facilities and/or Services, including disputes concerning: (1) the quality, safety or suitability of the Facilities or Services; ... It includes disputes based on ... alleged wrongful acts of every type (whether intentional, fraudulent, reckless, or negligent). It includes disputes that seek relief of any type, including damages..."

[5] If called upon to determine whether the parties' Membership Agreement invokes interstate commerce, a review of the V.I. Casino and Resort Control Act of 1995, pursuant to which TBVI's casino was developed, suggests that the issue would be determined in the affirmative. ("[C]asino gaming... is... seen by this body as a cornerstone in the St. Croix tourism/entertainment market...") 32 V.I.C. § 401(b)(9).

Further, courts of various jurisdictions have consistently held that casinos, by their very nature, are entrenched in interstate commerce. *See, e.g., Prescott v. Little Six, Inc.*, 2003 U.S. Dist. LEXIS 18844, at *11-29 (D. Minn. 2003) (collecting cases); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 181 (2d Cir. 1996) ("Indeed, a bingo hall and casino even one on tribal grounds designed to attract tourists from surrounding states undeniably affects interstate commerce"); *Arce v. Cotton Club*, 883 F. Supp. 117, 120 (N.D. Ms. 1995) ("As the chief executive of a casino, Phillip Arce's duties involved interstate commerce").

[6] Without citation to any authority, TBVI contends that Plaintiff waived her right to oppose arbitration by initially filing her Demand for Arbitration with AAA. Although this issue has not been litigated in the Virgin Islands, the Third

is well established that for an Arbitration Agreement to be unenforceable on grounds of unconscionability, it must be both procedurally and substantively unconscionable." *Canton v. Toyota Motor Corp.*, 2011 V.I. LEXIS 27, at *3 (V.I. Super. Ct. 2011). Procedural unconscionability refers to the form of the agreement and the process by which the agreement is reached; substantive unconscionability refers to terms that unreasonably favor one party to which the disfavored party does not truly assent. *Id.* (citations omitted); *see also Allen*, 59 V.I. at 440 ("The mere fact that a contract is adhesive does not — without more — render it unconscionable … Thus, a party challenging a contract on unconscionability grounds must also show that the contract is substantively unconscionable by demonstrating that the contract contains terms unreasonably favorable to the stronger party.")

Plaintiff relies upon a Third Circuit case involving the same Defendant, which affirmed the Virgin Islands District Court's finding that TBVI's arbitration provision in its employment agreement "was unconscionable because of the possibility of the plaintiff having to pay the entire costs associated with an arbitration such that it would discourage her from filing a meritorious claim, given her personal financial situation." Opposition, at 11 (citing *Hall v. Treasure Bay Virgin Islands Corp.*, 371 F. Appx. 311, 313 (3d Cir. 2010)). *Hall* is not analogous to the instant case, as the two provisions of the parties' employment contract found to be unconscionable in *Hall* are not present here: the "loser pays" provision and the "constraint" provision. 371 F. Appx. at 312. The Membership Agreement in issue contains neither such provision.[7]

The Membership Agreement expressly contains a provision relieving Plaintiff of the potential unconscionability of a "loser pays" provision, to the effect:

Circuit has persuasively held to the contrary. "In order to establish waiver, the party submitting to arbitration must have 'clearly indicated his willingness to forego judicial review.'" *Black Box Corp. v. Markham*, 127 F. Appx. 22, 24 n.2 (3d Cir. 2005) (quoting *Local 719, Am. Bakery & Confectionery Workers of Am. v. Nat. Biscuit Co.*, 378 F.2d 918, 921-22, (3d Cir. 1967)). "A waiver will not be inferred if a party objects to the arbitrability of an issue but nonetheless voluntarily submits the issue to arbitration." *Id.* (citing *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503, 1510 (3d Cir. 1994), aff'd, 514 U.S. 938 (1995)).

[7] The "constraint" provision in *Hall* stated: "The arbitrator, in rendering a decision, may uphold the actions of the Company or may grant relief to Employee. If the arbitrator finds that disciplinary action was merited, the arbitrator may not alter or amend the form of disciplinary action imposed by the company." The Third Circuit found the provision to be substantively unconscionable, finding that "this provision is contrary to the rules of the American Arbitration Association which state that 'the arbitrator may grant any remedy or relief which the Arbitrator deems just and equitable within the scope of the agreement of the parties.'" 371 Fed. Appx. at 313 (citation omitted). The present dispute contains no such provision as the arbitrator will determine the parties' dispute *de novo,* rather than reviewing an employer's prior determination in a disciplinary action.

> If you cannot afford the Administrator's fees or you believe they are too high, we will consider in good faith any reasonable written request for us to bear the cost. We will not ask you to pay for any fees of the Administrator we pay on our or your behalf, regardless of the outcome of the arbitration. Each party must pay for its own attorneys, experts and witnesses, regardless of who wins the arbitration, except where applicable law and/or this Agreement provides otherwise. We will pay any fees or expenses we are required to pay by law.

These express terms are directly contrary to *Hall's* "loser pays" provision in that TBVI confirms that it "will not ask you to pay for any fees of the Administrator we pay on our or your behalf, regardless of the outcome of the arbitration."

The Supreme Court of the Virgin Islands has held that "a provision could potentially be unconscionable if it results in the arbitral forum becoming prohibitively expensive as a means of obtaining redress." *Allen*, 59 V.I. at 440. By the quoted language from the Membership Agreement, TBVI offers to consider in good faith any reasonable written request of Plaintiff to bear the costs of AAA, the administrator. Plaintiff has not claimed that she has made such a request, and she has not claimed that TBVI refused to cover her arbitration costs. Moreover, Plaintiff has not pointed to any specific provision of the Membership Agreement that she claims is unconscionable.

The Supreme Court has stated that "a contract or term is unconscionable, and therefore avoidable, where there was a lack of meaningful choice in the acceptance of the challenged provision and the provision unreasonably favors the party asserting it." *Rojas v. Two/Morrow Ideas Enters.*, 53 V.I. 684, 698 (V.I. 2010); *see also Connor v. Connor*, 2011 V.I. LEXIS 94, at *11 (V.I. Super. Ct. 2011) (an unconscionable agreement is one that no sensible, undeluded individual would make on one hand, and no honest and fair individual would accept).

Here, Plaintiff has failed to identify and the Court independently finds no provision of the Membership Agreement that so unreasonably favors TBVI as to render it unconscionable. Plaintiff's argument in this regard fails and the arbitration provision within the parties' Membership Agreement will be enforced.

Conclusion

Although untimely, Plaintiff's filed Opposition is accepted and considered. The Court finds that the parties agreed, by their Membership Agreement, to submit all disputes between them to arbitration at the election of either party. The arbitration provision is enforceable as a matter of contract law without regard to any nexus to interstate commerce or any provisions of the FAA.

Because the Membership Agreement's arbitration provision does not so unreasonably favor TBVI as to render it unconscionable, it will be enforced as the parties' exclusive means of claims resolution upon the election of TBVI. In light of the foregoing, it is hereby

ORDERED that Plaintiff's Motion for Leave to File Opposition Out of Time is GRANTED. It is further

ORDERED that Defendant's Motion to Dismiss Complaint for Arbitration is GRANTED, and Plaintiff's Complaint is DISMISSED with prejudice.

Dated: February 27, 2017.

DOUGLAS A. BRADY, JUDGE

ATTEST:
ESTRELLA GEORGE
Acting Clerk of the Court

By:
Court Clerk Supervisor
2/27/17