

STATE OF MICHIGAN
COURT OF APPEALS

NATHAN NEUMAN & NATHAN, P.C.,

Plaintiff/Counter-Defendant-
Appellee,

v

GLOBAL ELECTRONICS, LIMITED,

Defendant/Counter-Plaintiff/Third-
Party Plaintiff,

and

LEIF ANDERSON,

Third-Party Defendant-Appellee,

and

GARY A. COLBERT,

Appellant.

UNPUBLISHED

September 25, 2007

No. 270079

Oakland Circuit Court

LC No. 2005-070874-CK

Before: Borrello, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Attorney Gary Colbert¹ appeals as of right, challenging the trial court's orders granting plaintiff Nathan Neuman & Nathan, P.C.'s motion to compel arbitration and for summary

¹ Defendant Global Electronics, Limited was originally an appellant, but at oral argument plaintiff's counsel indicated that plaintiff and Global have settled all disputes arising in this case, including settlement of the sanctions awarded to plaintiff. Neither party has cited to this Court any authority indicating that the payments by Global to plaintiff for the sanctions, make this appeal moot. Our limited research reveals that the federal courts are mixed on this issue. See e.g., *Lasar v Ford Motor Co*, 399 F3d 1101, 1108 (CA 9, 2005) (client's payment of the sanction
(continued...))

disposition pursuant to MCR 2.116(C)(7), and awarding Nathan Neuman sanctions against Global and Colbert, jointly and severally, on the ground that Global's defenses and counterclaim were frivolous. We affirm.

I. Facts and Proceedings

Defendant Global was represented in underlying litigation by attorney Leif Anderson, who was then employed with the law firm of Hyman Lippitt, P.C. After Anderson left the Hyman Lippitt firm and joined Nathan Neuman, Global's president, Robert Wiebe, signed a retainer agreement with Nathan Neuman. That agreement contained a clause stating that all claims arising out of the agreement, including any claim for legal malpractice, would be submitted to statutory arbitration. The retainer agreement also contained clauses whereby Global acknowledged that it had the right to seek independent legal advice before signing the agreement and understood that it had the right to unilaterally cancel the agreement within seven days by notifying Nathan Neuman in writing. The retainer agreement required an initial retainer fee of \$10,000.

Anderson later wrote a letter to Wiebe informing him that substantial legal fees had been outstanding for several months and that, pursuant to the retainer agreement, Nathan Neuman would commence arbitration proceedings to seek collection of the fees. Anderson suggested the names of three attorneys to act as an arbitrator and invited Global to agree to one of the attorneys or suggest alternates, stating that, if no agreement on an arbitrator was reached in seven days, Nathan Neuman would file a circuit court action to compel arbitration.

After Nathan Neuman filed its complaint to compel arbitration, Global filed an answer and affirmative defenses, asserting that the retainer agreement was void because it was the product of Anderson's undue influence and economic duress. Global also filed a counterclaim against Nathan Neuman and Anderson for legal malpractice.

The trial court granted Nathan Neuman's motion for summary disposition and to compel arbitration, finding that Global's allegations of undue influence and economic duress were not legally tenable. MCR 2.116(C)(7). The court also granted Nathan Neuman's request for sanctions against Global and Colbert, on the basis that Global "failed to comply with a clear and unambiguous contract provision to which it is bound" and presented arguments to avoid the contract that were "devoid of arguable legal merit and contradict well-settled law."

II. Analysis

(...continued)

amount to the other party made attorney's appeal of that sanction moot); *Corley v Rosewood Care Center, Inc*, 142 F3d 1041, 1057-1058 (CA 7, 1998) (appeal by attorney not moot because appellate court can order payment made in satisfaction of sanction order to be returned). We will address the issue, however, because counsel would be placed in a difficult position of either paying the sanction (thus complying with the order) or not paying, and not complying with the order solely to obtain appellate review, but risk noncompliance with a court order. *American Nat Bank & Trust of Chicago by Equitable Life Assurance Co*, 406 F3d 867, 876-877 (CA 7, 2005).

Colbert argues on appeal that the trial court erred in awarding sanctions for filing a frivolous defense. We review a trial court’s decision that a claim or defense was frivolous for clear error. *Attorney Gen v Harkins*, 257 Mich App 564, 575; 669 NW2d 296 (2003).

The trial court granted Nathan Neuman’s request for sanctions against Global and Colbert pursuant to MCR 2.114, MCR 2.625(A)(2), and MCL 600.2591. The court found that Global “failed to comply with a clear and unambiguous contract provision to which it is bound” and that the “arguments to void the clear and unambiguous provision are devoid of arguable legal merit and contradict well-settled law.”

Pursuant to MCR 2.114(F) and MCR 2.625(A)(2), if the court finds, upon motion of a party, that an action or defense is frivolous, it shall award costs as provided by MCL 600.2591, which provides, in pertinent part:

(1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

* * *

(3) As used in this section:

(a) ‘Frivolous’ means that at least 1 of the following conditions is met:

* * *

(iii) The party’s legal position was devoid of arguable legal merit.

We hold that the trial court did not clearly err in finding that (1) Global’s allegations regarding Anderson’s conduct did not come close to establishing that Anderson exercised undue influence, (2) Global signed the retainer agreement because of economic duress, and (3) that Global’s attempts to avoid the arbitration clause in the parties’ retainer agreement were “devoid of arguable legal merit” and were therefore frivolous within the meaning of MCL 600.2591.²

In deciding this issue, we must first look to the law governing the defense asserted by Global, i.e., whether the retainer agreement was void. “Whether a dispute is arbitrable represents

² We reject Colbert’s argument that had Global been allowed to engage in further discovery, there may have been a better factual basis for the defense. First, a simple pre-filing investigation into the law and facts should have alerted Colbert that Global had no factual or legal basis to challenge the contract. See *McGhee v Sanilac County*, 934 F2d 89, 93 (CA 6, 1991). Second, since the trial court accepted Global’s factual assertions as true, further discovery should have had no impact on resolution of this case, particularly because Global did not identify what material facts might still lay hidden to be discovered.

a question of law for the courts,” which we review de novo. *Madison Dist Pub Schools v Myers*, 247 Mich App 583, 594; 637 NW2d 526 (2001). The grant of a motion for summary disposition is also reviewed de novo. *Michelson v Voison*, 254 Mich App 691, 693-694; 658 NW2d 188 (2003). In reviewing a motion brought under MCR 2.116(C)(7), the court “must accept the well-pleaded allegations of the nonmoving party as true and construe them most favorably to the nonmoving party.” *Id.* at 694.

There is no dispute that the retainer agreement contains a clause stating that all claims arising under the agreement, including claims for legal malpractice, must be submitted to arbitration. This language brings the agreement to arbitrate within the scope of the uniform arbitration act (UAA), MCL 600.5001 *et seq.* A written agreement to arbitrate a future controversy or dispute under the UAA is “valid, enforceable, and irrevocable save upon such grounds as exist at law or in equity for the rescission or revocation of any contract.” MCL 600.5001(2); *Wold Architects & Engineers v Strat*, 474 Mich 223, 230; 713 NW2d 750 (2006).

“To ascertain the arbitrability of an issue, the court must consider whether there is an arbitration provision in the parties’ contract, whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration by the terms of the contract.” *Watts v Polaczyk*, 242 Mich App 600, 608; 619 NW2d 714 (2000). An arbitration agreement that has been signed because of force or coercion is “void or voidable due to duress.” *Horn v Cooke*, 118 Mich App 740, 744-745; 325 NW2d 558 (1982). However, “[a]ny doubts about the arbitrability of an issue should be resolved in favor of arbitration. *Watts, supra* at 608.

Colbert argues that the arbitration clause is voidable because the retainer agreement was signed as the result of economic duress and undue influence on the part of Anderson. In support of this argument, Colbert relies on Robert Wiebe’s affidavit in which he averred, in pertinent part, that Anderson (1) “brought great pressure to bear on Global to follow him to his new employer,” (2) “knew from his representation that Global was in dire financial straits,” (3) told Wiebe that no one at Anderson’s former firm, Hyman Lippitt, knew the case as well as he did and that any attorney there would have to work to “come up to speed,” (4) represented that there were important litigation deadlines looming and that attorneys at Hyman Lippitt could not “come up to speed in a timely manner” to meet these deadlines, (5) induced Wiebe to sign the retainer agreement and return it immediately in order to obtain Nathan Neuman’s services, (6) did not explain the arbitration clause or its consequences, (7) did not advise Wiebe regarding the impact of submitting a malpractice claim to arbitration, and (8) did not afford Global independent advice about the arbitration agreement.

Because Global was the party seeking to avoid the statutory arbitration clause in the retainer agreement, it had the burden of bringing forth sufficient evidence to rebut the presumption of the validity of the agreement. *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167, 173; 405 NW2d 88 (1987). Accepting the allegations in Wiebe’s affidavit as true, they were insufficient to allege a claim for either undue influence or economic duress.

In the context of a will contest, a presumption of undue influence arises when evidence is introduced showing “(1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary or an interest which he represents benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor’s decision in that transaction.” *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976). The payment of fees to

an attorney as a trustee of an estate is insufficient to establish the type of benefit that would raise the presumption of undue influence. See *In re Vollbrecht Estate*, 26 Mich App 430, 436; 182 NW2d 609 (1970) (“appointment of the scrivener as trustee alone does not create a substantial benefit sufficient to raise the presumption of undue influence”). To prove undue influence, the proponent must show “threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel [the individual] to act against his inclination and free will.” *In re Karmey Estate*, 468 Mich 68, 75; 658 NW2d 796 (2003), quoting *Kar*, *supra* at 537.

Global failed to allege facts that would support a presumption of undue influence because it failed to show any benefit that Nathan Neuman or attorney Anderson received as a result of the retainer agreement beyond the payment of attorney fees, and that alone is an insufficient benefit to raise a presumption of undue influence. Further, while Anderson had the opportunity to influence Global’s decision to retain Anderson’s new firm, Wiebe, on behalf of Global, acknowledged that he understood that Global had “the right to seek independent legal advice prior to execution of this Retainer Agreement” and also had seven days from the date of the agreement “to unilaterally cancel and void this Retainer Agreement without penalty” These statements, coming from Global itself, belie Global’s argument that it had no opportunity to obtain separate legal advice regarding the agreement. Finally, although Anderson may have tried to convince Wiebe to continue to use his legal services, there is no evidence of threats or coercion sufficient to compel Wiebe to act against his own inclination and free will. At most, Wiebe made a business decision that it would be in Global’s best interests to retain the services of Anderson and Nathan Neuman in Global’s ongoing litigation.

There is also no evidence of economic duress sufficient to avoid the effects of the arbitration clause in the retainer agreement. To avoid a contract on the basis of economic duress, a party must establish a “wrongful act or threat” that “deprive[d] the victim of his unfettered will,” and the party “must not have an adequate legal remedy available.” *Hungerman v McCord Gasket Corp*, 189 Mich App 675, 677; 473 NW2d 720 (1991). To succeed on a claim of economic duress, a party “must establish that they were illegally compelled or coerced to act by fear of serious injury to their persons, reputations, or fortunes.” *Farm Credit Services, PCA v Weldon*, 232 Mich App 662, 681-682; 591 NW2d 438 (1998), quoting *Enzymes of America, Inc v Deloitte, Haskins & Sells*, 207 Mich App 28, 35; 523 NW2d 810 (1994), *rev’d in part on other grounds* 450 Mich 889 (1995). “Fear of financial ruin alone is insufficient to establish economic duress; it must also be established that the person applying the coercion acted unlawfully.” *Id.*

Here, there is no indication of illegal coercion employed by Nathan Neuman or Anderson to induce Global to sign the retainer agreement. Although Wiebe averred that Anderson was aware of Global’s difficult financial position, Wiebe did not allege illegal or even seriously injurious conduct on the part of Anderson. Fear of financial ruin alone, without also showing an illegal or wrongful act, does not establish economic duress and is insufficient to avoid an otherwise valid contractual clause. *Farm Credit Services, supra* at 681-682. Further, as previously noted, the retainer agreement conspicuously states that Global understood that it had the right to consult independent legal counsel before signing the agreement and that it had seven days after the agreement was signed to cancel and void the agreement without penalty.

Accordingly, the trial court did not clearly err in granting Nathan Neuman's motion for sanctions.

Affirmed.

/s/ Stephen L. Borrello

/s/ Kathleen Jansen

/s/ Christopher M. Murray