

Judgment rendered June 26, 2019.
Application for rehearing may be filed
within the delay allowed by Art. 2166,
La. C.C.P.

No. 52,752-CA
No. 52,753-CA
(Consolidated Cases)

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

52,752-CA
IBERIA BANK
Plaintiff-Appellee

52,753-CA
IBERIA BANK
Plaintiff-Appellee

versus

versus

DALTON CONSTRUCTION, LLC
AND NICHOLAS DALTON
Defendants-Appellants

NICHOLAS DALTON
Defendant-Appellant

* * * * *

Appealed from the
Forty-Second Judicial District Court for the
Parish of DeSoto, Louisiana
Trial Court Nos. 78952; 78953

Honorable Charles B. Adams, Judge

* * * * *

MARK W. ODOM

Counsel for Appellants

McNEW, KING, & LANDRY, L.L.P.
By: William T. McNew
April M. Hammett

Counsel for Appellee

* * * * *

Before WILLIAMS, McCALLUM, and THOMPSON, JJ.

THOMPSON, J.

On November 20, 2017, Plaintiff, Iberia Bank, filed suit in the 42nd Judicial District Court to collect on a promissory note and guaranty (No. 78952). Named as defendants were Dalton Construction, LLC, and Nicholas Dalton, based on his execution of a commercial agreement guarantying the payment of Dalton Construction, LLC's indebtedness. On that same date, Plaintiff also filed a separate suit in the 42nd Judicial District Court on a line of credit agreement against Nicholas Dalton (No. 78953).

Answers in both suits were filed by Defendants on January 26, 2018. Plaintiff filed motions for summary judgment ("MSJ") in both suits on March 16, 2018. The hearing on the MSJ in the suit on the promissory note/guaranty (No. 78952) was scheduled for April 24, 2018, before Division "B." The hearing on the MSJ in the suit on the line of credit (No. 78953) was scheduled for April 26, 2018, before Division "A." Counsel for both parties agreed to consolidate the two actions. On April 24, 2018, the actions were consolidated into No. 79,852, and a hearing on the motions for summary judgment was set for May 31, 2018, in Division "B."

On May 31, 2018, Defendants filed a motion to stay pending arbitration and for continuance, based upon an arbitration clause in the promissory note.¹ Plaintiff consented to a continuance to allow the motions for summary judgment and the motion to stay to be heard together. The motions were rescheduled for June 21, 2018. On June 20, 2018, Plaintiff

¹ There is not an arbitration clause in the line of credit agreement.

filed a memorandum in opposition to the motion to stay pending arbitration. At the hearing on June 21, the trial court denied the motion to stay in open court (and signed a judgment to that effect on July 13, 2018) and granted a continuance as to the motions for summary judgment to allow oppositions to be filed. The trial court specifically ordered that “[A]ny opposition to the Motions [for] Summary Judgment be filed on or before July 12, 2018. If no opposition is timely filed, no hearing will be held and the Court shall rule on the Motions based on the record.”

No such opposition was filed, and the trial court signed a judgment on July 30, 2018, granting summary judgment in favor of Plaintiff and against Defendants in the suit on the promissory note/guaranty (No. 78952) in the amount of \$69,305.29, together with accrued interest of \$2,344.10 through October 18, 2017, interest accruing thereafter at the rate of 7.38% per annum until paid, late fees of \$302.85, and reasonable attorney fees and costs. In a second judgment signed on July 30, 2018, the trial court granted summary judgment in favor of Plaintiff and against Nicholas Dalton in the suit on the line of credit (No. 78953) in the amount of \$13,018.55, together with accrued and unpaid interest of \$1,256.24 through October 18, 2017, interest accruing thereafter at the default rate provided for in the parties’ agreement of 21% per annum until paid, late fees of \$75, and reasonable attorney fees and costs. Defendants have appealed from the trial court’s judgments denying their motion to stay and granting summary judgment in favor of

Plaintiff in the suit on the promissory note/guaranty (No. 78952/52,752-CA).²

DISCUSSION

The issue of whether a court should stay or compel arbitration is a question of law. *Swaggart v. Doe*, 50,739 (La. App. 2 Cir. 04/05/17), 216 So. 3d 1118, *writ denied*, 17-0758 (La. 09/22/17), 227 So. 3d 822); *Hansford v. Cappaert Manufactured Housing*, 40,160 (La. App. 2 Cir. 09/21/05), 911 So. 2d 901, *writ denied*, 05-2338 (La. 03/17/06), 925 So. 2d 542; *Conagra Poultry Co. v. Collingsworth*, 30,155 (La. App. 2 Cir. 01/21/98), 705 So. 2d 1280; *Williams v. Keller Williams Realty*, 14-0202 (La. App. 4 Cir. 11/05/14), 154 So. 3d 605; *Hennecke v. Canepa*, 96-0772 (La. App. 4 Cir. 05/21/97), 700 So. 2d 521, *writ denied*, 97-1686 (10/03/97), 701 So. 2d 210. The applicable standard of review for questions of law is whether the trial court was legally correct or incorrect. *Id.*

The failure of a party to arbitrate in accordance with the terms of an agreement may be raised either through a dilatory exception of prematurity demanding dismissal of the suit or by a motion to stay the proceedings pending arbitration, as was done in the case *sub judice*. *Swaggart, supra*; *Long v. Jeb Breithaupt Design Build Inc.*, 44,002 (La. App. 2 Cir. 02/25/09),

² According to Defendants, because there is no arbitration clause in the line-of-credit agreement between Plaintiff and Defendant Nicholas Dalton, they have not pursued their appeal from the grant of summary judgment in No. 78953/52,753-CA. Defendants did file an appeal in No. 78953/52,753-CA specifically from the summary judgment ruling in that matter. Thereafter, it appears that Defendants simply abandoned their appeal in 52,753-CA by failing to timely file a brief. *See* URCA Rule 2-8.6. [And by letting this Court know via their appellate brief in 52,752-CA as follows, “Because no arbitration provision is contained within the line-of-credit agreement . . . this appeal will proceed only [in] 52,752-CA involving the promissory note . . . and Commercial Guaranty Agreement accompanying that promissory note executed by Nicholas Dalton, Individually.”]

4 So. 3d 930; *Wied v. TRCM, LLC*, 30,106 (La. App. 2 Cir. 07/24/97), 698 So. 2d 685.

La. R.S. 9:4202 provides:

If any suit or proceedings be brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the suit is pending, upon being satisfied that the issue involved in the suit or proceedings is referable to arbitration under such an agreement, shall upon application of one of the parties stay the trial of the action until an arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with the arbitration.

Louisiana and federal law explicitly favor the enforcement of arbitration clauses in written contracts. The Louisiana Binding Arbitration Law is set forth in La. R.S. 9:4201, *et seq.*, and expresses a strong legislative policy favoring arbitration. *Duhon v. Activelaf, LLC*, 16-0818 (La. 10/19/16), ___ So. 3d ___, 2016 WL 6123820, *cert. denied*, ___ U.S. ___, 137 S. Ct. 2268, 198 L. Ed. 2d 700 (2017); *University of Louisiana Monroe Facilities, Inc. v. JPI Apartment Development, L.P.*, 49,148 (La. App. 2 Cir. 10/08/14), 151 So. 3d 126, *writs denied*, 14-2344, 14-2366 (La. 02/06/15), 158 So. 3d 818, 820.

Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit. *Chase Bank USA, N.A. v. Leggio*, 43,751 (La. App. 2 Cir. 12/03/08), 999 So. 2d 155. Ordinarily, the threshold inquiry is whether the parties have agreed to arbitrate the dispute in question. *Johnsons, Inc. v. GERS, Inc.*, 34,268 (La. App. 2 Cir. 01/24/01), 778 So. 2d 740. This determination involves two considerations: (1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of

that arbitration agreement, as long as the applicant is not in default in proceeding with arbitration. *Coleman v. Jim Walter Homes, Inc.*, 08-1221 (La. 03/17/09), 6 So. 3d 179; *Long, supra*.

The arbitration clause *in the promissory note in this case* contains the following language:

Borrower and Lender agree that *all disputes, claims, and controversies between them whether individual, joint, or class in nature, arising from this Note or otherwise, including without limitation contract and tort disputes, shall be arbitrated pursuant to the Rules of the American Arbitration Association in effect at the time the claim is filed, upon request of either party* (emphasis added). . . .

This provision does not envision a limited use or one-time use of arbitration. *See, e.g., Goodrich Petroleum Co., LLC v. MRC Energy Co.*, 13-1345 (La. App. 4 Cir. 04/16/14), 137 So. 3d 200, *writ denied*, 14-1199 (La. 09/19/14), 149 So. 3d 249; *Metro Riverboat Associates, Inc. v. Bally's Louisiana, Inc.*, 97-1672 (La. App. 4 Cir. 01/14/98), 706 So. 2d 553, *writ denied*, 98-0679 (La. 05/29/98), 720 So. 2d 339. If the parties to a contract have explicitly agreed to submit all disputes to an arbitrator, then a determination that a contract is valid will necessarily suffice to require enforcement of the arbitration clause. *Id.; Lorusso v. Landrieu Enterprises, Inc.*, 02-2346 (La. App. 4 Cir. 05/21/03), 848 So. 2d 656.

The parties are in agreement that there was a valid agreement to arbitrate in this case. *See, R.pp. 100-01, 108-09.* As noted above, the parties, having agreed to submit “all disputes” to an arbitrator, clearly intended to include disputes over the payment or nonpayment of amounts due under indebtedness represented by the promissory note. This exact

clause has been held to include such an action by the Fourth Circuit in *Regions Bank v. Weber*, 10-1169 (La. App. 4 Cir. 12/16/10), 53 So. 3d 1284.

Louisiana law is clear that once the court finds that the parties made an arbitration agreement and have failed to comply with it, the issue of alleged waiver is a question for the arbitrator, not for the court.

International River Center v. Jones-Manville Corp., 02-3060 (La. 12/03/03), 861 So. 2d 139; *University of Louisiana Monroe Facilities, Inc., supra*; *Wilson v. Allums*, 47,147 (La. App. 2 Cir. 06/08/12), 94 So. 3d 908, *writ denied*, 12-1611 (La. 10/26/12), 99 So. 3d 650.³

We find that the trial court erred in denying Defendants' motion to stay pending arbitration based upon its finding that Defendants waived their right to arbitration. Because the issue of the payment or nonpayment by Defendants on their indebtedness under the promissory note is a dispute "arising out of" the promissory note, it is subject to arbitration under the parties' written agreement (which we note was prepared by Plaintiff). We therefore reverse the trial court's judgment denying the motion to stay pending arbitration, grant the stay, and remand the matter to the trial court for it to be referred to arbitration. This ruling necessarily requires that we

³ Plaintiff argued to the trial court that Defendants had waived their right to arbitrate by "substantially invoking the judicial process." While the issue of waiver is to be decided by the arbitrator, as noted above, applicable federal and Louisiana law provide that waiver will be found when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party. *In re Mirant Corp.*, 613 F. 3d 584 (5th Cir. 2010); *Walker v. J.C. Bradford & Co.*, 938 F. 2d 575 (5th Cir. 1991); *Matthews-McCracken Rutland Corp. v. City of Plaquemine*, 414 So. 2d 756 (La. 1982). To invoke the judicial process, "a party must, at the very least, engage in some overt act in court that evinces a desire to resolve the arbitrable dispute through litigation rather than arbitration." *In re Migrant Corp., supra* at 589, *citing Subway Equipment Leasing Corp. v. Forte*, 169 F. 3d 324, 329 (5th Cir. 1999). Neither the answering of a judicial demand nor the delay in filing the demand for arbitration necessarily constitutes a waiver of the right to demand arbitration, especially in the absence of prejudice to the opposing party. *Matthews-McCracken Rutland Corp., supra*; *Electrical & Instrumentation Unlimited, Inc. v. McDermott International, Inc.*, 627 So. 2d 702 (La. App. 4 Cir. 1993).

set aside the trial court's grant of summary judgment in favor of Plaintiff in the suit on the promissory note/guaranty.

CONCLUSION

That portion of the July 13, 2018 judgment denying the motion to stay filed by Defendants, Dalton Construction, LLC, and Nicholas Dalton, is reversed and the motion to stay is granted. The July 30, 2018 judgment granting the motion for summary judgment filed by Plaintiff, Iberia Bank, in No. 78952/52,752-CA is hereby set aside, and the matter is remanded to the trial court, with the stay to become effective upon the trial court's referral of the suit to arbitration. As a result thereafter, all proceedings in the trial court will be stayed pending arbitration. Costs of this appeal are assessed against Plaintiff, Iberia Bank.

**JUDGMENT REVERSED; MOTION TO STAY PENDING
ARBITRATION GRANTED; MOTION FOR SUMMARY
JUDGMENT SET ASIDE; REMANDED.**