

STATE OF MICHIGAN
COURT OF APPEALS

ERNESTINE DOROTHY MICHELSON,

Plaintiff-Appellee,

v

GLENN A. VOISON and VOISON AGENCY,
INC.,

Defendants,

and

FUTURE FIRST FINANCIAL GROUP, INC.,
RANDY STELK, FIDELITY GROUP, INC., and
CHARLES R. SUSSMAN,

Defendants-Appellants.

FOR PUBLICATION
January 10, 2003
9:05 a.m.

No. 233114
Saginaw Circuit Court
LC No. 00-035186-CK

Updated Copy
March 14, 2003

Before: Neff, P.J., and Hoekstra and O'Connell, JJ.

O'CONNELL, J.

Defendants Future First Financial Group, Inc., Randy Stelk, Fidelity Group, Inc., and Charles R. Sussman appeal by leave granted from an order denying their motion for summary disposition and to compel arbitration and granting plaintiff Ernestine Dorothy Michelson summary disposition pursuant to MCR 2.116(I)(2) on her claims under the Michigan Uniform Securities Act (MUSA), MCL 451.501 *et seq.* We affirm.

After signing an agreement to purchase a viatical settlement¹ through defendants, plaintiff commenced this suit alleging breach of contract, misrepresentation or fraud, and a violation of

¹ "A viatical settlement is an investment contract pursuant to which an investor acquires an interest in the life insurance policy of a terminally ill person [the viator]—typically an AIDS victim—at a discount of 20 to 40 percent, depending upon the insured's life expectancy. When the insured dies, the investor receives the benefit of the insurance. The investor's profit is the difference between the discounted purchase price paid to the insured and the death benefit

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the MUSA for a sale of unregistered securities. In her complaint, plaintiff named as defendants Glenn A. Voison and Voison Agency, Inc.,² the person and the agency who sold the viatical settlement to her. Only defendants Future First, Stelk, Fidelity Group, and Sussman, the brokers and their officers, filed the motion for summary disposition under MCR 2.116(C)(7) and to compel arbitration. They argued that plaintiff's claim was improperly before the circuit court because the parties' viatical settlement agreement contained a binding arbitration clause. The trial court held: (1) viatical settlements qualify as securities; (2) plaintiff's claim was properly before the circuit court; (3) the parties' agreement represented an improper unregistered security; (4) the agreement and its arbitration clause were void; and (5) plaintiff was entitled to summary disposition.

The grant or denial of summary disposition as well as the existence and enforceability of an arbitration agreement are questions of law for a court to determine de novo. *Groncki v Detroit Edison Co*, 453 Mich 644, 649-650; 557 NW2d 289 (1996); *Watts v Polaczyk*, 242 Mich App 600, 603; 619 NW2d 714 (2000). Under MCR 2.116(C)(7), we must accept the well-pleaded allegations of the nonmoving party as true and construe them most favorably to the nonmoving party. *Grazia v Sanchez*, 199 Mich App 582, 583; 502 NW2d 751 (1993).

Defendants first argue that the court erred in holding that viatical settlements³ are securities under the MUSA and that the parties' agreement, including its arbitration clause, was therefore void. We disagree.

Under MCL 451.810(a), any person who offers or sells a security in violation of the MUSA or by misrepresentation of a material fact "is liable to the [buyer] . . . and the buyer may sue either at law or in equity to recover the consideration paid for the security" MCL 451.810(h) expressly states that "[t]he rights and remedies provided by this act *are in addition to any other rights or remedies that may exist at law or in equity*" (Emphasis added.) Because the MUSA does not specifically allow avoidance of a contract, we must determine whether the trial court was authorized to void the parties' agreement under another right or remedy existing at law or in equity.

Contracts founded on acts prohibited by a statute, or contracts in violation of public policy, are void. *Maids Int'l, Inc v Saunders, Inc*, 224 Mich App 508, 511; 569 NW2d 857 (1997). The MUSA does not expressly include viatical settlements in its definition of a

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collected from the insurer, less transaction costs, premiums paid, and other administrative expenses." *Securities & Exchange Comm v Life Partners, Inc*, 318 US App DC 320, ___; 87 F3d 536, 537 (1996).

² Defendants Glenn A. Voison and Voison Agency are not parties to this interlocutory appeal.

³ The circuit court referred to the investment product defendants sold to plaintiff as a "viatical settlement contract." We note that the investment product itself and the separate contract to purchase it are variously called viatical settlements, agreements, or contracts. In this case, the "agreement" was the purchasing vehicle that contained the arbitration clause.

"security." Furthermore, we have been unable to discover any statutory law or case law specifically indicating whether viatical settlements are included in the MUSA's definition of a "security."⁴

"In interpreting our security statutes, we look beyond the form of the transaction to its substance, paying close attention to the economic realities of the situation." *Noyd v Claxton, Morgan, Flockhart & VanLiere*, 186 Mich App 333, 338; 463 NW2d 268 (1990). The MUSA "shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it and to coordinate the interpretation and administration of this act with the related federal regulation." MCL 451.815. Thus, it is appropriate to consider other state and federal decisions.

Securities & Exchange Comm v Life Partners, Inc., 318 US App DC 320, ____; 87 F3d 536, 538 (1996), held that viatical settlements are not securities under the federal securities laws. The court held that the investor was not dependant on the efforts of others,⁵ but instead relied "entirely upon the mortality of the insured" 318 US App DC ____; 87 F2d 548. However, in *Siporin v Carrington*, 200 Ariz 97, 104; 23 P3d 92 (Ariz App, 2001), the court held that the "mortality of the viator is merely another factor to be considered" The *Siporin* court determined that viatical settlements are securities under Arizona's securities laws, and that "[t]he *Life Partners* rationale does not serve the prophylactic and remedial purposes" of the laws. *Id.* Under current Arizona law, viatical settlements are securities. Ariz Rev Stat 44-1801.

Similarly, several other states have also included viatical settlements in the definition of a security: Alas Stat 45.55.990; Cal Corp Code 25019; Ga Code Ann 10-5-2;⁶ Ind Code 23-2-1-1; Iowa Code 502.102; Me Rev Stat Ann, Title 32, 10501; Miss Code Ann, 75-71-105; Neb Rev Stat 8-1102; NC Gen Stat 78A-2;⁷ ND Cent Code 10-04-02; SD Codified Laws Ann 47-31A-401; and W Va Code 32-4-401.⁸

⁴ We note that the Legislature has enacted a separate act in the Insurance Code regulating the sale of original viatical settlement contracts without reference to whether these contracts can be resold as securities. See MCL 550.521 *et seq.* The viatical settlement contract act largely regulates the original contract between the viator (the insured party) and the insurance provider, not its resale to investors such as plaintiff. No Michigan appellate court has interpreted the act.

⁵ "[A]n investment contract is a security subject to [the Securities Act of 1933, 15 USC 77a *et seq.*] if investors purchase with (1) an expectation of profits arising from (2) a common enterprise that (3) depends upon the efforts of others." *Life Partners, supra* 318 US App DC ____; 87 F3d 542, citing *Securities & Exchange Comm v WJ Howey Co*, 328 US 293, 298-299; 66 S Ct 1100; 90 L Ed 1244 (1946).

⁶ "Viatical investment" was added to the definition of a "security" in Ga Code Ann 10-5-2(a)(26) on July 1, 2002. See 2002 Ga L 792, §§ 1, 2.

⁷ "Viatical settlement" was added to the definition of a "security" in NC Gen Stat 78A-2 (11) on April 1, 2002. See 2001 Acts 308.

⁸ "Viatical settlement" was added to the definition of a "security" in W Va Code 32-4-401(n) in July 2001. See 2001 Acts 308.

Finally, Michigan Department of Commerce Corporation & Securities Bureau Bulletin No. 2002-07-SEC by Commissioner of Financial and Insurance Services Frank Fitzgerald specifically includes viatical settlements within the MUSA's definition of a "security." Although it does not have the full force or effect of law, MCL 24.203(6), we generally give deference to administrative agency interpretations. *McGill v Automobile Ass'n of Michigan*, 207 Mich App 402, 407, n 1; 526 NW2d 12 (1994). Considering that the MUSA is intended to be broadly interpreted and provide conformity with other states' securities laws, and the intent of the Office of the Commissioner of Financial and Insurance Services, we find that the MUSA's use of the term "security" includes viatical settlements.

Therefore, the trial court properly rescinded a security contract made in violation of statutory law and public policy because defendants were not licensed or registered to sell securities.⁹ See *Maids Int'l*, *supra* at 511. Because plaintiff alleged a misrepresentation in defendants' procurement of the viatical settlement agreement, the arbitration clause may be avoided. See *Watts*, *supra* at 609. When a contract is rescinded, the contract is abrogated from the beginning, and none of its provisions, including the present contract's arbitration clause, are applicable. *Lash v Allstate Ins Co*, 210 Mich App 98, 102; 532 NW2d 869 (1995).

Defendants next argue that the court erred in finding that there was no genuine issue of material fact regarding plaintiff's MUSA claims. We disagree.

The court granted plaintiff summary disposition pursuant to MCR 2.116(I)(2). "Summary disposition is properly granted [under MCR 2.116(I)(2)] to the opposing party if it appears to the court that that party, rather than the moving party, is entitled to judgment." *Sharper Image Corp v Dep't of Treasury*, 216 Mich App 698, 701; 550 NW2d 596 (1996). The MUSA's definition of the term "security" and its application to the parties' agreement are questions of law concerning statutory interpretation. See *Oade v Jackson Nat'l Life Ins Co*, 465 Mich 244, 250; 632 NW2d 126 (2001). Thus, the court's decision was based on a legal inquiry and factual proofs were unnecessary. See MCR 2.116(I)(2).

Finally, defendants contend that not all defendants were liable for the MUSA claim and the court erred in granting plaintiff summary disposition against all defendants. We disagree.

Under the MUSA,

[e]very person who directly or indirectly controls a seller . . . every partner, officer, or director of the seller, every person occupying a similar status or performing similar functions, every employee of the seller who materially aids in the sale, and every broker-dealer or agent who materially aids in the sale are also

⁹ Judge O'Connell finds it is unseemly and against public policy in a civilized society to have such a practice as buying a life insurance policy in the hope that someone will die to obtain the benefit. See *Life Partners*, *supra*. Plaintiffs appearing in court alleging that the principal did not die soon enough to satisfy the terms and conditions of the viatical agreement would present quite a sight in a Michigan court.

liable jointly and severally with and to the same extent as the seller [MCL 451.810(b).]

According to the parties' agreement, plaintiff purchased the viatical settlement from defendant Future First. *Id.* Thus, this defendant was liable under MCL 451.810(b) as a seller. Defendant Fidelity Group was also named in the agreement as the purchase administrator. *Id.* Therefore, as a material aid to the sale, Fidelity Group was also liable pursuant to MCL 451.810(b). Finally, defendants Stelk and Sussman were officers of defendants Future First and Fidelity Group, respectively. Thus, they were also clearly liable under MCL 451.810(b). Because the trial court has not granted or denied summary disposition with respect to plaintiff's claims against defendants Glenn A. Voison and Voison Agency, we need not consider the appellants' argument that the Voison defendants were similarly situated.

Affirmed.

Neff, P.J., concurred.

/s/ Peter D. O'Connell

/s/ Janet T. Neff