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

RAMONA LOPEZ, **Plaintiff,** **vs.** **RENAISSANCE ST. CROIX CARAMBOLA BEACH RESORT & SPA AND JS HOSPITALITY LLC, D/B/A CARAMBOLA BEACH RESORT,** **Defendants.**	**SX-16-CV-381** **ACTION FOR WRONGFUL DISCHARGE, AGE DISCRIMINATION, RETALIATION, AND DAMAGES** **JURY TRIAL DEMANDED** *Cite as: 2019 VI SUPER 6*

FOR PUBLICATION

Appearances:

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For Defendant

MEMORANDUM OPINION

WILLOCKS, Administrative Judge.

THIS MATTER is before the Court on Defendant Renaissance St. Croix Carambola Beach Resort & Spa's (hereinafter "Renaissance") Amended Motion to Dismiss and Motion for Referral to Arbitration (collectively "Amended Motion") filed on April 3, 2018. Plaintiff Ramona Lopez (hereinafter "Lopez") filed a response (hereinafter "Opposition") on May 2, 2018, and

2019 VI SUPER 6

Renaissance replied (hereinafter "Reply") on May 16, 2018. Defendant JS Hospitality LLC, d/b/a Carambola Beach Resort (hereinafter "JS Hospitality") did not join Renaissance's Amended Motion and has not appeared in these proceedings.

BACKGROUND

Lopez was employed as a Loss Prevention Officer for Renaissance's resort property from 2007 until June 3, 2014. (Compl. ¶¶ 8,10). Though Lopez's Complaint does not specifically allege whether she worked for Renaissance or JS Hospitality, her employment agreement, titled "Hourly Employment Agreement" (hereinafter "Agreement"), was executed with JS Hospitality. Additionally, Renaissance refers to JS Hospitality as its former property manager. (*See* Amended Mot. ¶ 2.)

Lopez states that in 2010 she sustained a work-related injury and "as a result was on Workman's Compensation and unable to work for six months." (Compl. ¶12). From 2013 through 2014, she allegedly sought medical treatment for a second injury that aggravated the first. (*Id.* ¶¶ 13-14.) During this time, she was periodically absent from work while receiving treatment. (*Id.*) Lopez claims that she notified the Defendants about her ongoing treatments and her doctor's recommendation that she be provided "with an alternate schedule in order to properly accommodate her while she was employed, due to her injury," but the Defendants "ignored it." (*Id.* ¶¶ 15-16). Lopez did not wish to take medical leave from work. (*See id.* ¶ 21.)

Lopez ultimately claims that her employment was terminated, and that the termination was wrongful, discriminatory, and retaliatory because it came in response to her age, race, injuries and refusal to take medical leave. (*Id.* ¶¶ 11, 17-24). The Complaint was filed against Renaissance and JS Hospitality on June 28, 2016, claiming no less than $400,000 in damages. (*See generally id.*)

2019 VI SUPER 6

At first, neither Defendant appeared in this action. Then, on September 29, 2016, Renaissance filed a Motion for Extension of Time to File Responsive Pleading. Renaissance failed to meet its requested deadline of October 10, 2016, and instead filed a Motion to Dismiss (hereinafter "2016 Motion") on November 4, 2016, accompanied by a Motion for Leave to File Responsive Pleading Out of Time. The Motion for Extension of Time was unopposed and granted by the Court.

The 2016 Motion alleged that Lopez's Complaint was deficient for failure to state a claim. (2016 Mot. 2-6.) However, the Amended Motion, filed April 3, 2018, which is the basis of this opinion states only compulsory arbitration as its grounds for dismissal. In essence, the Amended Motion abandons the original claim of deficient pleading for an entirely new argument. The Court, therefore, deems the assertions of the 2016 Motion withdrawn and will rule only on the issue of arbitration.

DISCUSSION

In the Amended Motion, Renaissance argues that Lopez signed the Agreement, which requires arbitration of all controversies arising from her employment with JS Hospitality. (Amended Mot. 2.) Renaissance also argues that Lopez's claims in this matter relate solely to her employment and are therefore subject to mandatory arbitration pursuant to the Federal Arbitration Act. (*Id.* at 3-4.)

In contrast, Lopez claims that the arbitration clause in the Agreement is not binding for disputes involving Renaissance because "[n]owhere in the document, nor…in the [Amended] Motion…is there an explanation as to how it is that the agreement is binding between Ramona

2019 VI SUPER 6

Lopez and Defendant Renaissance." (Opp'n 3-4.) Lopez further argues that, because Renaissance is not a party to the Agreement, it cannot seek to enforce its provisions. (Opp'n 3-4.)

In the alternative, Lopez argues that the arbitration provision in the Agreement is void because Renaissance, even if it has the right to enforce the Agreement, has breached the contract and violated JS Hospitality's Equal Employment Policy and Non-Harassment Policy, which are incorporated into the Agreement in paragraph 8[1]. (Opp'n 6.) Lopez claims that the Defendants' misrepresentations of a nondiscriminatory work environment void the entire contract. (Opp'n 6-7.)

I. The FAA Applies to Employment Agreements with an Interstate Nexus

In a recent decision, the Supreme Court of the Virgin Islands determined that the Federal Arbitration Act (hereinafter "FAA")—which generally requires the enforcement of arbitration agreements[2]—applies to the Virgin Islands, either "through the Territorial Clause or the Commerce Clause" if the party seeking to compel arbitration can demonstrate that the agreement to arbitrate has an interstate nexus. *Whyte v. Bockino*, S. Ct. Civ. No. 2017-0024, ___ V.I. ___; 2018 V.I. Supreme LEXIS 25, *19 (V.I. Aug. 29, 2018).

An "interstate nexus" means a "transaction involving commerce." *Allen v. Hovensa, L.L.C.*, 59 V.I. 430, n. 2 (2013). The burden to prove an interstate nexus is very low. *Whyte*, 2018 V.I. Supreme LEXIS at*17 (citations omitted). For a court to find such a nexus, "the parties' agreement need not be *in* interstate commerce nor have a ***substantial*** effect on interstate commerce...." *Id.* (citations omitted). Rather, "the contract between the parties need only 'affect[]

[1] "You and JS Hospitality agree to abide by all terms of the JS Hospitality's Equal employment [sic] Policy and Non-Harassment Policy." Agreement ¶ 8.
[2] *See* Federal Arbitration Act, 9 USC §1 et seq. (2012).

2019 VI SUPER 6

interstate commerce,'" such as where the economic activities of at least one of the parties demonstrates a nexus to interstate commerce." *Id.* (citations omitted).

Under the Commerce Clause, Congress has the power to regulate the channels, instrumentalities, and "activities having a substantial relation to interstate commerce." *United States v. Morrison*, 529 U.S. 598, 609 (2000) (citations omitted). This includes establishments such as restaurants and hotels. *See Katzenbach v. McClung*, 379 U.S. 294 (1964) (noting that the regulation of restaurants offering food moved in interstate commerce falls under Congress' Commerce Clause power); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 248 (1964) (finding that discrimination by hotels is impermissible because "'any inn, hotel, or other establishment which provides lodging to transient guests' affects commerce *per se*" under the Commerce Clause).

In the present case, JS Hospitality hired Lopez as a security person and the Agreement states that "regardless of [her] classification, [she] will perform any work assignments related to the business of the Carambola Beach Resort...." (Agreement § 1.) The Agreement also states that "duties shall be rendered at the Resort and at such other place or places as JS Hospitality shall designate." (Agreement § 2.) An interstate nexus exists in the fact that Lopez worked at the Carambola Beach Resort, an entity engaged in the business of traveler hospitality. (*See* Opp'n 2.) Such an entity is undoubtedly engaged in interstate commerce, at least minimally, by enticing guests from out of the territory and importing many of the goods required for its daily functioning, such as linens, food, etc. Consequently, the FAA applies to this case because the Agreement demonstrates an interstate nexus.

Furthermore, it is apparent from the plain language of the Agreement that the claims made by Lopez against Renaissance and JS Hospitality—all of which are work-related, and include wrongful discharge, age discrimination, and retaliation—fall under its arbitration provisions.[3]

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[3] The arbitration provisions read as follows:

> 10. **Arbitration** Subject to the provisions of paragraph 9, any controversy or claim by you [Lopez] or JS Hospitality against each other relating to your employment by JS Hospitality will be resolved by [sic] exclusively by arbitration, including, without limitation, all controversies or claims arising out of or relating in any way to (i) this Agreement, (ii) the breach of this Agreement, (iii) your employment with JS Hospitality, or to the suspension or termination of your employment with JS Hospitality, or (iv) your presence of JS Hospitality's presence at the Resort, including claims by you against JS Hospitality, its shareholders, partners, owners, or subsidiary or parent or affiliated companies, and its or their officers, directors, employees, and agents (all of the foregoing shall be collectively referred to as "JS Hospitality" for purposes of section 11-15) [sic] Judgment on the award rendered mayh [sic] be entered in any court having jurisdiction over the matter. You and JS Hospitality agree that your sole remedy for any controversy or claim arising out of or in any way relating to (1) this Agreement; (2) to the breach of this Agreement; (3) to your employment with JS Hospitality or to the suspension or termination of your employment with JS Hospitality; (4) and/or your presence at the Resort shall be in accordance with the terms of this Agreement.
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> 11. **Matters Arbitrable** All claims or matters arising out of or relating in any fashion to this Agreement, to the breach of this Agreement, or to your dealings with JS Hospitality, your employment or the suspension or termination of your employment with JS Hospitality shall be considered arbitrable. Arbitrable matters include, but are not limited to, claims arising under the following:
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> a) The Civil Rights Act of 1866, 42 U.S.C. §1981;
> b) The Civil Rights Act of 1871, 42 U.S.C. §1983;
> c) The Civil Rights Act of 1964, 42 U.S.C. §2000e;
> d) The Civil Rights Act of 1991, P.L. 102-166;
> e) The Age Discrimination in Employment Act, 29 U.S.C. §621
> f) The Equal Pay Act, 29 U.S.C. §206 [sic]
> g) The Americans with Disabilities Act, 42 U.S.C. §12101;
> h) The Family and Medical Leave Act, 29 U.S.C. §2601;
> i) The Fair Labor Standards Act, 29 U.S.C. §201;
> j) Any provisions of Titles 10 and 24 of the Virgin Islands Code, including without limitation provisions dealing with wrongful or retaliatory discharge or wrongful or discriminatory treatment under Virgin Islands law, including without limitation the Wrongful Discharge Act, 24 V.I. Code §76;
> k) Any other law of the United States or the Virgin Islands prohibiting employment discrimination or retaliation or otherwise making any employment action unlawful;
> l) Tort law, including without limitation claims against JS Hospitality or you (or any other person with whom either party has agreed to arbitrate under the terms of this agreement) for personal injury and/or bodily injury of any nature, defamation, and intentional infliction of emotional distress;
> m) This Agreement or any other contract; and
> n) Any law or regulation affecting JS Hospitality's right to discipline, promote, demote, or terminate the employment of you.
> o) The issue of arbitrability of any claim or dispute.
>
> ...

2019 VI SUPER 6

As such, the FAA is applicable to this particular case because there is an interstate nexus found in the Agreement as well as arbitration provisions that apply to the claims brought by Lopez.

II. An Arbitration Provision in an Employment Contract May be Enforced by an Intended Third-Party Beneficiary

Although the FAA applies to the Agreement, it is a separate question whether the arbitration provisions may be enforced by a third-party like Renaissance. Contracts may generally only be enforced by the executing parties.[4]

On this topic, Section 302 of the Restatement (Second) of Contracts states:

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
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> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
>
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

It follows, therefore, that when an intended third-party beneficiary can enforce a contract, the third-party beneficiary can also enforce an arbitration provision in a contract if the executing parties so intended as to that *specific* provision.

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12. **Procedure For Arbitration** Arbitration shall take place pursuant to the Federal Arbitration Act and in accordance with the Rules governing arbitration set forth by the National Rules for the Resolution of Employment Disputes of the American Arbitration Association, as they shall be amended from time to time.

[4] *See e.g., Petrus v. Queen Charlotte Hotel Corp.*, 56 V.I. 548 (V.I. 2012) (stating that "[n]ormally, only a promise under a contract can sue to enforce its promises.") (citation omitted).

However, as the Supreme Court of the Virgin Islands has stated, courts may not give "mechanistic and uncritical reliance [to] the Restatements." *Gov't of the Virgin Islands v. Connor*, 60 V.I. 597, 2014 V.I. Supreme LEXIS 17 ** (V.I. S. Ct. 2014) (citing *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967, 2011 V.I. Supreme LEXIS 46 ** (S. Ct. 2011).

> [T]he Superior Court, when considering a question not foreclosed by prior precedent from this Court, must perform a three-part analysis as set forth in *Banks*. The first step in the analysis — whether any Virgin Islands courts have previously adopted a particular rule — requires the Superior Court to ascertain whether any other local courts have considered the issue and rendered any reasoned decisions upon which litigants may have grown to rely. The second step — determining the position taken by a majority of courts from other jurisdictions — directs the Superior Court to consider all potential sides of an issue by viewing the potentially different ways that other states and territories have resolved a particular question. Finally, the third step in the *Banks* analysis — identifying the best rule for the Virgin Islands — mandates that the Superior Court weigh all persuasive authority both within and outside the Virgin Islands, and determine the appropriate common law rule based on the unique characteristics and needs of the Virgin Islands. *Connor*, 60 V.I. at 603, 2014 V.I. Supreme LEXIS at *8-9 (citations omitted).

A. *Virgin Islands Precedent*

In reviewing the decisions of the courts of our jurisdiction—the Supreme Court, Superior Court, District Court, and even the Third Circuit (prior to the autonomy of the Supreme Court of the Virgin Islands)—only a few cases addressing the above-issue are to be found. In general, these cases relate to the enforcement of an insurance contract by the designated insurance beneficiary, but the legal framework is sufficiently analogous to apply it to contracts in general.[5] Thus, the

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[5] *See Fabien v. Fabien*, 2018 V.I. Supreme LEXIS 28, *25 (V.I. 2018) (citing *Campbell v. Parkway Surgery Ctr., LLC*, 158 Idaho 957 (Idaho 2015), which states that "[a] party need only show either privity or third-party beneficiary status in order to have standing to sue for breach of contract)); *Petrus v. Queen Charlotte Hotel Corp.*, 56 V.I. 548 (2012) (finding that, pursuant to the Restatement (Second) of Contracts §302, a third-party beneficiary to a lease has the right to performance of the contract if it can proved that performance would effectuate the intent of the

Virgin Islands has a history of allowing a third-party beneficiary to enforce a contract because it was intended by the parties who executed the contract.

B. Majority Approach

An exhaustive search has revealed that a large majority of jurisdictions have expressly adopted the Restatement (Second) of Contracts (1981) rule, clearly making it the majority approach in the United States.[6] The fact that most jurisdictions support the concept of third-party beneficiaries as outlined by the Restatement (Second) of Contracts weighs heavily in favor of its application here.

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parties that made the contract); *Francis v. Graham Miller (Caribbean) Ltd.*, 1991 V.I. LEXIS 19, (Terr. Ct. 1991) (finding that "[a]n agreement generally must clearly express an intent to benefit third parties) (citing *Virgin Islands Corporation v. Merwin Lighterage Co.*, 4 V.I. 80, 177 F. Supp. 810 (D.V.I. 1959); *Foy v. Ambient Techs., Inc.*, 2009 U.S. Dist. LEXIS 52136 (D.V.I. 2009) ("Only intended beneficiaries of a contract are entitled to enforce arbitration provisions of a contract, and then only if the dispute is covered by the contract.") (citing *Kmart Corp. v. Balfour Beatty, Inc.*, 38 V.I. 251 (D.V.I. 1998).

[6] *See e.g., DuPont v. Yellow Cab Co.*, 565 So. 2d 190, 192 (Ala. 1990); *Rathke v. Corr. Corp. of Am., Inc.*, 153 P.2d 303, 310 (Alaska 2007); *Mountain States Tel. & Tel. Co. v. Kennedy*, 147 Ariz. 514 (Ariz. 1985); *Farm Bureau Ins. Co. of Ark., Inc. v. Running M Farms, Inc.*, 366 Ark. 480, 489 (Ark. 2006); *Rodriguez v. Oto*, 212 Cal.App. 4th 1020, 1028 (Cal. Ct. App. 2013); *E.B. Constr. Co. v. Concrete Contractors, Inc.*, 704 P.2d 859, n. 7 (Colo. 1985); *Silberberg v. Becker*, 191 A.3d 324, 334 (D.C. 2018); *Jou v. Dai-Tokyo Royal State Ins. Co.*, 116 Haw. 159, 170-71 (Haw. 2007); *Am. W. Enters. v. CNH, LLC*, 155 Idaho 746, 753 (Idaho 2013); *Olson v. Etheridge*, 177 Ill. 2d 396, 411-412 (Ill. 1997); *Sanford v. Fillenwarth*, 863 N.W.2d 286, 293 (Iowa 2015); *State ex rel. Stovall v. Reliance Ins. Co.*, 278 Kan. 777, 795 (Kan. 2005); *Perkins v. Blake*, 2004 ME 86, ¶8-9, 853 A.2d 752 (Me. 2004); *CR-RSC Tower I, LLC*, 429 Md. 387, 458 (Md. 2012); *Miller v. Mooney*, 431 Mass. 57, 62 (Mass. 2000); *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W. 826, 832 (Minn. 2012); *Miss. High Sch. Activities Ass'n v. R.T.*, 163 So. 3d 274 Miss. 2015); *Lunceford v. Houghtlin*, 326 S.W.3d 53 (Mo. Ct. App. 2010); *Turner v. Wells Fargo Bank, N.A.*, 2012 MT 213, ¶ 17 (MT 2012); *Spring Valley IV Joint Venture v. Neb. State Banke of Omaha*, 269 Neb. 82, 86 (Neb. 2005); *Brooks v. Trustees of Dartmouth College*, 161 N.H. 685, 698 (N.H. 2011); *Tarin's, Inc. v. Tinely*, 2000-NMCA-048, 3 P.3d 680, 1999 N.M. App LEXIS 151 (N.M. Ct. App. 1999); *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 329 N.C. 646, 651-53 (N.C. 1991); *Huff v. FirstEnergy Corp.*, 130 Ohio St. 3d 196, 2011-Ohio-5083, 957 N.E. 2d 3 (Ohio 2011); *Embry v. Innovative Aftermarket Sys. L.P.*, 2008 OK CIV APP 92, 198 P.3d 388 (Okla. 2008); *Caba v. Barker*, 341 Ore. 534, 539-40 (Ore. 2006); *Konyk v. Pa. State Police of the Commonwealth*, 183 A.3d 981, 987-88 (Pa. 2018); *Glassie v. Doucette*, 157 A.3d 1092, 1097-98 (R.I. 2017); *Masad v. Weber*, 2009 SD 80, 772 N.W.2d 144 (S.D. 2009); *Herbert v. Pico Ski Area Mgmt. Co.*, 2006 VT 74, 908 A.2d 1011 (Vt. 2006); *Pridemore v. Hryniewich*, 2018 Va. Cir. LEXIS 12, 98 Va. Cir. 113; *Argo v. Port Jobs*, 2015 Wash. App. LEXIS 311 (Wash. Ct. App., Div. I 2015; *Aplus Co. v. Nilzeki Int'l Saipan Co.*, 2006 MP 13 (N. Mar. I. 2006).

C. *The Best Rule for the Virgin Islands*

To follow a consistent course is beneficial to any body of law in any jurisdiction. Here, there is Virgin Islands precedent as well as the support of many other jurisdictions in favor of the Restatement (Second) of Contracts theory of third-party beneficiaries. To allow third-party beneficiaries to enforce contracts is, therefore, the best rule in the Virgin Islands.

In this particular case, JS Hospitality was the property manager for Renaissance and hired Lopez to work security for Renaissance at Renaissance's resort property. This indicates that Renaissance is an intended third-party beneficiary of Lopez's general employment agreement with JS Hospitality.

However, the arbitration provisions in the Agreement are of a different nature than the general employment terms. There is no indication that Lopez ever agreed or intended to agree to extend the arbitration provisions to Renaissance. Moreover, the arbitration provisions do not involve an exchange of contract obligations, whereas the employment obligation was met with the return obligation of payment by Renaissance. The arbitration clause merely sets out a procedure for addressing disputes between Lopez and JS Hospitality. Furthermore, though Renaissance calls itself Lopez's "successor employer" since JS Hospitality is now "defunct," (Reply 2), there is no indication that Renaissance was assigned the Agreement or that it was party to a novation substituting itself for JS Hospitality.[7]

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[7] In its Reply, Renaissance claims that it has privity of contract with JS Hospitality as the successor employer and that "successorship doctrine" allows for the enforcement of the contract, (Reply 1-2), but that doctrine does not apply here. *See NLRB v. Burns Intl'l Sec. Servs.*, 406 U.S. 272 (1972). Successorship doctrine requires that successor employers bargain with the unions of established businesses before altering "terms and conditions of employment." *See id.* at 293. As of yet, successorship doctrine extends only to the acquisition of unionized operations. *See Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987) ("In *Burns*, this Court ruled that the new employer, succeeding to the business of another, had an obligation to bargain with the union representing the predecessor's employees.") (citing

2019 VI SUPER 6

Renaissance is therefore an intended third-party beneficiary of the Agreement's general employment provisions, but not of its arbitration clause that is specific to Lopez and JS Hospitality. As such, Renaissance may not seek mandatory arbitration of Lopez's claims against it.

Whether to dismiss or stay proceedings that must be sent to arbitration is a question not reached in this matter.

CONCLUSION

After careful consideration of the above, the Court has denied Renaissance's Amended Motion to Dismiss and Motion for Referral of All Claims to Mandatory Arbitration. An Order consistent with this Memorandum Opinion was entered on October 26, 2018.

DATED this 28 day of January, 2019.

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

ATTEST:
Estrella George
Clerk of the Court
By: _____
Deputy Clerk
Dated: 1/23/19

Burns, 406 U.S. at 278-279). The present matter does not involve the NLRB or a union. More importantly, successorship doctrine is meant to protect employees, not employers.