NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2005 CA 1598

BEN W. NEVERS, SR. AND BARBARA ANN NEVERS

VERSUS

GE COMMERCIAL DISTRIBUTION FINANCE CORPORATION f/k/a DEUTSCHE FINANCIAL SERVICES CORPORATION AND DANIEL BROWN

On Appeal from the 22nd Judicial District Court
Parish of Washington, Louisiana
Docket No. 91,162, Division "C"
Honorable Patricia T. Hedges, Judge Presiding

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BEFORE: PARRO, McDONALD, AND HUGHES, JJ.

Judgment rendered AUG 2 3 2006

PARRO, J.

In this suit for a declaratory judgment regarding personal guaranties on a commercial loan, the defendant appeals a judgment denying its motion to stay and to compel arbitration. We reverse and render.

FACTUAL AND PROCEDURAL BACKGROUND

In 1981, Ben W. Nevers, Sr. and his wife, Barbara Ann Nevers (the plaintiffs), founded Nevers Electric, d/b/a Country Stop Marine, in Bogalusa, Louisiana. Their son, Ben W. Nevers, Jr., worked as the general manager of this company. Nevers Electric acquired an outboard motor dealership in Bogalusa in 1987, a second marine retail outlet in Mandeville in 1993, and a third operation named Louisiana Fiberglass in Bogalusa in 1997. GE Commercial Distribution Finance Corporation, f/k/a Deutsche Financial Services Corporation (GE) and/or its predecessors provided inventory (floorplan) financing over the years for these businesses.

In 2000, Ben W. Nevers, Jr. organized a holding company, Louisiana Marine Holdings, L.L.C., and also organized Country Stop Marine and Sporting Goods, L.L.C. and Country Stop Marine and Outdoor Center, L.L.C.[1] to continue operating the retail outlets, which he bought from his parents in June 2001. The two Country Stop stores applied for floorplan financing from GE; GE required personal guaranties from Ben W. Nevers, Jr., his wife, and the plaintiffs for these lending agreements. Each of the personal guaranties, dated November 1, 2001, had a bold-typed statement about binding arbitration on the signature page. The guaranties signed by the plaintiffs are at issue in this litigation.

In October 2002, all the business entities filed for bankruptcy protection, and in September 2003, Mr. and Mrs. Ben W. Nevers, Jr. filed personal bankruptcies. The trustee in the business bankruptcies filed suit against GE and others, and the district court in that suit ordered submission of the matter to arbitration, pursuant to the provisions in the lending agreements. This court denied writs seeking review of that

[1] Louisiana Fiberglass, L.L.C. was also registered at this time by Ben W. Nevers, Jr.

judgment. Caillouet v. Yamaha Motor Corp. U.S.A., 04-0918 (La. App. 1st Cir. 8/23/04) (unpublished writ action).

Following that decision, GE filed a request for arbitration with the American Arbitration Association (AAA), naming the plaintiffs and Mr. and Mrs. Ben W. Nevers, Jr. as respondents. After receiving notice of the arbitration from the AAA, the plaintiffs filed this suit, seeking a declaratory judgment that they are not bound by the guaranties.[2] They sent a copy of the petition to the AAA and advised that they would not participate in arbitration. Their petition claimed that Ben W. Nevers, Jr. had asked them to sign personal guaranties, limited in amount and duration, in order for floorplan financing to be approved by GE for his businesses. They admitted their son presented the signature pages to them, and alleged they signed those pages without seeing any other portion of the documents. They also stated that, other than their son, there were no witnesses to their signatures, nor were their signatures notarized in their presence. The petition alleged they did not receive or review anything other than the signature pages when or after they signed, and they knew none of the terms of the guaranties until GE demanded payment under their provisions in October 2002. At that time, they learned that GE claimed they were personally liable for the balance of the funds owed to GE by their son's bankrupt companies. The plaintiffs stated they had never agreed in writing to guarantee any debts of their son or his businesses, nor had they consented to any contract terms other than those set forth on the signature pages.

GE responded to their petition with a motion for a stay and to compel arbitration. After a hearing, the court took the matter under advisement, eventually denying the motion. In reasons for judgment, the court stated that because of the irregularity in the notarizing of the plaintiffs' signatures, which the court attributed to GE, the documents were invalid. GE applied for writs, and this court ordered the matter to be re-submitted as an appeal. Nevers v. GE Commercial Dist. Fin. Corp., 05-0824 (La. App. 1st Cir. 5/31/05) (unpublished writ action). This appeal by GE followed.

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[2] In the alternative, should the court determine they were bound by the guaranties, the plaintiffs sought indemnification from Daniel Brown, a Yamaha sales representative, for his alleged misrepresentations that resulted in the lending agreements with GE and their execution of the guaranties.

GUARANTY DOCUMENTS

The signature pages on the two identical guaranties are the crux of the matter before this court. Therefore, we have reproduced the terms of those pages as they appear in the record, with handwritten insertions shown in bold italics, as follows:

served if mailed or delivered; (i) to us at our address below; (ii) to you at 655 Maryville Centre Drive, St. Louis, Missouri 63141-5832, Attention: General Counsel; or such other address as the parties may specify from time to time in writing.

The agreement to arbitrate will survive the termination of this Guaranty.

IF THIS GUARANTY IS FOUND TO BE NOT SUBJECT TO ARBITRATION, ANY LEGAL PROCEEDING WITH RESPECT TO ANY DISPUTE WILL BE TRIED TO A COURT OF COMPETENT JURISDICTION BY A JUDGE WITHOUT A JURY. WE WAIVE ANY RIGHT TO A JURY TRIAL IN ANY SUCH PROCEEDING.

We acknowledge and agree that this Guaranty and all agreements between Dealer and you have been substantially negotiated, and will be performed, in the state of **LOUISIANA**. Accordingly, we agree that all Disputes will be governed by, and construed in accordance with, the laws of such state, except to the extent inconsistent with the provisions of the FAA which will control and govern all arbitration proceedings hereunder.

THIS GUARANTY CONTAINS BINDING ARBITRATION, JURY WAIVER AND PUNITIVE DAMAGES WAIVER PROVISIONS.

Date: ***11-1***, 20***01***

INDIVIDUAL GUARANTOR(S):

SIGNED BY: ***Ben W. Nevers, Sr.***
[Print Name: Ben W. Nevers, Sr.]

WITNESS: _____
(DFS Employee)
[Print Name: _____]

SIGNED BY: ***Barbara Ann Nevers***
[Print Name: Barbara Ann Nevers]

WITNESS: _____
(DFS Employee)
[Print Name: _____]

CORPORATE, PARTNERSHIP OR LIMITED LIABILITY COMPANY GUARANTOR:

(Name of Corporate, Partnership or Limited Liability Company Guarantor)

BY: _____
[Print Name: _____]
Title: _____

BY: _____
[Print Name: _____]
Title: _____

Address of Guarantor(s):

61596 Little South Village Road
Bogalusa, LA 70427

NOTARY STATEMENT

State of ***Louisiana***)
)
County of ***Washington***)

On this ***7th*** day of ***Nov***, 20 ***01***, before me, the subscriber, a Notary Public, personally appeared Ben W. Nevers Sr. and Barbara Ann Nevers known to me to be the person(s) described in and who executed the above Guaranty, and who acknowledged the execution thereof to be their free act and deed.

Notary Public: **/Signature/**
(SEAL)

My Commission Expires: ***Death***, 20 ___

The signature pages were preceded by three other pages, such that each guaranty document consisted of four pages.

ANALYSIS

GE's first argument is that the court erred in attributing the improper notarizing of the guaranties to it, when there was no evidence before the court concerning when, how, and by whom the notary's signature was affixed. Furthermore, it argues that there is no requirement in law that a suretyship or guaranty be notarized, only that it be express and in writing. Therefore, any irregularity in the notarizing of these documents is legally irrelevant.

GE is correct on this latter point. Suretyship is an accessory contract by which a person binds himself to a creditor to fulfill the obligation of another upon the failure of the latter to do so. LSA-C.C. art. 3035. The only formal requirements of suretyship are that it "must be express and in writing." LSA-C.C. art. 3038; Bossier Orthopaedic Clinic v. Durham, 32,543 (La. App. 2nd Cir. 12/15/99), 747 So.2d 731, 735. The term "writing" as applied to a contract means either an act under private signature pursuant to LSA-C.C. art. 1837 or an authentic act pursuant to LSA-C.C. art. 1833. Revision Comments--1987, comment (d). An act under private signature need not be written by the parties, but must be signed by them. LSA-C.C. art. 1837. In the matter before us, the plaintiffs have admitted that the signatures on the signature pages are theirs, thus meeting the definition of an act under private signature. This was a sufficient "writing," and there was no need for witnesses or a notary to sign the documents in order to satisfy this formal requirement for suretyship. Therefore, the court's conclusion that the guaranties were invalid due to irregularities in the notarizing process is legal error.

Having so found, we must still address the issue that was the subject of GE's motion. Most of the arguments made by both parties to the lower court and this court concerned the validity of the guaranties, in light of the plaintiffs' claim that they did not see and did not know the terms of the guaranties when they signed the signature pages, and thus, the documents did not satisfy the requirement that a suretyship be "express." Those arguments addressed an issue on the merits of one of the plaintiffs' claims, which was not before the lower court and is not before this court on this appeal.

The only issue in the GE motion was and is whether the litigation should be stayed and the matter submitted to arbitration.

In the matter before us, even a cursory glance at the signature pages the plaintiffs signed reveals that the agreements they were signing were subject to arbitration. The bold type above their signatures states that the agreement includes a binding arbitration provision. According to an earlier sentence, "[t]he agreement to arbitrate will survive the termination of this Guaranty." The document also pointed out that the provisions of the FAA[3] would control and govern all arbitration proceedings. Thus, even if the plaintiffs were unaware of the precise terms of the guaranty, the plaintiffs had to know that the document they were signing included the agreement to submit any disputes they might have concerning it to binding arbitration. Moreover, paragraph 22 of the plaintiffs' petition states that they "never consented, freely or otherwise, to any contract terms, **other than** those set forth in Exhibit A." (Emphasis added). Exhibit A consists of the two signature pages on which the arbitration requirement is clearly set forth. Therefore, this paragraph of the petition implicitly acknowledges their consent to arbitration.

The issue of the appropriate forum in which the merits of the plaintiffs' claims would be presented was and is the only issue before the court. Our reading of the signature pages compels the conclusion that the plaintiffs agreed to arbitrate whatever disputes they might have concerning the agreements they signed. This includes the legal efficacy of their signatures on those documents, the enforceability of the guaranties against them, and any claims they might have for indemnification from Mr. Brown.

Our conclusion comports with the applicable state and federal jurisprudence. In Aguillard v. Auction Management Corp., 04-2857 (La. 6/29/05), 908 So.2d 1, the Louisiana Supreme Court observed:

> The only issue before the court was the enforceability of the arbitration clause[,] as this matter came before the court through the defendants' motion to stay proceedings pending arbitration. The entire contract was

[3] The Federal Arbitration Act is found in 9 U.S.C. §§ 1, et seq. The provisions of LSA-R.S. 9:4201 of the Louisiana Binding Arbitration Law are very similar to § 2 of the FAA.

> not properly before the court, just the arbitration provisions. The merits are reserved for arbitration.

Aguillard, 908 So.2d at 17. In Vishal Hospitality, LLC v. Choice Hotels Intern., Inc., 04-0568 (La. App. 1st Cir. 6/28/06), ___ So.2d ___, ___, 2006 WL 1751889, *1, this court also addressed the argument that the arbitration clause could not be valid if the agreement itself were invalid. The plaintiff in Vishal Hospitality had claimed there was a real issue as to consent to the agreement itself. Quoting a recent United States Supreme Court case, Buckeye Check Cashing, Inc. v. Cardegna, ___ U.S. ___, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006), this court said:

> "regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." Buckeye, 126 S.Ct. at 1210. ... Vishal is challenging the agreement itself and is not specifically challenging its arbitration provisions. Because the challenge by Vishal is to the contract as a whole, and not specifically to the arbitration clause, the challenge to the contract must be considered by an arbitrator and not by a court.

Vishal Hospitality, ___ So.2d at ___, 2006 WL 1751889, *3. Moreover, a court may enforce an arbitration agreement in a contract that the arbitrator later finds to be void and unenforceable. Buckeye, 126 S.Ct. at 1210; Vishal Hospitality, ___ So.2d at ___ n.4, 2006 WL 1751889, *3, n.4.

Similarly, in the matter before us, the plaintiffs have acknowledged signing documents that they understood were limited guaranties for the obligations of their son's business entities under floorplan financing agreements with GE. But they claim in their petition that the purported guaranties are "a nullity, and of no effect, and may not be enforced as against the plaintiffs." The plaintiffs' challenge in this case is to the guaranty agreements as a whole, and not specifically to the arbitration clause. Therefore, their challenge must be considered by an arbitrator and not by the court.

CONCLUSION

The judgment of April 22, 2005, denying GE's motion to stay and to compel arbitration, is reversed, and judgment is rendered, ordering this lawsuit stayed and compelling arbitration of all of the claims asserted in this case. All costs of this appeal are assessed to Ben W. Nevers, Sr. and Barbara Ann Nevers.

REVERSED AND RENDERED.