

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

RONAE P. BURKE,

Plaintiff,

v.

**TREASURE BAY V.I. CORP. d/b/a DIVI CARINA
BAY CASINO, VINCENT SMITH and LYA SMITH
f/k/a LYA WESTBROOK or LAURA
WESTBROOK,**

Defendants.

)
) **CIVIL NO. SX-16-CV-121**

)
) **ACTION FOR DAMAGES**

)
) **JURY TRIAL DEMANDED**

MEMORANDUM OPINION

MOLLOY, Robert A., Judge

THIS MATTER comes before the Court on Defendant Treasure Bay V.I. Corp.'s (hereinafter "TBVI") "Motion to Dismiss Complaint for Arbitration" filed on April 13, 2016. TBVI seeks a dismissal of the claim alleged by Plaintiff, Ronae Burke (hereinafter "Burke") based on the fact that Burke agreed to arbitrate those claims. Also before the Court is Defendants, Vincent Smith and Lya Smith (hereinafter "the Smiths" or "the Smith Defendants"), "Motion to Stay Pending Arbitration" filed on April 22, 2016. The Smiths, non-signatories to the arbitration agreement, request that the court stay the civil action until the completion of the arbitration between Burke and TBVI.

For the reasons stated below, the Court will convert TBVI's motion to dismiss into a motion for summary judgment and allow the parties an opportunity to submit materials pertinent to the issue as to whether Burke agreed to arbitrate the claims alleged against TBVI. In addition, the Court will deny the Smiths motion to stay this case pending arbitration.

I. BACKGROUND

For purposes of these motions, the Court will consider the factual allegations in the complaint as true.

On March 18, 2014, Burke, along with two of her friends, Shamar Morris and Yessina Perez, were playing black jack at the Divi Carina Bay Casino, a property owned and operated by TBVI. Burke alleges that Defendant Vincent Smith approached the black jack table and inquired as to whether he could sit at the empty seat next to Burke. When Burke informed Smith that someone was playing in that seat and the table was full, Smith began to harass Burke and the other guests sitting at the table. Burke alleges that Smith continued to behave in a drunken and belligerent manner cursing at Burke and refusing to leave the black jack table. Smith then began to direct his rude and harassing behavior towards Morris. Burke alleges that Smith punched Morris as the two got into a physical altercation with Smith “hitting and pulling Mr. Morris by his dreadlocks as Mr. Morris was falling to the ground.” Verified Comp. ¶ 20. Burke and another friend then began to assist Morris. The complaint does not allege exactly at what point Burke sustained her injuries, but paragraph 25 of the complaint alleges that “[a]s a result, the plaintiff suffered bodily injuries, psychological and mental pain, anguish, loss of enjoyment of life, and medical expenses all of which will continue for the foreseeable future as a direct and proximate result of the defendants’ conduct.” *Id.* at ¶ 25.

Burke filed a Verified Complaint on March 18, 2016, alleging two causes of action. Count I alleges a cause of action for assault and battery against Defendants Vincent and Lya

Smith.¹ Count II alleges a cause of action for negligence against TBVI for “fail[ing] to take reasonable and timely actions to protect plaintiff...” *Id.* at ¶ 34.

On April 13, 2016, TBVI filed a motion to dismiss the complaint contending that Burke signed a Beachcomber’s Gold Club Membership Agreement which contained language wherein Burke agreed to arbitrate any dispute arising out of her use of the casino. Several days thereafter, on April 22, 2016, the Smiths filed a motion to stay the case while TBVI and Burke proceeded to arbitration. Burke has not filed a response to either motion.

II. DISCUSSION

a. TBVI’s Motion to Dismiss

TBVI filed a pre-answer motion contending that the Court should dismiss the complaint because Burke agreed to arbitrate the negligence claim filed against TBVI. TBVI does not identify the rule that would govern this motion, but instead, cites to several provisions of the Federal Arbitration Act (“FAA”) in support of its position. The United States Supreme Court, however, has explicitly held that the FAA applies in state courts only to the extent that an arbitration provision affects interstate commerce. *Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265 (1995); *see also Gov’t of the V.I. v. United Indus. Workers*, 169 F.3d 172, 176, 40 V.I. 489 (3d Cir. 1999) (“a contract comes within the purview of the FAA only when an interstate nexus is shown”). TBVI has presented no arguments or made any showing that the arbitration agreement in this case has any affect on interstate commerce. *Allen v. HOVENSA, L.L.C.*, 59 V.I. 430, 442 n.2 (V.I. 2013) (“[I]t is the burden of the

¹ Paragraph 23 of the Verified Complaint alleges that “Defendant Lya Smith was an aider and abettor in her husband’s criminal conduct—a “hate crime” (third degree assault under 14 V.I.C. § 707(a)) and subject to joint civil liability as a participant therein.” Verified Compl. ¶ 23.

party seeking to compel arbitration to prove that the contract at issue involves commerce.”).

Thus, it is unclear to the Court that the provisions of the FAA applies to this case.

Nonetheless, TBVI seeks a dismissal of this matter pursuant to an agreement to arbitrate between Burke and TBVI. “[M]otions seeking a dismissal of an action on the basis that arbitration is required . . . are covered under Federal Rules of Civil Procedure 12(b)(6) or 56.” *Martinez v. Columbian Emeralds, Inc.*, 51 V.I. 174, 188 (V.I. 2009) (citations omitted). Here, TBVI filed a pre-answer motion to dismiss raising the affirmative defense that Burke agreed to arbitrate this dispute. Thus, the Court will determine whether the complaint should be dismissed under Rule 12(b)(6).

“Under [Rule 12(b)(6)], a party may move to have a claim dismissed for failure to state a claim upon which relief can be granted.” *Brady v. Cintron*, 55 V.I. 802, 822 (V.I. 2011) (internal citations omitted). The facts alleged in the pleadings, and any inferences drawn therefrom, must be viewed in the light most favorable to the plaintiff. *Benjamin v. AIG Ins. Co. of Puerto Rico*, 56 V.I. 558, 566 (V.I. 2012). “In deciding a Rule 12(b)(6) motion to dismiss, the Court may consider ‘the allegations contained in the complaint, exhibits attached thereto, and matters of public record.’” *Petersen v. Golden Orange Ctrs. Inc.*, 2014 V.I. LEXIS 76, at *4 (V.I. Super. Ct. Sept. 25, 2014) (quoting *Beverly Enters., Inc. v. Trump*, 182 F.3d 183, 190 n.3 (3d Cir. 1999)). “However . . . a document integral to or explicitly relied upon in the complaint may be considered without converting the motion to dismiss into one for summary judgment.” *Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014) (internal quotations and citations omitted).

However, “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.” *Islands Tile & Marble, LLC v. Bertrand*, 57 V.I. 596, 612 (V.I. 2012) (emphasis in original); *see also* Fed. R. Civ. P. 12(d).² “Rule 12(b) gives [courts] two options when matters outside the pleadings are presented in . . . a 12(b)(6) motion: the court may exclude the additional material and decide the motion on the complaint alone or it may convert the motion to one for summary judgment under Fed. R. Civ. P. 56 and afford all parties the opportunity to present supporting material.” *Fonte v. Bd. of Managers of Continental Towers Condominium*, 848 F.2d 24, 25 (2d Cir. 1988) (citing 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1366 (1969 & Supp. 1986)).

In this matter, TBVI attached two exhibits to its motion to dismiss (purportedly bearing Burke’s signature) containing broad language wherein the signer agreed to arbitrate any dispute “that arises from or relates in any way to the Facilities and/or Services . . .” and “includes disputes based on constitutional provisions, statutes, regulations, ordinances, contracts, and alleged wrongful acts of every type (whether intentional, fraudulent, reckless, or negligent).” *See* TBVI’s Mot. to Dismiss - Exhibits A and B. However, these unauthenticated documents were not attached to the complaint nor were they referenced in any of Burke’s allegations. These documents are extraneous to the complaint and thus, the

² Rule 12(d) provides:

If, on a motion under Rule 12(b)(6) or 12(c), 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. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

Court considers these documents to relate to “matters outside the pleadings” rendering them inappropriate for a consideration on a Rule 12(b)(6) motion. Accordingly, the Court will convert TBVI’s motion into a motion for summary judgment and will allow the parties an opportunity to present material as to whether there was a valid agreement to arbitrate the claims alleged in the complaint against TBVI.

b. Smiths’ Motion to Stay Pending Arbitration

The Smiths seek a stay of the case based on the premise that the Court will order Burke and TBVI to arbitration. The Smiths based their motion on section 3 of the FAA.³ Even if the provisions of the FAA applied in this matter, there is no indication that Burke and the Smiths entered into any agreement to arbitrate their claims. Thus, as a nonparty to the arbitration agreement, the Smiths are not entitled to invoke section 3 of the FAA. *See Mendez v. Puerto Rican Int’l Companies, Inc.*, 553 F.3d 709, 715 (3d Cir. 2009) (holding that “in order for a party to be the subject of a mandatory stay pending arbitration under section 3 of the FAA, that party must have committed itself to arbitrate one or more issues in [the] suit.”); *see also IDS Life ins. Co. v. SunAmerica, Inc.*, 103 F.3d 524, 529 (7th Cir. 1996) (“Although not expressly so limited, section 3 assumes and the case law holds that the movant for a stay, in order to be entitled to a stay under the arbitration act, must be a party to the agreement to

³ Section 3 of the FAA states in full:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3.

arbitrate, as must be the person sought to be stayed.”); *Citrus Marketing Bd. of Israel v. J. Lauritzen A/S*, 943 F.2d 220, 224-25 (2d Cir. 1991) (“We have construed section 3 not to authorize a stay at the behest of . . . a nonparty to the arbitration agreement”).

Notwithstanding the fact that the mandatory stay provisions of section 3 of the FAA do not apply to nonparties to an agreement to arbitrate, this Court still retains the inherent authority to stay a case. As stated by the Supreme Court of the United States:

The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.

Landis v. North American Co., 299 U.S. 248, 254-55, 81 L. Ed. 153, 57 S. Ct. 163 (1936). In determining whether to stay a case pending arbitration between parties who are non-signatories to an arbitration agreement, courts ordinarily consider three factors: (1) whether the proposed stay would prejudice the non-moving party; (2) whether the proponent of the stay would suffer a hardship or inequity if forced to proceed; and (3) whether granting the stay would further the interest of judicial economy. *See Airgas, Inc. v. Cravath, Swaine & Moore LLP*, 2010 U.S. Dist. LEXIS 15120, at *6-7 (E.D. Pa. Feb. 22, 2010) (citing *Landis*, 299 U.S. at 254-55); *see also Rhodes v. Independence Blue Cross*, 2012 U.S. Dist. LEXIS 17129 (E.D. Pa. Feb. 9, 2012). In weighing these factors, the court must keep in mind that the party proposing the stay “must state a clear countervailing interest to abridge a party’s right to litigate.” *CTF Hotel Holdings, Inc. v. Marriott Int’l, Inc.*, 381 F.3d 131, 138 (3d Cir. 2004).

Assuming, without deciding, that the case between Burke and TBVI will eventually be submitted to arbitration, the Court does not find that a stay is warranted in this case. First, the Smiths have not presented a clear countervailing interest that would justify abridging Burke's right to litigate her claim against them. There is no dispute that these parties have not agreed to arbitrate the claim alleged in the complaint. Further, there is also no indication that any arbitration proceeding between Burke and TBVI have commenced nor is there any estimate as to how long the arbitration proceeding would last. At this juncture, Burke would have to wait an indefinite amount of time before she could litigate her claim against the Smiths if this matter were stayed. Such an indefinite stay would be an abuse of this Court's discretion and could substantially affect Burke's right to litigate. *See Dover v. Diguglielmo*, 181 Fed. Appx. 234, 237 (3d Cir. 2006) (opining that trial court was not required to stay proceedings indefinitely pending appointment of counsel because "such a stay can itself constitute an abuse of discretion").

Second, the Smiths have failed to demonstrate that they will suffer any hardship if this matter is not stayed. Because the Smiths would not be a party to any arbitration proceeding between Burke and TBVI, the Smiths would not be subject to duplication of work nor would they have to expend any unnecessary resources. *See e.g., Rhodes*, 2012 U.S. Dist. LEXIS 17129, at *15 (finding hardship to defendant because "[w]ithout a stay, defendant will be required to spend time and money on this litigation duplicating the work required in the Iowa litigation."). To be sure, "the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for

which he prays will work damage to someone else.” *Landis*, 299 U.S. at 255. The Smiths have failed to do so. This Court finds that this factor weighs against the issuance of a stay.

Finally, the Court does not find that granting a stay would further the interest of judicial economy. The Smiths argue, in a conclusory fashion, that granting a stay would promote judicial economy because it would simplify and narrow (or eliminate) the issues for trial. The Court disagrees. The issues to be resolved between Burke and the Smiths center around whether Vincent Smith assaulted and battered Burke.⁴ The issue between Burke and TBVI is whether TBVI owed a duty of care to Burke by virtue of being the possessor of land where Burke was allegedly injured.⁵ One claim is based on a theory of intentional torts and the other is based on a theory of negligence. While in both claims Burke must prove that Vincent Smith assaulted and/or battered her, in her claim against TBVI, however, Burke has the additional burden of proving that TBVI knew or should have known that Vincent Smith posed an unreasonable risk of harm to her, that TBVI should have expected that Burke would not discover or realize the danger Vincent Smith posed to her, and TBVI failed to exercise reasonable care to protect her from the danger posed by an allegedly drunk, belligerent, and

⁴ In order to prevail on a claim for the intentional tort of assault, a plaintiff must prove that: (1) the defendant intentionally caused harmful or offensive contact with the person of the plaintiff or a third person, or an imminent apprehension of such contact; and (2) the plaintiff is put in such imminent apprehension. *See Ho v. Vu*, 2015 V.I. LEXIS 80, at *4 (V.I. Super. Ct. July 16, 2015) (conducting *Banks* analysis and citing Restatement (Second) of Torts § 21); *Canton v. Gov’t of the Virgin Islands*, 2016 V.I. LEXIS 31, at *6 (V.I. Super. Ct. Apr. 4, 2016). Similarly, in order to prevail on a claim for battery, a plaintiff must demonstrate that the defendant intended “to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and . . . a harmful contact with the person of the other directly or indirectly results.” *Ho*, 2015 V.I. LEXIS 80, at *5 (citing Restatement (Second) of Torts § 13).

⁵ “In the Virgin Islands, a possessor of land is subject to liability for physical harm caused to its business invitees by a condition on the land only if it: (1) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees; (2) should expect that they will not discover or realize the danger, or will fail to protect themselves against it; and (3) fails to exercise reasonable care to protect them against the danger.” *Bynoe v. CULUSVI, Inc.*, 2016 V.I. LEXIS 32, at *3-4 (V.I. Super. Ct. Apr. 1, 2016 (citing *Perez v. Ritz-Carlton (Virgin Islands), Inc.*, 59 V.I. 522, 529 (V.I. 2013))).

aggressive Vincent Smith. Failure to prove any one of these elements would be fatal to Burke's claim against TBVI. *See generally, Perez*, 59 V.I. 522 (V.I. 2013) (establishing the elements for a cause of action for negligence based on a theory of premises liability). An arbitrator, potentially, could render a decision in TBVI's favor without reaching the issue of whether Vincent Smith assaulted or battered Burke. Thus, it would appear that the claim against TBVI is more complex and involve more issues to which a resolution is not likely to have a significant effect on the issues relating to Burke's claim against the Smiths. While a court may "in the exercise of its sound discretion . . . hold one lawsuit in abeyance to abide the outcome of another which may substantially affect it or be dispositive of the issues," *Bechtel Corp. v. Laborers' Int'l Union*, 544 F.2d 1207, 1215 (3d Cir. 1976), a decision by an arbitrator in the TBVI matter could have little or no impact on Burke's ability to pursue her claim against the Smiths. Accordingly, the Court finds that the Smiths have failed to demonstrate that the issuance of a stay would promote the interest of judicial economy.

III. CONCLUSION

In sum, the Court will convert TBVI's motion to dismiss into a motion for summary judgment and will allow the parties to submit materials on the issue of whether Burke agreed to arbitrate her claim filed against TBVI. The Court, however, will deny the Smiths' request to stay the non-arbitrable claims Burke filed against them. An appropriate Order follows.

DATED: October 6, 2016


ROBERT A. MOLLOY
Judge of the Superior Court