

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

CYNTHIA FARRELL,

PLAINTIFF,

v.

**GRAPETREE SHORES, INC., D/B/A DIVI CARINA
BAY RESORT,**

DEFENDANT.

SX-12-CV-358

**ACTION FOR DAMAGES
2019 VI Super 130U**

Appearances:

LEE J. ROHN, ESQ.
For Plaintiff

GREGORY KUBARYCH, ESQ.
For Defendant

MEMORANDUM OPINION

WILLOCKS, Administrative Judge.

¶1 **THIS MATTER** is before the Court on the Defendant Grapetree Shores, Inc. d/b/a/ Divi Carina Bat Resort Motion to Dismiss First Amended Complaint for Lack of Subject Matter Jurisdiction (hereinafter “Motion”), filed on December 12, 2016. On January 11, 2017, the Cleocy Shaw (hereinafter “Plaintiff”) filed an opposition, which the Defendant filed a reply to on February 6, 2017.

BACKGROUND

¶2 On September 17, 2008, Cynthia Farrell¹ (hereinafter “Farrell”) executed a Beachcomber’s Gold Club Membership Agreement (hereinafter “Membership Agreement”) in order to become a player’s club member at the Defendant’s casino. (Def. Mot. to Dismiss dated 10/2/12.) According to the First Amended Complaint, on May 31, 2012, the Plaintiff was at the Defendant’s casino walking

¹ Cynthia Farrell is the original Plaintiff in this matter. However, Farrell died on November 25, 2003 and as a result Cleocy Shaw was substituted as personal representative. *See* Order dated November 22, 2016.

towards the slot machines when one of the casino's employees ran into her and knocked her down. (First Amend Compl. at 2.) As a result, on August 12, 2012, Farrell filed a complaint alleging she suffered damages, including physical injuries, mental anguish, pain and suffering as well as other pecuniary losses due to the events that took place at the Defendant's casino. (*Id.*) On October 2, 2012, the Defendant filed a Motion to Dismiss claiming that pursuant to the Membership Agreement, the matter should be dismissed in favor of arbitration. In response, the Plaintiff filed a Stipulation to Stay the Matter Pending Arbitration (hereinafter "Motion to Stay"), on January 8, 2013. On July 7, 2014, the Court granted the Plaintiff's Motion to Stay and ordered that the Plaintiff file her Demand for Arbitration with the American Arbitration Association (hereinafter "AAA"). According to the Plaintiff's response to the Court's order, the matter was referred to the AAA on June 24, 2014. (Plaintiff's Response dated 06/09/16.) Subsequently, the parties informed the Court that due to a disagreement regarding whether the Consumer or Commercial Rules of arbitration should govern the matter, the case had not been arbitrated. (Order dated 10/25/2016.)

STANDARD OF REVIEW

¶3 In *Cornwall* this Court determined that when a party files a motion to compel arbitration that the matter should be stayed rather than dismissed under Rule 12 or Rule 56.² In reaching this conclusion the Court acknowledged that traditionally the Virgin Islands would consider motions to compel arbitration under Rule 12 or 56 in accordance with the Supreme Court of the Virgin Islands' decision in *Martinez*.³ However, as the Court noted in *Cornwall*, *Martinez* was decided at a time when the Federal Rules of Civil Procedure governed in this jurisdiction.⁴ Moving forward by the time *Cornwall* was decided the Supreme Court of the Virgin Islands had promulgated the Virgin

² *Cornwall v. V.I. Indus. Maint. Corp.*, 2019 V.I. LEXIS 91 at **17,26 (V.I. Super. Ct. Aug. 26, 2019)("[N]either

³ *Cornwall*, 2019 V.I. LEXIS at **30; (quoting *Martinez v. Colombian Emeralds, Inc.*, 51 V.I. 174, 188 (V.I. 2009)("[M]otions seeking the dismissal of an action on the basis that arbitration is required are . . . considered under Federal Rules of Civil Procedure 12(b)(6) or 56.")).

⁴ *Cornwall*, 2019 V.I. LEXIS at **14.

Islands Rules of Civil Procedure. However, in spite of Rule 12 and 56 essentially mirroring Rule 12 and Rule 56 of the Federal Rules of Civil Procedure the Court in *Cornwell* determined that applying Rules 12 and 56 to a motion to compel arbitration would not be the best approach.⁵ The Court found that rather than questioning whether Rule 12 or Rule 56 would be the best approach for the jurisdiction the Supreme Court simply adopted the approach of the Third Circuit.⁶ However, after an exhaustive analysis the Court in *Cornwell*, determined that the best approach for the Virgin Islands would be to stay proceedings referred to arbitration rather than applying Rule 12 or 56 that would ultimately end further litigation.⁷ Moreover, the Court also found that despite there being no specific rule in the Virgin Islands Rules of Civil Procedure that governed motions to compel arbitration that the Virgin Islands law in accordance with V.I.R. Civ. P. 1-3(a), had already addressed the necessary showing to compel arbitration.⁸

¶4 Under Virgin Islands law, in order to compel arbitration a party must show that there is: (1) an agreement to arbitrate; and (2) an interstate nexus⁹, which the party moving to compel arbitration has the burden of proving.¹⁰ In considering a motion to compel arbitration, the court must first determine whether the parties agreed to arbitrate the issues before the court.¹¹ If the parties did not agree to arbitrate the issues before the Court then the Federal Arbitration Act (hereinafter “FAA”)

⁵ *Cornwall*, 2019 V.I. LEXIS at **30: (“*Martinez*, court did acknowledge some discomfort with the standard governing motions to compel arbitration, observing that a motion to stay pending arbitration is not included in the ambit of the Federal Rules of Civil Procedure 12(b)(6) . . . [a]nd federal courts have also struggled with finding the right fit.”)(citing *FCCI Ins. Co. v. Nicholas Cty. Library*, No. 5:18-cv-038-JMH, 2019 U.S. Dist. LEXIS 42156, *5-6 (E.D. Ky. Mar. 15, 2019).

⁶ *Cornwall*, 2019 V.I. LEXIS at **14.

⁷ *Cornwall*, 2019 V.I. LEXIS at **24; (citing *S.E. Res. Recovery Facilities Auth. v. Montenay Int’l Corp.*, 973 F.2d 711, 713 (9th Cir. 1992); *Manes Org., Inc. v. Standard Dyeing & Finishing Co.*, 472 F. Supp. 687, 689 (S.D.N.Y. 1979); *Crown Chrysler Jeep, Inc. v. Boulware*, 2015-Ohio-5084, ¶ 22 (Ct. App)).

⁸ *Cornwall*, 2019 V.I. LEXIS at **30.

⁹ *Cornwall*, 2019 V.I. LEXIS at **30: (quoting *Whyte v. Bockino*, 69 V.I. 749, 760-61(V.I. 2018)(“ Thus, a party seeking to compel arbitration must not only show than an agreement to arbitrate exists, but also show that the contract evidences an interstate nexus.” (citations omitted)).

¹⁰ *Cornwall*, 2019 V.I. LEXIS at **30; (quoting *Allen v. Hovensa, LLC*, 59 V.I. 430, 442 n.2 (V.I. 2013)(The party seeking to compel arbitration has the initial burden of proving the existence of a written contract calling for arbitration and proving that that contract evidences a transaction involving interstate commerce.”(quotation marks and citation omitted)).

¹¹ *Cornwall*, 2019 V.I. LEXIS at **30; See *Whyte II*, 69 V.I. at 763.

does not apply.¹² Nonetheless, if the court determines that the parties did agree to arbitrate, it must then be determined whether the parties contract has an interstate nexus.¹³ Whether a contract has an interstate nexus is a low burden and the movant party only has to show that the contract has an effect on interstate commerce.¹⁴ And only the economic activity of one of the parties needs to have an interstate commerce nexus.¹⁵ However, it is the contract that must have the interstate nexus not the nature of the parties business.¹⁶

¶5 In the present matter, the Defendant has filed a Motion to Dismiss and although it did not file a motion to compel arbitration its claim that the Complaint should be dismissed due to a lack of subject matter jurisdiction is based on its belief that the matter should be arbitrated. Therefore, the Court will treat it as a motion to compel arbitration. Moreover, notwithstanding the fact that the Defendant filed their Motion in 2016 when the Federal Rules of Civil Procedure were applicable, the Court will adopt its finding in *Cornwell* and apply the Virgin Islands law that addresses motions to compel.

DISCUSSION

¶6 According to the Defendant's Motion, the Plaintiff's Complaint is subject to arbitration pursuant to the valid Membership Agreement between the parties. (Mot. at 3.) In support of this assertion the Defendant has inserted the pertinent parts of the Membership Agreement into their Motion as well as attached the Membership Agreement in its entirety as Exhibit A. The Defendant further asserts that the Plaintiff admits that the claims arise from being a guest at the casino facilities and that prior to the incident Farrell voluntarily executed the Membership Agreement, therefore, accepting all contractual terms including the arbitration provisions. (*Id.*) Therefore, the Court

¹² *Cornwall*, 2019 V.I. LEXIS at **32.

¹³ *Id.*

¹⁴ *Cornwall*, 2019 V.I. LEXIS at **32; *See Whyte II*, 69 V.I. at 761.

¹⁵ *Id.*

¹⁶ *Id.*

should enforce the Membership Agreement. (*Id.*) Furthermore, the Defendant claims that in spite of the Plaintiff's contention regarding whether the Consumer Rules or the Commercial Rules should apply, the Membership Agreement states that the arbitrator will decide which rules apply. *See id.* at 8 (Agreement, Def. Mot. Exhibit A) ("The arbitrator will set rules of procedure and evidence consistent with this agreement and the Administrator's rules).

¶7 In opposition the Plaintiff claims that without knowing that the Defendant had failed to establish that the Membership Agreement had an interstate nexus she agreed to arbitration. (Opp'n. at 2.) However, the Membership Agreement does not have an interstate nexus because as a Virgin Islands resident being a member of a local club does not affect interstate commerce. (*Id.* at 8.) The Plaintiff further claims that the Defendant is demanding that the matter be arbitrated under the Commercial Rules, which has higher filing fees than the Consumer Rules. (*Id.* at 3.) This will result in the Plaintiff, as the initiating party, having to pay the high filing fees. *See id.* (Pls.' Opp'n. Exhibit at 5.) Therefore, the Defendant's claim is unconscionable because the Plaintiff cannot afford to pay the extraordinary fee that the Defendant is requiring. (*Id.*)

1. Agreement to Arbitrate

¶8 Both parties acknowledge that the Agreement between them is valid and includes a provision that requires the Plaintiff to arbitrate the issues before the Court. As it is undisputed that Farrell became a member of the Beachcomber's Gold Club and signed the Membership Agreement that allowed either party to elect to have their claims resolved by arbitration. (Def. Mot. to Dismiss dated 10/02/12.) The Plaintiff also concedes that following the Defendant's initial Motion to Dismiss rather than filing a response she filed a Stipulation to Stay and submitted a request for arbitration to the AAA. (Def. Mot. to Dismiss dated 10/02/12; Pl's Opp'n. Ex. 3, Pl's Stipulation to Stay Matter Pending Arbitration; Pl's Opp'n. Ex. 4, Pl's Letter Intake Coordinator of the AAA.) As such it is clear that the Plaintiff's claims are subject to arbitration.

¶9 However, the Plaintiff is claiming that the Defendant's request for arbitration is unconscionable because it is requesting that the matter be arbitrated under the Commercial Rules. The Court disagrees with this assertion. The Defendant has stated in its Motion that the arbitrator will determine which rules apply pursuant to the Membership Agreement. In addition, Rule R-1 of the Commercial Rules state "[a]ny disputes regarding which AAA rules shall apply shall be decided by the AAA."¹⁷ Moreover, the Consumer Rules state that "[t]he AAA has the initial authority to apply or not apply the Consumer Arbitration Rules."¹⁸ Therefore, it is the AAA who will determine which rules shall apply.

¶10 Furthermore, it is well established that in order for an arbitration agreement to be unenforceable due to unconscionability, it must be both procedurally and substantively unconscionable.¹⁹ Procedural unconscionability denotes the form of the agreement and the process by which the agreement is reached.²⁰ Traditionally, procedural unconscionability was present if the agreement constituted an adhesion contract.²¹ However, a contract being adhesive does not solely render it unconscionable.²² Substantive unconscionability requires the contract to have terms that unreasonably favor the stronger party, and to which the disfavored party does not truly assent.²³

¶11 In support of the Plaintiff's unconscionability claim she cites the Third Circuit Court decision in *Treasure Bay Virgin Islands Corp.*, where the court held that the arbitration provision was unconscionable because of the "possibility of the plaintiff having to pay the entire cost associated with the arbitration such that it would discourage her from filing a meritorious claim. Opp'n. at 10

¹⁷ AAA. Commercial Arbitration Rules (2016) rule R-1, p. 10.

¹⁸ AAA. Consumer Arbitration Rules (2016) rule R-1(e), p. 9.

¹⁹ *Canton v. Toyota Motor Corp.*, 2011 V.I. LEXIS 27 at *3 (V.I. Super Ct. April 20, 2011)(citing *Alexander v. Anthony Int'l, L.P.*, 341 f.d 256, 265 (3d. Cir. 2003).

²⁰ *Canton*, 2011 V.I. LEXIS at *3.

²¹ *Id.*

²² *Allen*, 59 V.I. at 440.

²³ *Canton v. Toyota Motor Corp.*, 2011 V.I. LEXIS 27 at *3 (V.I. Super Ct. April 20, 2011)(citing *Alexander v. Anthony Int'l, L.P.*, 341 f.d 256, 265 (3d. Cir. 2003).

(quoting *Hall v. Treasure Bay Virgin Islands Corp.*, 371 F. App'x 311, 313 (3rd Cir. 2010)).

However, the reasoning in *Hall* does not apply to the case at bar. In *Hall*, the court found that the “loser pays” provision and the “constraint” provision in the employment contract was unconscionable. Here, the Membership Agreement does not contain either provision. Rather, the Agreement in this case attempts to prevent potential unconscionability from being imposed on the Plaintiff by including a provision, which states that “[i]f you cannot afford the Administrator’s [AAA] fees or you believe they are too high, we will consider in good faith any reasonable written request for us to bear the cost.”²⁴ We will not ask you to pay or reimburse us for any fees”²⁵ Given this provision the Court finds that the arbitration agreement is not unconscionable and therefore enforceable.

2. Interstate Nexus

¶12 In *Le v. Treasure Bay VI Corp.*, this Court held that “irrespective of the applicability of the FAA, arbitration agreements are enforceable as a matter of Virgin Islands law”.²⁶ Further, the Court found that the Gold Club Membership Agreement did have an interstate nexus because the Resort Control Act of 1995, which the casino was developed pursuant to, states that “casino gaming . . . is . . . seen by this body as a cornerstone in the St. Croix tourism/entertainment market.”²⁷

¶13 The *Le* case is quite analogous to the case at bar because not only do the cases address the same claims, they also include the same Defendant²⁸ and Membership Agreement. In the *Le* case, the Plaintiff was also a Beachcomber’s Gold Club Member and had signed the Membership Agreement prior to her injury that occurred at the Defendant’s casino.²⁹ Therefore, it is only natural that the

²⁴ Agreement at 2.

²⁵ *Id.*

²⁶ *Le v. Treasure Bay VI Corp.*, 2017 V.I. LEXIS 35 at *7 (V.I. Super. Ct. Feb. 27, 2017)(quoting *Gov’t of the V.I. v. United Indus., Svc., Transp., Prof & Gov’t Workers of N.A.*, 64 V.I. 312, 330 (V.I. 2016)(“ . . . basic principle that parties are generally free to structure their arbitration agreement as they see fit and they may limit by contract the issues which they will arbitrate.”).

²⁷ *Le*, 2017 V.I. LEXIS at *7 n. 5; (quoting 32 V.I.C. § 40 1(b)(9)(“Casino gaming . . . is . . .

²⁸ *Treasure Bay Virgin Islands Corp.* is the parent company to Grapetree Shores, Inc.

²⁹ *Le*, 2017 V.I. LEXIS at *2.

Court shall reach the same conclusion here. Thus, the Defendant arbitration agreement is enforceable under Virgin Islands law, regardless of whether the FAA is applicable. Furthermore, the Membership Agreement does contain an interstate nexus as this Court has already determined in *Le*.

CONCLUSION

¶14 Accordingly, for the reasons stated above, the Defendant's Motion must be denied as this Court holds that cases shall be stayed rather than dismissed when referred to arbitration. As such, the matter shall be referred to arbitration given that the arbitration agreement is enforceable. An appropriate order follows.

DONE and so ORDERED this 25 day of October, 2019.

ATTEST:

Estrella H. George
Clerk of the Court

By:

Court Clerk Supervisor

Dated:


HAROLD W.L. WILLOCKS
Presiding Judge of the Superior Court