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

MIMI JOHNSTON Plaintiff, v. ST. CROIX FINANCIAL CENTER, INC Defendant.	)))))))	CIVIL NO. SX-17-CV-167 ACTION FOR DAMAGES 2019 Super Ct U133

MEMORANDUM OPINION and ORDER

¶ 1 THIS MATTER is before the Court on Defendant St. Croix Financial Center Inc.'s (SCFC) Motion to Stay Proceedings Pending Arbitration, with Memorandum in Support, filed June 26, 2017; Plaintiff's Response, filed July 13, 2017; and Defendant's Reply, filed August 10, 2017. Following reassignment to the undersigned, pursuant to Order entered March 20, 2019, SCFC filed its Supplemental Brief on April 17, 2019, followed by Plaintiffs Opposition, filed May 6, 2019, and SCFC's Reply, filed May 15, 2019. For the reasons that follow, the Court concludes that the arbitration agreement ("Agreement") between Plaintiff Mimi Johnston and SCFC is enforceable and that Johnston's claims must be resolved in arbitration. Accordingly, the Court will grant SCFC's Motion.

BACKGROUND

¶ 2 Mimi Johnston was hired in July 2010 by SCFC, owner and operator of Tamarind Reef Hotel, Deep End Bar and Green Cay Marina, and became a full-time employee September 1, 2011. Complaint ¶ 6. After a series of incidents, the details of which are contested, Johnston resigned March 13, 2017. *Id.* ¶ 78. She filed her Complaint April 3, 2017. At the commencement of her employment, Johnston executed the Agreement, dated July 13, 2010. The Agreement, presented as the last of three separately signed paragraphs that constitute Exhibit 1 to SCFC's Motion, designated "SIGNATURE PAGE," the final page (designated page 14) of the company's Policy Manual. By signing the first paragraph. Johnston acknowledged receipt of the Policy Manual, not a contract of employment, and agreed that she was an employee at will. By the second paragraph, Johnston confirmed that she was hired as a trainee and agreed to the terms of Tamarind Reef Hotel's probationary period policies.

¶ 3 The final paragraph on the page signed separately by Johnston constitutes the Agreement, and reads in full:

> I agree that I will settle any and all previously asserted claims, disputes or controversies arising out of or relating to my application or candidacy of employment, employment and/or cessation of employment with the Tamarind Reef Hotel, The Deep End Bar and, exclusively by final and binding arbitration before a neutral Arbitrator. By way of example only, such claims include claims under federal, state and local statutory or common laws, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including amendment of the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and law of tort.

¶ 4 SCFC asserts that the Agreement is a valid and enforceable contract that must be upheld pursuant to the Federal Arbitration Act (FAA) which provides that a written provision in any contract evidencing a transaction involving commerce to settle a controversy arising out of such contract or transaction by arbitration is valid, irrevocable and enforceable. 9 U.S.C. § 2. Accordingly, SCFC avers that Johnston's claims must be determined in arbitration and that this case must be stayed pending arbitration.

¶ 5 Johnston responds that the Agreement is unenforceable because: 1) 9 U.S.C. § 3 does not apply in Virgin Islands courts; 2) there is no valid agreement to arbitrate this dispute; and 3) Johnston's employment contract does not involve interstate commerce. By her May 2019 Opposition, Johnston adds a new argument not presented in her Response to SCFC's Motion – that the Agreement is procedurally and substantively unconscionable.

¶ 6 Johnston argues that SCFC seeks relief exclusively pursuant to section 3 of the FAA which, by its terms, applies only to federal courts, requiring the denial of the Motion. Well established Virgin

Islands case law confirms both that the substantive provisions of the FAA apply in the Virgin Islands, and that agreements of parties to arbitrate their disputes are enforceable as a matter of contract law. *See Allen v. HOVENSA, L.L.C.*, 59 V.I. 430, 435 (V.I. 2013); *Gov't of the Virgin Islands, Dep't of Ed. v. St. Thomas/St. John Educational Administrators Assn., Local 101*, 67 V.I. 623, 638 (V.I. 2017).

DISCUSSION

¶ 7 Johnston construes too narrowly SCFC's justification for the relief it seeks and unpersuasively tries to distinguish *Whyte v. Bockino*, 69 V.I. 749 (V.I. 2018), where questions relative to the applicability of the FAA in the Virgin Islands were resolved. While it remains uncertain whether the FAA applies to the Virgin Islands through the Territorial Clause or the Commerce Clause of the U.S. Constitution, "the FAA is a legislation which plainly states that it applies to the Virgin Islands." *Id.* at 760.

Agreement to Arbitrate

¶ 8 Johnston argues that the Agreement is not valid because "the first paragraph of the Signature Page clearly states that 'this Policy Manual is not a contract of employment and should not be deemed as such…'" Johnston is correct that the parties agreed that the Policy Manual did not constitute a contract of employment. However, the separate Agreement regarding arbitration stands alone and is not dependent upon the terms or validity of the preceding paragraphs also signed by Johnston appearing on the same page.

¶ 9 Regardless of the enforceability or effect of the Policy Manual on the relationship of the parties, that noted provision does not affect the validity of the parties' separate Agreement to arbitrate disputes. An enforceable contractual arbitration provision may be enforced, and severed if necessary, notwithstanding a party's challenge to another provision of the parties' agreement or to the parties' contract as a whole. *See Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63, 70-71 (2010).

¶ 10 The text of the Agreement states: "I agree that I will settle any and all ***previously asserted*** claims, disputes or controversies arising out of or relating to my application or candidacy of employment, employment and/or cessation of employment..." (emphasis added). SCFC contends that the word "asserted" should properly read "unasserted" and that the mistake was a "scrivener's error." Johnston argues that her because her present claims had not been "previously asserted," they are not subject to arbitration by the terms of the Agreement, and that the assertion of a "scrivener's error" is actually SCFC's attempt to "rewrite the clear and unambiguous terms of the document."

¶ 11 Interpretation of a contract provision is to be undertaken in a manner to enforce the intended meaning of the parties. In the context of an agreement to arbitrate disputes, the Supreme Court has held that "arbitration is a matter of contract, and that courts should strive to most appropriately implement the intent of the parties." *GVI, Dep't of Ed. v. St. Thomas/St. John EAA, Local 101*, 67 V.I. at 638 (citing *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 947 (1995) ("[T]he basic objective in this area is ... to ensure that ... arbitration agreements, like other contracts, are enforced according to their terms and according to the intentions of the parties.") (other citations omitted). "Any such reading which renders contract provisions pointless, superfluous, or ineffective violates basic notions of contract interpretation, and leads to an absurd result which should not be entertained." *Weary v. Long Reef Condominium Ass'n*, 57 V.I. 163, 175 (V.I. 2012) (Hodge, C.J., dissenting in part), citing RESTATEMENT (SECOND) OF CONTRACTS § 203(a) & cmt. b (1981) ("Since an agreement is interpreted as a whole, it is assumed in the first instance that no part of it is superfluous.") (other citations omitted).

¶ 12 To interpret the parties' intent by the Agreement to refer to arbitration only "previously asserted claims" would render pointless, superfluous and ineffective the language of the same sentence by which the parties agree to arbitrate claims arising out of or relating to Johnston's employment and/or any future cessation of her employment. Accordingly, proper rules of contract interpretation require the Court to find that the parties intended to refer to arbitration all claims Johnston might present relating to her employment and the termination of that employment.

¶ 13 Such an interpretation is consistent with the purposes of the FAA. "Congress enacted the FAA to replace judicial indisposition to arbitration with a 'national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts.'" *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008) (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)). In this instance, the finding that the parties intended to resolve claims relative to the cessation of Johnston's employment by arbitration aligns with the FAA's policy goals and case law.

Federal Arbitration Act

¶ 14 Although the Supreme Court has made clear that the FAA applies to the Virgin Islands, it has yet to be determined whether the FAA applies by way of the Commerce Clause or the Territorial Clause of the U.S Constitution. *Whyte v. Bockino*, 69 V.I. at 758-59. Such a determination is unnecessary here, as in *Whyte,* because "a contract comes within the purview of the FAA ... [if] an interstate nexus is shown." *Id.* at 760. Although the burden to show that the contract evidences an interstate nexus lies with the party seeking to compel arbitration, the burden is "relatively low." *Id.* "For an interstate nexus to exist, the parties' agreement need not be *in* interstate commerce nor have a *substantial* effect on interstate commerce; in other words, the FAA commands the 'full reach' of Congress's commerce power." *Id.* at 761 (emphasis in original). Rather, the parties' contract need only '"affect[ ] interstate commerce,' such as where the economic activities of at least one of the parties demonstrates a nexus to interstate commerce." *Id.* (citing *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003)).

¶ 15 By the allegations of her Complaint, Johnston cites facts that support a finding that the economic activities of SCFC demonstrate a nexus to interstate commerce. SCFC owns and operates Tamarind Reef Hotel, owns and controls the Green Cay Marina and other properties and businesses. Complaint, ¶ 5. Johnson herself was employed by SCFC to provide customer service, act as liaison and concierge to resort guests; to update and maintain social media accounts; and to oversee special events such as weddings. *Id.* ¶ 8. These activities of SCFC as set out by Johnston affect interstate commerce in that the hotel business, marina and social media presence all by definition include outreach beyond the shores of the Virgin Islands. As "even the slightest nexus is sufficient," SCFC has demonstrated a nexus to interstate commerce sufficient to confirm that the FAA applies to the parties' Agreement. *Whyte*, 69 V.I. at 762.

Unconscionability

¶ 16 Johnston presents a new argument in her May 2019 Opposition that the Agreement is procedurally and substantively unconscionable. She claims that she did not agree to submit claims to arbitration, but rather signed her name only to acknowledge receipt of SCFC's Policy Manual. Her argument is unpersuasive as it relates to only the first of the three different paragraphs she signed, separate and apart from the Agreement regarding arbitration.

¶ 17 The Court has recently had the opportunity to address the same unconscionability argument regarding the same Agreement in *Nelson Cruz v. St. Croix Financial Center d/b/a Tamarind Reef Hotel*, SX-18-CV-209 (Order entered June 25, 2019; on appeal at: S. Ct. Civ. No. 2019-0060). The gist of Johnston's claim is that by the Agreement "Plaintiff is not afforded the protections of the A[merican] A[rbitration] A[ssociation] Employment Rules," and that its enforcement would be unconscionable in that it is cost prohibitive to her. However, an agreement to arbitrate is not rendered unenforceable simply because it says nothing about arbitration costs, and thus fails to provide protection from potentially substantial costs of pursuing claims in the arbitral forum. *See Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90-91 (2000). "[T]he 'risk'" that a person "will be saddled with prohibitive costs is too speculative to justify invalidation of an arbitration agreement." *Id.* at 91.

¶ 18 There is no substantive difference between the Agreement in issue here and the dispute resolution provision in *Green Tree* relative to cost distribution in arbitration. Because she is "the party seeking to invalidate an arbitration agreement on the grounds that arbitration would be prohibitively expensive," Johnston "bears the burden of showing the likelihood of incurring such costs." *Id.* at 81. Johnston has failed to do so here. Accordingly, the silence of the Agreement on the issue of cost distribution or procedural rules is insufficient to render the Agreement unenforceable.

Motion to Stay

¶ 19 This Court has previously held that discretionary dismissal of an action is proper where all claims have been referred to mandatory, binding arbitration and there is no further role for the trial court to play in concluding the resolution of the parties' dispute. *See Prentice v. Seaborne Aviation, Inc.*, 65 V.I. 96, 113 (V.I. Super. 2016). Here, SCFC has sought an order to stay the proceedings herein, rather than the discretionary dismissal of the action. The Court will refer Johnston's claims to arbitration, In this context, where issues of arbitrator selection and procedural rules are not a part of the parties' Agreement, the Court will not exercise its discretion to dismiss the action but will stay further proceedings pending arbitration.

CONCLUSION

¶ 20 Johnson signed a valid and enforceable Agreement to submit claims to mandatory arbitration that is governed by the FAA. Accordingly, her claims must be resolved in the arbitral forum selected by the parties' Agreement, and SCFC's Motion will be granted.

In light of the foregoing, it is hereby

ORDERED that SCFC's Motion to Stay Proceedings Pending Arbitration is GRANTED, and all proceedings herein are STAYED pending referral to and conclusion of arbitration. It is further

ORDERED that the parties shall advise the Court in writing of the status of the arbitration proceeding not more than 240 days from the entry of this Order. It is further

ORDERED that this Memorandum Opinion and Order shall forthwith be served on the parties through counsel.

Dated: October 2, 2019.

DOUGLAS A. BRADY, JUDGE

ATTEST:
ESTRELLA GEORGE
Clerk of the Court

By: Court Clerk ~~Supervisor~~ II
10/3/19