

STATE OF MICHIGAN
COURT OF APPEALS

JENNIFER BARTH and MICHAEL BARTH,

Plaintiffs-Appellants,

v

FIRST CONSUMER CREDIT, INC.,

Defendant-Appellee.

UNPUBLISHED

November 25, 2008

No. 278517

Oakland Circuit Court

LC No. 2006-079111-NZ

Before: Schuette, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(8) in this action in which plaintiffs alleged that defendant's debt-collection activities constituted, *inter alia*, violations of the Michigan Collection Practices Act, MCL 445.251 *et seq.*, and the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.* We affirm in part, reverse in part, and remand.

I

Plaintiff Michael Barth entered into a retail installment contract with Erie Construction Midwest, Inc., for the purchase and installation of replacement windows. Plaintiff Jennifer Barth, Michael Barth's wife, is not a party to the contract. Erie subsequently assigned the contract to defendant. There is no dispute that Michael Barth became delinquent in his payments.

Plaintiffs filed a complaint alleging that defendant, in attempting to collect the contractual debt, had been making repeated, threatening, and harassing phone calls to plaintiffs, to their friends, family, and neighbors, and to Michael Barth's place of employment, resulting in the loss of his job. In addition to their claims under the collection practices act and the MCPA, plaintiffs raised tort claims of intentional infliction of emotional distress, intrusion upon seclusion, and disclosure of embarrassing facts.

The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(8), holding that Michael's claims were subject to arbitration under an arbitration agreement in the retail installment contract. The court further dismissed Jennifer's claims on the ground that she "lack[ed] standing to pursue any claims with respect to the agreement between Michael Barth and [defendant]."

II

Plaintiffs first argue that the trial court erred in mandating arbitration of Michael Barth's claims because the claims do not arise out of, or relate to, the contract. We disagree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Likewise, the existence and enforceability of an arbitration agreement are questions of law for a court to determine de novo. *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 152; 742 NW2d 409 (2007); *Michelson v Voison*, 254 Mich App 691, 693-694; 658 NW2d 188 (2003). When reviewing a decision on a motion for summary disposition predicated on the existence of an agreement to arbitrate, this Court accepts the plaintiff's well-pleaded allegations as true and construes them in favor of the nonmoving party. *Michelson, supra* at 694, citing MCR 2.116(C)(7).

Michigan common law and statutory law "strongly favor arbitration." *Rembert v Ryan's Family Steak Houses, Inc.*, 235 Mich App 118, 127-128; 596 NW2d 208 (1999). The Michigan arbitration act (MAA), MCL 600.5001 *et seq.*, "evidences Michigan's strong public policy favoring arbitration," *Watts v Polaczyk*, 242 Mich App 600, 607; 619 NW2d 714 (2000), quoting *Grazia v Sanchez*, 199 Mich App 582, 584; 502 NW2d 751 (1993), and stands as "a strong and unequivocal endorsement of binding arbitration agreements." *Watts, supra* at 607-608, quoting *Rembert, supra* at 132.

Generally, the parties' agreement determines the scope of arbitration. *Rooyakker & Sitz, supra* at 163; *Fromm v MEEMIC Ins Co*, 264 Mich App 302, 305-306; 690 NW2d 528 (2004). "To determine whether an issue is arbitrable, 'the court must consider whether there is an arbitration provision in the parties' contract, whether the disputed issue is arguably within the arbitration agreement, and whether the dispute is expressly exempt from arbitration by the terms of the contract.'" *Rooyakker & Sitz, supra* at 163, quoting *Fromm, supra* at 305-306 (internal citations omitted). Any doubts about whether the dispute is subject to arbitration should be resolved in favor of arbitration. *Rooyakker & Sitz, supra* at 163; *Fromm, supra* at 306; *Burns v Olde Discount Corp*, 212 Mich App 576, 580; 538 NW2d 686 (1995).

The subject arbitration agreement provides:

Buyer and Creditor agree that any and all disputes, claims or controversies arising under or relating to this contract, including by way of example and not as a limitation: (i) the relationships resulting from this contract; (ii) the breach or alleged breach of this contract; or (iii) the validity of this contract or the validity or enforceability of this arbitration provision, shall be subject to binding arbitration to be determined by a board of three arbitrators, in accordance with and pursuant to the then prevailing rules and procedures of the Commercial Rules of the American Arbitration Association. . . .

The language employed by the arbitration provision is very broad in scope, contemplating that "any *and all* disputes, claims or controversies arising under *or relating to* this contract" shall be subject to binding arbitration (emphasis supplied). Each of plaintiffs' claims is premised on defendant's activities in attempting to collect Michael Barth's contractual debt, and

are therefore claims “arising under or relating to” the retail installment contract. Moreover, the non-exhaustive list of examples in the arbitration agreement explicitly provides that “the relationships resulting from this contract” are subsumed within the category of disputes or controversies that arise under or relate to the contract. Defendant’s alleged debt-collecting activities are inseparable from the credit relationship established by the terms of the installment contract.¹ Because plaintiffs’ claims are arguably within the arbitration agreement, and because the dispute is not expressly exempt from arbitration by the terms of the contract, the trial court properly determined that the claims fall within the scope of the arbitration agreement. *Rooyakker & Sitz, supra* at 163; *Fromm, supra* at 305-306.

III

Plaintiffs assert that even if plaintiffs’ claims are within the scope of the arbitration agreement, the agreement is nevertheless unenforceable because it is procedurally and substantively unconscionable. Plaintiffs’ arguments regarding the enforceability of the arbitration agreement were raised in response to defendant’s motion for summary disposition.² The trial court failed, however, to address plaintiffs’ arguments regarding the enforceability of the arbitration agreement.³ Because the enforceability of an agreement to arbitrate will turn on

¹ Plaintiffs’ reliance on two federal cases, *Seifert v US Home Corp*, 750 So2d 633 (Fla App, 1999), and *Denali Flavors, Inc v Marigold Foods, LLC*, 214 F Supp 2d 784 (WD Mich 2002), is misguided. While *Seifert* involved allegations of an unforeseeable death resulting from the defendant’s negligence in the design and manufacture of a new home—a claim which, arguably, had little connection to the parties’ commercial agreement—plaintiffs’ allegations concerning defendant’s debt-collection activities in this case are intricately related to the retail contract at issue, and collection activities were anticipatable under the very terms of the contract. *Denali Flavors* is likewise distinguishable. Contrary to the expansive language of the arbitration clause at issue in this case, the subject clause in *Denali* provided, narrowly, that “a dispute concerning this agreement, or either parties’ [sic] responsibilities under the agreement . . . shall be submitted to arbitration.”

² Plaintiffs presented a number of arguments in support of the assertion that the arbitration agreement is procedurally and substantively unconscionable. Plaintiffs argued that the arbitration agreement was cost-prohibitive and therefore did not provide for effective vindication of plaintiff’s statutory rights. They maintained that filing a lawsuit and jury request in the State of Michigan would cost \$235, while instituting arbitration under the Commercial Arbitration Rules of the American Arbitration Association would cost of a minimum of \$4,000. They also maintained that the arbitration clause did not allow joinder of Jennifer Barth and therefore plaintiffs would incur the additional cost of filing a separate legal action for her claims. They further maintained that the arbitration clause permitted the arbitrator to include an award of costs and legal fees, thus vitiating the fee-shifting provisions of the collection practices act and MCPA. Additionally, they argued that the arbitration clause was buried in fine print on the back of the contract and did not provide clear notice, and that the clause did not afford a fair arbitral hearing because it allocated some arbitration costs to the consumer, thus deterring claims and circumventing the fee-shifting provisions of the collection practices act and MCPA.

³ The trial court simply found that the claims fell within the arbitration agreement and that Michael Barth signed the agreement and was therefore bound by its terms.

whether the contract preserves substantive rights and remedies and is procedurally fair, see, e.g., *Rembert*, *supra* at 156; and because the trial court completely failed to determine whether the arbitration agreement in this case is procedurally and substantively unconscionable, we remand this matter to the trial court for such a determination.

IV

Plaintiffs argue that the trial court erred in dismissing Jennifer's claims on the ground that she lacked standing to pursue claims arising out of the agreement between Michael Barth and defendant. A review of the record reveals that the trial court dismissed Jennifer's claims under the collections practices act and the MCPA on the ground that she lacked standing to pursue these claims. The trial court did not address Jennifer's tort claims, nor did the trial court determine whether any of Jennifer's claims failed to state a cause of action.

With regard to Jennifer's claim under the collections practice act, the act does not require that a claimant qualify as a "consumer" or "debtor," defined in MCL 445.251(d) as "a natural person obligated or allegedly obligated to pay a debt." Rather, MCL 445.257(1) provides that "[a] person who suffers injury, loss, or damage, or from whom money was collected by the use of a method, act, or practice in violation of this act may bring an action for damages or other equitable relief" (emphasis supplied). The trial court erred by finding that Jennifer lacked standing to pursue her claims under the collections practices act solely on the ground that she was not a party to the retail installment contract. With regard to Jennifer's claim under the MCPA, MCL 445.911 permits an action by any "person" to enforce the provisions of the MCPA. Accordingly, notwithstanding that Jennifer Barth was not a party to the retail installment contract, she nevertheless had standing to bring a claim alleging that defendant's conduct violated the MCPA.⁴

We therefore reverse the trial court's finding that Jennifer lacked standing to pursue her claims under the collection practices act and the MCPA. Although the trial court also dismissed Jennifer's tort claims, the trial court did not specifically find that Jennifer lacked standing to pursue the claims and, in fact, failed to provide any reasoning whatsoever with regard to these claims. We are therefore unable to determine whether the trial court properly concluded that Jennifer lacked standing to pursue her tort claims. We therefore reverse the trial court's finding that Jennifer lacked standing to pursue her tort claims without prejudice to defendant once again raising this issue before the trial court.

Affirmed in part, reversed in part, and remanded. Jurisdiction is not retained.

/s/ Bill Schuette
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald

⁴ The trial court did not rule that Jennifer's claims were insufficiently pled.