IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

BARRY WHYTE, Plaintiff, v. STEVE BOCKINO, JOSE LORENZO, WORLD FRESH MARKET, LLC d/b/a PUEBLO SUPERMARKET, Defendants.	)	CIVIL NO. SX-15-CV-83 ACTION FOR DAMAGES JURY

MEMORANDUM OPINION and ORDER

THIS MATTER is before the Court on Defendants' Motion to Compel Arbitration, filed August 10, 2016; Plaintiff's Opposition to Motion to Compel Arbitration, filed September 7, 2016; Defendants' Reply to Opposition to Motion to Compel Arbitration, filed October 13, 2016. Also pending are Defendants' Motion to Stay Pending Arbitration, filed September 19, 2016; and Plaintiff's Response to Motion to Stay Pending Arbitration, filed December 6, 2016. For the reasons discussed below, Defendants' Motion to Compel Arbitration will be granted, and Defendants' Motion to Stay Pending Arbitration will be denied, as moot. Because the Court concludes that all claims herein must be referred to mandatory, binding arbitration, and there is no further action to be taken by the Court, discretionary dismissal of the action is preferable to a stay pending the conclusion of arbitration, and Plaintiff's Complaint will be dismissed.

Background

Plaintiff was hired by World Fresh Market, LLC (Pueblo) in September 2013 as an Assistant Store Manager at the Villa La Reine store. Complaint and Answer, ¶ 6. In January 2014, Plaintiff was transferred to the Golden Rock store to become the Acting Store Manager. *Id.* ¶ 7. Six months later, on August 10, 2014, Plaintiff was transferred back to the Villa La Reine store as Manager. *Id.* ¶ 11 Plaintiff was terminated from his employment October 30, 2014. *Id.* ¶¶ 39, 45. Plaintiff's employment with Pueblo was governed by an Employment Contract, which included an arbitration provision wherein the parties agreed as follows:

> The parties knowingly and voluntarily waive any and all rights to judicial intervention in favor of the procedures contained herein. Accordingly, any dispute, controversy or claim between the Company and the Employee (or against any representative of the other) whether related to this Contract or otherwise, and any dispute or claim related to the relationship or duties contemplated hereunder, including the validity of this clause (a "Dispute") will be resolved as set forth in

> this section. Each party will give written notice to the other party of any Dispute claimed by it. Promptly following delivery of such notice, a representative of each party will meet and will be obligated to attempt in good faith to resolve the Dispute. If within thirty (30) days following the receipt of notice of a Dispute, the Dispute has not been resolved, the parties agree that such Dispute will be resolved solely and exclusively by binding arbitration at the request of any party upon written notice to the other. Either party may file a written request to initiate proceedings with the American Arbitration Association ("AAA") at any regional office of the AAA, or with the International Center for Dispute Resolution, within the time limit established by the applicable statute of limitations. If no applicable statute of limitations, the time limit to file is sixty (60) days from the event which forms the basis of the claim. For the purposes of limitations, the event forming the basis of a claim is any Dispute under this Contract.... The arbitration will be governed by the United States Arbitration Act, 9 U.S.C. §§ 1-16 to the exclusion of any provision of state or territorial law inconsistent therewith or which would produce a different result. A single, neutral arbitrator will determine the Dispute of the parties and render a final award in accordance with the applicable substantive law. The parties agree that all matters of substantive and procedural arbitrability shall be decided exclusively by arbitration....

Employment Contract, ¶ 12.

Plaintiff's Complaint alleges three counts: tortious interference by his supervisors, Defendants Jose Lorenzo and Steve Bockino, with his employment with Pueblo; breach by Pueblo of the implied contractual duty of good faith and fair dealing; and defamation *per se* by all Defendants. Complaint ¶¶ 50-60.

Legal Standard

When ruling on a motion to compel arbitration under the Federal Arbitration Act (FAA) the merits of the underlying claims are not considered. Courts have consistently interpreted the FAA as instituting a policy that favors dispute resolution through arbitration. *Daniel v. Treasure Bay V.I. Corp.*, 62 V.I. 423, 425-426 (V.I. Super. Ct. 2015) (collecting cases). Further, the "primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms." *Id.* at 427, n.5 (citations omitted). To determine whether a dispute may be arbitrated, the Court must determine: (1) whether an arbitration provision is present in a valid contract; (2)

whether the particular dispute falls within the scope of that agreement. *Valentin v. Grapetree Shores*, 2015 V.I. LEXIS 76, at *2 (V.I. Super. Ct. 2015).[1]

Discussion

Defendants contend that Plaintiff's Employment Contract with World Fresh Market, LLC, signed September 20, 2013, "mandates that 'any dispute, controversy or claim between the Company and the Employee (or against any representative of the other), whether related to this Contract or otherwise' be arbitrated by the American Arbitration Association." Motion ¶¶ 1-2 (citing Employment Contract, ¶ 12). Defendants also contend that they have not waived their right to compel arbitration and that arbitration provisions are enforceable in the Virgin Islands. *Id.* ¶¶ 3-4 (citing *Allen v. HOVENSA, LLC*, 59 V.I. 430 (V.I. 2013)).

Conversely, Plaintiff argues that (1) the Employment Contract upon which Defendants rely is invalid because it has expired; (2) even if the Employment Contract were valid, Defendants failed to file for arbitration within 60 days as required by the terms of the Contract; (3) Defendants waived arbitration by failing to assert it as an affirmative defense; and (4) Plaintiff would be prejudiced if forced to arbitrate because the parties have participated significantly in the litigation to this point. Opposition, at 1. Plaintiff also avers that because the parties' Employment Contract does not indicate that Plaintiff's employment involved interstate commerce, Defendants may not move to compel arbitration under the provisions of the Federal Arbitration Act. *Id.*

<u>Contract Expiration</u>

Specifically, Plaintiff argues that the Employment Contract cannot apply because it expired on September 30, 2014, while Plaintiff was terminated on October 30, 2014, and that neither he nor Defendants sought to extend the provisions of the Employment Contract, including the agreement to arbitrate disputes. Opposition, at 4-5. Further, Plaintiff argues that because he had been promoted from Assistant Manager at the La Reine store, his position pursuant to the Employment Contract, to store Manager at a different store, the provisions of the Contract no

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[1] The Supreme Court of the Virgin Islands has expressed reservations concerning the application of the FAA to disputes in the Virgin Islands. *See Gov't of the V.I. v. United Indus., Svc., Transp., Prof. & Gov't Workers of N.A.*, 64 V.I. 312, 321 n.3 (V.I. 2016) (quoting *Allen v. Hovensa, L.L.C.*, 59 V.I. 430, 443 n.2 (V.I. 2013)). The Supreme Court expressed its reservations and questioned the applicability of the FAA; however, in both cases the Court expressly declined to decide the issue. *Allen,* 59 V.I. at 443 n.2 ("since Allen's claim fails regardless of whether section 2 of the FAA preempts the VIWCA, we need not make this determination for the first time on appeal"); *United Indus., Svc.*, 64 V.I. at 321 n.3 ("because the result would remain the same regardless of whether the FAA is applicable to this case, we decline to reach the issue as part of this appeal"). *See* discussion *infra,* Interstate Commerce, p. 8.

longer applied. *Id.* at 4. Plaintiff argues that since a demotion is a considered a termination from a previously held position, his promotion herein must likewise be considered a termination from his previously held position, such that the Employment Contract was effectively terminated. *Id.* at 5-6 (citing *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 286 (1946)).

The "law compels a party to submit his grievance to arbitration only if he has contracted to do so." *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 200 (1991) (quoting *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 374 (1974)). In *Litton*, the Supreme Court clarified that in the context of a collective bargaining agreement, a "postexpiration grievance can be said to arise under the contract only where it involves facts and occurrences that arose before expiration, where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement." 501 U.S. at 205-206.

> [I]f a collective bargaining agreement provides in explicit terms that certain benefits continue after the agreement's expiration, disputes as to such continuing benefits may be found to arise under the agreement and so become subject to the contract's arbitration provisions.... We presume as a matter of contract interpretation that the parties did not intend a pivotal dispute resolution provision to terminate for all purposes upon the expiration of the agreement."

Id. at 207-8.

Here, as in *Litton,* the Employment Contract in question contains a broad arbitration clause. The Employment Contract further states:

> SURVIVAL: Notwithstanding any termination of Employee's employment under this Contract, Employee shall remain bound by the provisions of Sections 7, 8 and 12 hereof [Non-Disclosure; Confidentiality; Non-Competition; and Arbitration provisions] to the extent provided herein.

Employment Contract, ¶ 14.

Here, the dispute giving rise to the grievance did not occur prior to the expiration of the term of the Employment Contract, as Plaintiff was terminated on October 30, 2014, after the September 30, 2014 expiration of the Contract term. The Court therefore examines whether "under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement." 501 U.S. at 206.

The arbitration provision of Plaintiff's Employment Contract with Pueblo requires binding arbitration of all disputes of Plaintiff against Pueblo and "against any representative of the other." That is, the dispute resolution clause of the Employment Contract covers Plaintiff's claims against

Pueblo and its representatives Steve Bockino and Jose Lorenzo, both of whom are sued for their actions taken on behalf of Pueblo. As also noted, the plain terms of ¶ 14 of the parties' Employment Contract requires that "Notwithstanding any termination of Employee's employment under this Contract, the Employee shall remain bound by the [Arbitration] provisions..." As such, by that plain language, Plaintiff's Contract with Pueblo requires that his dispute with all three Defendants be resolved by arbitration. Even if the plain language of the Contract did not end the inquiry and require arbitration of Plaintiff's dispute against all Defendants, the parties' conduct suggests that the terms of the Employment Contract survived the September 30, 2014 conclusion of the Contract term.

"An agreement is a 'promise that is either stated in oral or written words (express contract), or a promise that can be inferred wholly or partially by conduct (implied contract).'" *Mosley v. Penn*, 2016 V.I. LEXIS 138, at *7, n.19 (V.I. Super. Ct. 2016) (quoting *Peppertree Terrace v. Williams*, 52 V.I. 225, 241 (V.I. 2009)). "An implied-in-fact contract is a true contract and means that the parties had a contract that can be seen in their conduct rather than in an explicit set of words." *Carlos Warehouse v. Thomas*, 64 V.I. 173, 191 (V.I. Super. Ct. 2016).

In the context of Plaintiff's employment, Plaintiff notes frequent changes in his employment from one location to another, and changes in his position and title during the Contract term. These changes were accomplished without evidence of negotiations or any modification to the Employment Contract. This continuity, together with the simple fact that the employment relationship continued after September 30, 2014, suggests that the Employment Contract remained in place controlling the relationship of the parties despite Plaintiff's changes in roles, responsibilities, job titles, store locations, level of pay and the passing of the expiration date of the Contract term. *See, e.g., Neely v. Crown Solutions Co., LLC*, 2013 U.S. Dist. LEXIS 162958, at *28-29 (S.D. Ohio 2013) ("it is a widely accepted principle that when an agreement expires by its terms, if, without more, the parties continue to perform as therefore an implication arises that they have mutually assented to a new contract containing the same provisions as the old") (citations omitted).

Here, by their actions, the parties mutually assented to the continuation of the terms of their Employment Contract after the nominal passing of the term on September 30, 2014.

Waiver

Plaintiff argues that Defendants have waived any right to arbitration under the Employment Contract on three grounds: by failing to file their request for arbitration with the American Arbitration Association within "sixty (60) days from the event which forms the basis for the claim" (Employment Contract ¶ 12); by failing to assert their right to arbitration as an affirmative defense in their Answer pursuant to Fed. R. Civ. P. 8; and by failing to assert a right to arbitration until after the parties had participated significantly in the litigation to date, to the prejudice of Plaintiff.

Plaintiff's first claim is defeated by a plain reading of the language of the Employment Contract. "Either party may file a written request to initiate proceedings with the American Arbitration Association... within the time limit established by the applicable statute of limitations." *Id.* The 60 day filing deadline referenced by Plaintiff controls where there is "no applicable statute of limitations." *Id.*

The three counts of Plaintiff's Complaint allege the intentional torts of tortious interference with Plaintiff's employment and defamation, as well as a claim for breach of contract. The statute of limitations for the tort claims is two years (5 V.I.C. § 31(5)(A)), and the statute of limitations for Plaintiff's breach of contract claim is six years (5 V.I.C. § 31(3)). By his Complaint, Plaintiff asserts that Defendants' actions giving rise to his claims occurred between October 9 and October 30, 2014. Defendants' Motion to Compel arbitration was filed herein on August 10, 2016, within the limitations period for all of Plaintiff's claims.

Plaintiff also claims that Defendants waived the right to arbitration by failing to assert the same affirmatively in their Answer, pursuant to Fed. R. Civ. P. 8. However, ample persuasive case law stands for the proposition that the "defense set forth in Rule 8(c)(1) is not that the claim should be arbitrated rather than adjudicated in court; it is that the claim has already been resolved by an award in arbitration." *Hill v. Ricoh Ams. Corp.*, 603 F.3d 766, 771 (10th Cir. 2010) (citing *Forms, Inc. v. Am. Standard, Inc.*, 550 F. Supp. 556, 557 (E.D. Pa. 1982) (party seeking arbitration did not waive its right to arbitrate by not raising it as a defense in its answer), *aff'd*, 725 F.2d 667 (3d Cir. 1983) (unpublished table decision); *Mapes v. Chevron USA Prods Co.*, 237 F. Supp. 2d 739, 745 (S.D. Tex. 2002) (same); *Lee v. Grandcor Med. Sys., Inc.*, 702 F.Supp. 252, 254 (D. Colo. 1988) (same); 5 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 1270 at 562 (3d ed. 2004) (arbitration-and-award provision in Rule 8(c)(1) applies only if "the dispute has already been resolved by an arbitration and award").

Because the parties' dispute has not yet be resolved by arbitration, the "arbitration and award" affirmative defense reference in Federal Rule 8(c)(1) is inapplicable, and Plaintiff's claim that Defendants have waived their right to arbitration on this ground fails.

Finally, Plaintiff claims that Defendants have waived the right to arbitrate this dispute on account of the prejudice to Plaintiff occasioned by Defendants delay in asserting the right until after the parties had participated significantly in the litigation. The lawsuit was filed February 26, 2015. Defendants filed their Motion to Compel arbitration on August 10, 2016. During that period, the parties exchanged initial disclosures, stipulated to a discovery plan and scheduling order and Plaintiff initiated preliminary written discovery, to which Defendants did not respond. In January 2016, Defendants filed a stipulation for substitution of counsel.

In *Allen,* the Supreme Court addressed the issue of waiver by participation in litigation. "A party waives the right to compel arbitration when it delays invoking the right and prejudice results from the delay. *See*, *e.g.*, *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 926-27 (3d Cir. 1992) ('A determination of prejudice… relevant to a finding of waiver… incorporates not only the timeliness or lack thereof of a motion to arbitration but also [, *inter alia*,] … the extent to which both parties have engaged in discovery' (citations omitted)). Thus, '"[m]erely answering on the merits… or participating in discovery, without more, will not necessarily constitute a waiver"' of arbitration; for a waiver to occur, the party must have 'engaged in extensive discovery' or sought a judicial disposition on the merits, such as by filing a motion to dismiss for failure to state a claim. *Id.* at 925 (quoting *Gavlik Constr. Co. v. H.F. Campbell Co.*, 526 F.2d 777, 783 (3d Cir. 1975))." *Allen v. HOVENSA*, 59 V.I. at 437.

The Supreme Court noted in *Allen* the defendant's "failure to file a motion to compel arbitration for approximately two years. Nevertheless, delay alone does not constitute sufficient prejudice to support waiver. Rather, the party opposing arbitration bears the burden to show how the delay resulted in prejudice. In other words, prejudice is the touchstone for determining whether the right to arbitrate has been waived.... Waiver is not favored. " *Id.* 59 V.I. at 437-38 (citations and internal quotations omitted).

Plaintiff's submissions fail to show how the delay in Defendants' assertion of the contractual arbitration clause has resulted in prejudice to him. Although Plaintiff initiated and moved to compel Defendants' responses to written discovery, Defendants filed the pending Motions rather than responding to discovery. Defendants have not filed a motion to dismiss or other dispositive motion, and the litigation had not been fully engaged by the time Defendants filed their Motions. Accordingly, Plaintiff's arguments that Defendants have waived their right to seek arbitration on this basis must fail.

Interstate Commerce

Plaintiff argues that the FAA does not apply because Defendants' Motion to Compel Arbitration failed to allege that the nature of Plaintiff's employment with Pueblo involved interstate commerce. Opposition, at 15. The Supreme Court of the Virgin Islands has expressed reservations concerning the applicability of the FAA to disputes in the Virgin Islands. Yet, this Court has ruled that binding precedent of the Third Circuit in *Gov't of the V.I. v. United Indus. Workers, N.A.* 169 F.3d 172, 173 (3d Cir. 1999) ("the provisions of the FAA and the standards developed by our jurisprudence in reviewing arbitrations under the FAA are enforceable in the Territorial Court") mandates the applicability of the FAA in the Superior Court. *See Prentice v. Seaborne Aviation*, 2016 V.I. LEXIS 127, at *9, n.2 (V.I. Super. Ct. 2016) (citing *Najawicz v. People of the V.I.*, 58 V.I. 315, 327-28 (V.I. 2013) (explaining that Third Circuit decisions in which that court was sitting as the "*de facto* court of last resort in the Virgin Islands" are binding upon the Superior Court even though they would only represent persuasive authority if the Supreme Court of the Virgin Islands were to consider the issue).

The reach of the FAA is coextensive with the full breadth of Congress' regulatory powers under the Commerce Clause. *United Indus. Workers, N.A.*, 169 F.3d at 176. The "only arbitration agreements not governed by the FAA are those so devoid of any connection to interstate commerce that they would fail to withstand scrutiny even under the expansive interpretation of Congressional regulatory power that has defined Commerce Clause jurisprudence for nearly 75 years." *Prentice v. Seaborne Aviation*, 2016 V.I. LEXIS 127, at *18.

Here, Plaintiff's Employment Contract with Pueblo concerned his management position in a supermarket that sells all types of food and grocery products. The Court judicially notices that the products sold in the Pueblo stores in the Virgin Islands where Plaintiff was employed are generally not grown or produced in the Virgin Islands, but rather are imported to the stores via container ship. As such, the parties' Employment Contract pursuant to which Plaintiff managed Pueblo's stores clearly evidences a significant nexus with interstate and potentially international commerce sufficient to invoke the application of the FAA.

Conclusion

The Court concludes that the Employment Contract's mandatory arbitration clause is enforceable and that Plaintiff's claims must be resolved in arbitration. By its Motion to Stay Pending Arbitration, Pueblo seeks a stay of this action in accordance with Section 3 of the FAA.[2] By its terms, however, that section applies only to actions "brought in any of the courts of the United States;" and therefore, it is one of the provisions of the FAA that does not apply in state and territorial courts. *See Martinez v. Colombian Emeralds, Inc.*, 51 V.I. 174, 237 (V.I. 2009).

Here, as all of Plaintiff's claims are referred to mandatory arbitration there remains no action to be taken in or by this Court with regard to Plaintiff's action against Defendants. This Court has previously analyzed and determined that "the best policy for the Virgin Islands is to permit discretionary dismissal of actions in which *all* claims have been referred to mandatory, binding arbitration. *Prentice v. Seaborne Aviation*, 2016 V.I. LEXIS 127, at *30 (emphasis in original); *see id.,* generally at *22 – 31. Because Plaintiff must seek his relief exclusively in arbitration, there is no further controversy over which the Court need retain jurisdiction and therefore Plaintiff's Complaint will be dismissed.

On the basis of the foregoing, it is hereby

ORDERED that Defendants' Motion to Compel Arbitration is GRANTED. It is further,

ORDERED that Defendants' Motion to Stay Pending Arbitration is DENIED, as moot. It is further

ORDERED that Plaintiff's Complaint is DISMISSED with prejudice; and Plaintiff may file his written request to initiate arbitration proceedings with the American Arbitration Association in accordance with the Employment Contract of the parties.

Dated: January 26, 2017

DOUGLAS A. BRADY, JUDGE

ATTEST: ESTRELLA GEORGE
Acting Clerk of the Court

By: ______________________
Court Clerk Supervisor

1/26/17

[2] "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 such 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.

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

IN RE:	)	
	)	**MISC NO. DAB012/2018**
ORDER DESIGNATING CERTAIN	)	
OPINIONS FOR PUBLICATION.	)	

TO: Clerk of the Court
Counsel of Record
Law Library / LexisNexis / Westlaw

ORDER

THE PREMISES considered, it is hereby

ORDERED that the following memorandum opinions issued in the below listed cases are hereby designated FOR PUBLICATION.

Pappas v. Hotel on the Cay Time-Sharing Ass'n, Inc., opinion dated April 27, 2015;
Estate of Burnett v. Kazi Foods of the V.I., SX-12-CV-139; opinion dated May 24, 2016;
FirstBank of Puerto Rico v. Prosser, SX-09-CV-520, opinion dated June 22, 2015;
James v. Guardian Insurance Company, SX-10-CV-435, opinion dated July 14, 2015;
Nurse v. Parris, SX-14-CV-011, opinion dated May 3, 2016;
Charles v. Arcos Dorados USVI, Inc., SX-13-CV-336, opinion dated August 18, 2016;
McGary v. J.S. Carambola, LLP, SX-13-CV-289, opinion dated October 7, 2016;
Whyte v. Bockino, SX-15-CV-083, opinion dated January 26, 2017;
Chiverton v. World Fresh Market, LLC, SX-10-CV-575, opinions dated March 10 & 28, 2017;
People v. Melendez, SX-16-RV-003, opinion dated March 22, 2017;
Edwards v. Hess Oil V.I. Corp., SX-15-CV-382, opinion dated June 28, 2017;
In re: Red Dust Claims, SX-15-CV-620, *et seq.*, opinion dated July 7, 2017;
Hamed v. Yusuf, SX-12-CV-370, *et seq.*, opinions dated July 21, 2017 and March 14, 2018;
Toutouyoute v. St. Croix Trading Co., Inc., SX-16-CV-457, opinion dated May 31, 2018.

Finally, it is ORDERED that a copy of this Order be served on counsel for the parties in the above-captioned cases (or the party if proceeding *pro se*), be filed in each of above-captioned maters, and forwarded to the Law Library for distribution to LexisNexis and Westlaw, FORTHWITH.

Dated: October 1, 2018.

DOUGLAS A. BRADY, JUDGE

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court
By:
Court Clerk Supervisor 10/1/18