

STATE OF MICHIGAN
COURT OF APPEALS

BRENDA ZALES, Personal Representative of the
ESTATE OF NEIL ZALES, and NEIL ZALES
LIVING TRUST,

UNPUBLISHED
March 16, 2006

Plaintiffs-Appellants,

v

HABERSHAM FUNDING, LLC,

No. 265128
Oakland Circuit Court
LC No. 2005-064938-CZ

Defendant-Appellee.

Before: Davis, P.J., and Cavanagh and Kelly, JJ.

PER CURIAM.

In this dispute arising out of a viatical settlement contract, plaintiffs appeal as of right from the trial court's order granting summary disposition in favor of defendant under MCR 2.116(C)(7), on the basis that plaintiffs' claims were barred by an agreement to arbitrate. We affirm.

In 1983, the decedent, Neil Zales, purchased a life insurance policy with a death benefit of \$50,000. Plaintiff, Neil Zales Living Trust, was the beneficiary of the insurance policy and plaintiff Brenda Zales was the beneficiary of the trust. In 1994, Neil was diagnosed with rectal cancer. Neil was treated with chemotherapy and radiation, however, the cancer reoccurred. In 2004, Neil and defendant Habersham Funding, a Georgia limited liability company, executed a viatical settlement contract under which Neil designated Habersham as the owner and sole beneficiary of the insurance policy and, in exchange, Habersham paid Neil \$4,750. The agreement read in pertinent part:

6. Binding Effect. This agreement is irrevocably binding upon Seller, Seller's executors, administrators, heirs and any beneficiaries, both past and current, to the Policy.

* * *

16. Choice of Law. Seller and Purchaser hereby agree and confirm that the law of the State of Georgia shall control this Agreement.

* * *

19. Arbitration and Enforcement Costs. The Parties agree that any disputes regarding this Agreement shall be submitted to arbitration in Fulton County, Georgia and shall be resolved and adjudicated according to the rules of the American Arbitration Association. The decision rendered in said arbitration shall be binding

After Neil passed, Brenda Zales initiated this action against defendant alleging that the viatical settlement contract was void because it failed to provide certain disclosures, as required by Michigan's viatical settlement contracts act (VSCA), MCL 550.521 *et seq.* Defendant moved for summary disposition under MCR 2.116(C)(7), asserting that plaintiffs' claims were barred by the agreement to arbitrate. The trial court agreed and granted defendant's motion.

On appeal, plaintiffs contend that the trial court erred in granting summary disposition for defendants because the viatical settlement contract was void and, as a result, the trial court could not enforce the arbitration provision in the contract. Without addressing the merits of plaintiffs' claim that the contract as a whole is void, we hold that the arbitration provision in the viatical settlement contract is enforceable.

This Court reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7). *Ousley v McLaren*, 264 Mich App 486, 490; 691 NW2d 817 (2004). When reviewing a motion under MCR 2.116(C)(7), the Court must consider all affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted to determine if the moving party is entitled to judgment as a matter of law. *Xu v Gay*, 257 Mich App 263, 266-267; 668 NW2d 166 (2003).

The Federal Arbitration Act (FAA), 9 USC 1 *et seq.*, governs actions in state and federal court that arise out of contracts, such as the one in this case, that involve interstate commerce. *Volt Information Sciences, Inc v Bd of Trustees of the Leland Stanford Junior University*, 489 US 468, 476; 109 S Ct 1248; 103 L Ed 2d 488 (1989); *DeCaminada v Coopers & Lybrand, LLP*, 232 Mich App 492, 496; 591 NW2d 364 (1998), citing *Burns v Olde Discount Corp*, 212 Mich App 576, 580; 538 NW2d 686 (1995).

Under the Supremacy Clause, US Const, art VI, cl 2, state courts are bound to enforce the FAA's substantive provisions. *DeCaminada, supra* at 498. And, where application of a federal law implicates the Supremacy Clause, a court cannot apply the state constitution or state laws to defeat the federal legislation. *Id.* at 501-502. Thus, where parties agree to arbitrate statutory claims, the agreement should be enforced unless the relevant statute prohibits arbitration or the agreement forecloses effective vindication of the statutory rights. *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*, 473 US 614, 628; 105 S Ct 3346; 87 L Ed 2d 444 (1985). "When parties have agreed to settle their disputes through federal arbitration, federal policy requires trial courts to compel arbitration and dismiss all arbitrable claims." *Lexus Financial Services, Inc v Trombly Tindall, PC*, 261 Mich App 417, 419; 683 NW2d 185 (2004), citing *Kauffman v Chicago Corp*, 187 Mich App 284, 287, 292; 466 NW2d 726 (1991).

Under the FAA, a court may adjudicate a claim that challenges the validity of the arbitration clause itself but may not consider general challenges regarding the validity of the contract in which the arbitration agreement is found. *Prima Paint Corp v Conklin*, 388 US 395, 403-404; 87 S Ct 1801; 18 L Ed 2d 1270 (1967). Thus, when the FAA applies and the plaintiff

does not attack the validity of the agreement to arbitrate in and of itself, whether the contract as a whole is enforceable is a question for the arbitrator, and not for the court. *Id.* at 406; *Scanlon v P & J Enterprises, Inc*, 182 Mich App 347, 350-351; 451 NW2d 616 (1990).

Here, plaintiffs challenge the validity of the viatical settlement contract; they do not attack the validity of the agreement to arbitrate in and of itself. Further, the VSCA does not prohibit arbitration and, because the VSCA does not provide for a private cause of action, we conclude that enforcement of the arbitration agreement will not foreclose effective vindication of plaintiffs' statutory rights. Thus, the arbitration provision is enforceable. Plaintiffs' claim regarding the validity of the viatical settlement contract presents a question for the arbitrator, not for the court. We hold that plaintiffs' claims are barred by an enforceable agreement to arbitrate and, therefore, the trial court did not err in granting summary disposition in favor of defendant.

Plaintiffs also contend that the choice of law provision in the viatical settlement contract is unenforceable because Georgia law would "leave a Michigan citizen unprotected." However, plaintiffs do not discuss how Georgia law fails to protect plaintiffs in this case. Moreover, it follows from our decision above that the enforceability of the choice of law provision, like the enforceability of the contract in general, is a question for the arbitrator, and not for the court.

Finally, plaintiffs contend that because the FAA impairs Michigan's VSCA, application of the FAA in this case is precluded under the McCarran-Ferguson Act (MFA), 15 USC 1011 *et seq.* The MFA states:

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. [15 USC 1012(b).]

We decline to address this issue because plaintiffs' claims regarding the validity of the viatical settlement contract are governed by the FAA, the rules of the American Arbitration Association, and the laws of the state of Georgia, not by Michigan's VSCA. Therefore, the effect of application of the FAA on Michigan's VSCA is of no consequence to this appeal.

Affirmed.

/s/ Alton T. Davis
/s/ Mark J. Cavanagh
/s/ Kristen Frank Kelly