IN THE SUPREME COURT OF MISSISSIPPI

REGIONS BANK
AS SUCCESSOR TO AMSOUTH BANK — APPELLANT

V.

DOCKET NO.2008-IA-00323-SCT
LOWER COURT CASE #2004-112-CV6

JIMMY WALKER AND BIG SHOT
INDOOR SHOOTING RANGE, LLC — APPELLEES

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judge of this Court may evaluate possible disqualification or recusal:

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   Appellant

2. Jimmy Walker and Big Shot Indoor Shooting Range, LLC
   Appellee

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STATEMENT OF ISSUES

I. Whether the Circuit Court of Jones County erred by holding that the arbitration agreement in issue did not cover the claims raised by Jimmy Walker and Big Shot Shooting Range LLC, and by failing to stay this matter and refer it to arbitration under the terms of the loan documents executed by the parties.

STATEMENT OF THE CASE

A. Nature of the Case

This is a permissive interlocutory appeal from an order of the Circuit Court for the Second Judicial District of Jones County, Mississippi denying the motion of AmSouth Bank the predecessor to Regions Bank, to stay the proceedings and compel arbitration. The sole issue for decision is whether the lower court erred by refusing to enforce the arbitration clause contained in the loan documents executed by Jimmy Walker (hereinafter "Walker") in favor of AmSouth Bank (hereinafter "AmSouth"), the predecessor in interest to Regions Bank (hereinafter "Regions").

B. Summary of the Proceedings Below

On June 24, 2004, Walker filed a complaint seeking damages and other relief in an effort to avoid his obligations under the terms of a Note for Business and Commercial Loans, a Security Agreement and a Guaranty Agreement (hereinafter collectively "the Loan Documents") executed by him in favor of AmSouth. (R. 3-11) AmSouth answered the allegations of the complaint and included as one of its affirmative defenses that Walker had contractually agreed "to submit to binding arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*" (R. at 18-27) At the same time, AmSouth filed a Motion to Stay Proceedings and for an Order Compelling Arbitration. (R. at 28-50) A response to the motion was filed by Walker on September 27, 2004. (R. at 54-68) A supplement to the motion to compel was filed by AmSouth on February 23, 2005. (R. 76-86) Notice of a hearing by the Court on the motion to compel was issued on December 16, 2004. A hearing on the motion to compel was held on February 28,

2005. (R. 72-73) On January 31, 2008, the Court entered an order denying the motion. (R. 93-95)[1]

While the Motion to Compel was pending, AmSouth was acquired by Regions and they became the successor in interest to AmSouth.[2]

On February 21, 2008, Regions filed a Petition for Interlocutory Appeal to this Court, pursuant to Rule 5 of the Mississippi Rules of Appellate Procedure. On March 13, 2008, this Court entered an order granting Regions permission to appeal. (R. 97)

C. Statement of Facts.

This lawsuit arises out of commercial loan for $255,000 obtained by Defendant Luther Tyrome Russell ("Russell") in order to open an indoor shooting range located in Hattiesburg, Mississippi. When the loan was obtained by Russell, Walker signed the note, referred to as the Note for Business and Commercial Loans (hereinafter, "the Note"), as a member of the Limited Liability Company. The Note contained an arbitration agreement. At the same time, Walker also signed a personal Guaranty Agreement (hereinafter "the Guaranty") and a Security Agreement, both of which contain the same arbitration agreement as the Note. (R. 34-53)

Walker and Russell were members of the aforesaid limited liability company. The Guaranty was an inducement to, a condition of and a part of the loan made to the limited liability company. (R. 38-42) Both Walker and Big Shot asserted claims against Russell and Region's predecessor, AmSouth, seeking damages and other relief in an effort to prevent the collection of

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[1] While the delay between the hearing and the ruling was nearly three years, neither party sought to force a ruling by the Court. While Counsel for Regions cannot speak for Counsel for Walker and Big Shot, he does represent to the Court that he considered there to be a genuine question as to whether Rule 15 of the Mississippi Rules of Appellate Procedure applied to a motion to compel arbitration. Nevertheless, there were contacts with the Staff Attorney for the trial court during that time. There was also a period of time after August 29, 2005 when Counsel for Regions was limited by damage to his office from Hurricane Katrina; however, Counsel does not rely on that as the sole explanation for the delay.

[2] According to records on file with the Secretary of State, the merger was effective November 3, 2006. http://www.sos.state.ms.us/imaging/29592395.PDF

the debt evidenced by the note and the enforcement by Regions of the debtors' obligations under the loan documents.

The Note that was executed by Walker contains a comprehensive arbitration agreement that states:

> "Any controversy, claim, dispute or issue related to or arising from (A) the Interpretation, negotiation, execution, assignment, administration, repayment, modification, or extension of this note or the Loan; (B) any charge or cost incurred under this note or the Loan; (C) the collection of any amounts due under this note or any assignment thereof; (D) any alleged tort related to or arising out of this note or the Loan; or (E) any breach of any provision of this note, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association (the "AAA Rules"). Any disagreement as to whether a particular dispute or claim is subject to arbitration under this paragraph shall not waive any right that person has to demand arbitration with respect to any counterclaim or other claim that may be made against that person, whether in, relating to, or arising out of such litigation, or otherwise. The Expedited Procedures of the AAA Rules shall apply in any dispute where the aggregate of all claims and the aggregate of all counterclaims each is in an amount less than $500,000. Judgment upon any award rendered by the arbitrator(s) in any such arbitration may be entered in any Court having jurisdiction thereof. Any demand for arbitration under this note shall be made no later than the date when any judicial action upon the same matter would be barred under any applicable statute of limitations. Any dispute as to whether the statute of limitations bars the arbitration of such matter shall be decided by arbitration in accordance with the provisions of this paragraph. The locale of any arbitration proceedings under this note shall be in Jackson, Mississippi or such other location as is mutually acceptable to all parties. The arbitrator(s) in any such arbitration shall establish such reasonable procedures as may be necessary for the reasonable exchange of information between the parties prior to such arbitration. Any arbitration under this paragraph shall be on an individual basis between the parties to this note only and shall not be commenced as a member or representative of or on behalf of a class of persons, it being the intention of the parties that there shall be no class action arbitrations under this note. All parties to this note specifically acknowledge and agree that this note evidences a "transaction involving commerce" under the Federal Arbitration Act, and each party to this note hereby waives and relinquishes any right to claim otherwise. With respect to disputes submitted to arbitration, each party waives all right to trial by jury." (R. 36)

Both the Guaranty and the Security Agreement contain the same language.[3] (R. 40, 42, 50)

[3] The arbitration agreement is found in paragraph 10 of the Guaranty and Section 8.16 of the Security Agreement.

On June 28, 2004 Walker and Big Shot filed a suit in the Circuit Court of Jones County, Second Judicial District against AmSouth Bank and Luther Tyrome Russell, being Cause 2004-112-CV6 on the docket of said Court. On August 2, 2004, AmSouth, now Regions, filed its Answer and Defenses and also filed a separate Motion to Stay Proceedings and for an Order Compelling Arbitration or Alternatively to Dismiss. The Matter was subsequently noticed for hearing before the Honorable Billy Joe Landrum on February 28, 2005. The parties appeared and argued the matter on that day, and on January 31, 2008, an order was entered by the Court overruling the motion and thereby refusing to enforce the arbitration process.

The arbitration agreements required Walker and Big Shot to arbitrate disputes involving "any controversy, claim, dispute, or issue related to or arising from," among other things, "the collection of any amounts due under this note or the assignment thereof . . . ." and includes "any alleged tort arising out of this note or the Loan." The order overruling the motion found that despite this language, the scope of the arbitration clause did not cover claims for fraud in the administration of the loan after execution of the loan documents.

SUMMARY OF THE ARGUMENT

The Federal Arbitration Act, (hereinafter "FAA") mandates trial courts to stay proceedings and refer them to arbitration if the parties had entered into an agreement to submit their dispute to arbitration, providing that the transaction is one that touches on interstate commerce. The United States Supreme Court and this Court have held that loan transactions have a sufficient enough connection with interstate commerce so as to be under the FAA. This case involves such a transaction and such an agreement.

This case involves a commercial loan to a start up business. Several of the loan documents executed by the parties in the matter contain a clear, unambiguous and

comprehensive arbitration provision. Despite that fact, Walker and Big Shot filed a suit in the Circuit Court of Jones County, Second Judicial District, in an effort to avoid liability under the loan documents. AmSouth, Regions' predecessor in interest, filed a motion to stay the proceedings and refer the matter to arbitration. That motion was overruled on the ground that Walker and Big Shot's claims arose out of a tort not associated with the loan.

While there are multiple counts in the Complaint, all of them arise out of the language of the loan documents and the administration of the loan. Walker, individually and on behalf of Big Shot, signed a Note for Commercial and Business Purposes, a personal Guaranty Agreement and a Security Agreement. Each of these documents contained the same arbitration agreement which included language specifically including any dispute with AmSouth or its successor, Regions, not only for breach of contract but also sounding in tort. There was absolutely nothing more in the record other than the naked allegations of the Complaint, which were denied by AmSouth, to support any possible claim that the actions of AmSouth constituted some form of legal bar to the enforcement of the arbitration agreement. The causes of action asserted by Walker and Big Shot clearly fell within the terms of the arbitration agreement and the trial court was in error for denying the motion to compel.

ARGUMENT

I. The Trial Court committed error when it refused to enforce the arbitration agreement contained in the loan documents executed by Walker and Big Shot.

A. The Federal Arbitration Act

Section 3 of the Federal Arbitration Act (the "FAA" or "the Act"), 9 U.S.C. § 3, provides:

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such 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 such arbitration."

The United States Supreme Court has stated that the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, enunciates a strong "federal policy favoring arbitration,"[4] which requires courts to "rigorously enforce agreements to arbitrate."[5] The Act provides that written agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract."[6] The Act further provides a court must stay its proceedings if it is satisfied an issue before it is arbitrable under the agreement.[7] As a final matter, the Act authorizes courts to issue an order compelling arbitration if a party failed to comply with an arbitration agreement.[8]

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[4] *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983).
[5] *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).
[6] 9 U.S.C. § 2.
[7] 9 U.S.C. § 3.
[8] 9 U.S.C. § 4.

"[T]he [Federal Arbitration] Act establishes that, as a matter of law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ."[9] The Act "leaves no place for the exercise of discretion by the district court [Circuit Court], but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed."[10]

The Federal Arbitration Act ("FAA") mandates arbitration whenever a contract provides for claims to be submitted to arbitration and evidences a transaction involving interstate commerce.[11] In ***Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995)**, the United States Supreme Court held that as long as the contract at issue touches upon interstate commerce in any sense or context, the FAA applies so as to preempt state law and displace it with the strong federal policy favoring enforcement of arbitration agreements.

The United States Supreme Court has recognized that the federal policy underlying the FAA requires courts to compel arbitration if any *reasonable interpretation of the arbitration clause would cover the dispute(s) at issue.*[12] The Supreme Court has stated the rule as follows:

> "An order to arbitrate . . . should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."[13]

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[9] *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 24-25 (1983).
[10] *Dean Witter Reynolds, Inc.*, 470 U.S. at 218, 105; see also *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 225-227; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991), aff'g, 895 F.2d 195 (4th Cir. 1990).
[11] 9 U.S.C. § 2; see also *Harvey v. Joyce*, 190 F.3d 790, 793-94 (5th Cir. 2000) (reversing District Court's denial of motion to compel arbitration and holding that all doubts as to scope of arbitration clause should be construed in favor of arbitration); *Pridgen v. Green Tree Fin. Servicing Corp.*, 88 F.Supp. 2d 655 (S.D. Miss. 2000); *IP Timberlands Operating Co., Ltd.*, 726 So. 2d at 108 (Miss. 1998) (holding that under FAA disputes involving interstate commerce that are even arguably covered by an arbitration provision, must be submitted to arbitration).
[12] *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983). (Emphasis added.)
[13] *United Steel Workers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960).

Therefore, as expressly recognized by the U.S. Supreme Court and the Mississippi Supreme Court, so long as the disputes at issue arguably or debatably are covered under the arbitration clause, the FAA requires that arbitration be compelled.

B. Application of the FAA under Mississippi Law.

This Court reviews the denial of a motion to compel arbitration by the trial court under a *de novo* standard. This Court has long "recognized the existence of a liberal federal policy favoring arbitration agreements." ***Equifirst Corp. v. Jackson,* 920 So. 2d 458, 461 (Miss. 2006) (*quoting Terminix International, Inc. v. Rice,* 904 So. 2d 1051, 1054-55 (Miss. 2004).** The first step in the Court's analysis is to determine whether the activity in which the parties are involved involves interstate commerce. This Court has previously held that transactions involving the borrowing of money from financial institutions are of a nature that they involve interstate commerce and fall within the provisions of the FAA. ***Equifirst Corp. v. Jackson,* 920 So. 2d at 462-63; *Northwest Financial Mississippi, Inc. v. McDonald,* 905 So. 2d 1187 (Miss. 2005).** Furthermore, as part of the arbitration agreement signed by the parties, they acknowledged that the transaction was within the scope of jurisdiction of the FAA.

Once it has been determined that the transaction is governed by the FAA, the court must then determine if the dispute is within the terms of the arbitration agreement and whether there are any external constraints that foreclose the use of arbitration. ***See, e.g., East Ford Inc. v. Taylor,* 826 So. 2d 709, 713 (Miss. 2002).**

C. Application of the Mississippi Rules Governing Arbitration Agreements to this Case

The language of the loan documents in this matter is clear, unambiguous and comprehensive as it relates to arbitration. Mississippi law has long recognized that a party to a

contract "is under a legal obligation to read a contract before signing it, and is charged with knowing what is contained in any agreement he signs, including knowing that it contains language agreeing to arbitrate disputes. ***Terminix International, Inc. v. Rice*, 904 So. 2d at 1057-1059**. Therefore, Walker and Big Shot are bound by the scope of the agreement.

The language utilized in the arbitration clause coupled with the liberal federal policy favoring arbitration means that all claims raised by Walker and Big Shot in their Complaint are clearly subject to arbitration. This Court should apply the long-standing mandate of the U.S. Supreme Court that arbitration "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." ***AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 650 (1986).** This Court has frequently held that the clear and unambiguous terms of an arbitration agreement or clause should be enforced. The same language as used in the documents pertinent to this transaction has been determined by this Court to be clear and unambiguous. ***Gulf Insurance Co. v. Neal-Shafer, Inc.* (Miss. 2004)**. This language was undoubtedly broad enough to include the claims of fraud raised by Walker and Big Shot.

The Trial Court concluded that the fraud and misrepresentation claims occurred outside the scope of the agreements. However, the agreement specifically states that the arbitration agreement includes "any alleged tort related to the arbitration agreement or arising out of the note or the Loan." The allegations of Walker's Complaint specifically allege conduct which he claims as tortious that occurred during the administration of the loan. Applying that test to this case makes it clear that the allegations of the Complaint fall within the scope of the arbitration agreement in the loan documents.[14]

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[14] See, *Pridgen v. Green Tree Financial Servicing Corp.*, 88 F. Supp. 2d at 657 (claims that a creditor harassed a debtor over delinquency payments is not outside the scope of arbitration agreement.)

According to this Court's recent decisions, when considering arbitration clauses in loan documents, if "[N]one of the borrowers cite either a lack of basic education or inability to read, none of the borrowers are unemployed, and each borrower received and signed multiple notices that all disputes would be subject to arbitration," the arbitration agreement will be enforced against claims of unconsciability or fraud. ***Northwest Financial Mississippi, Inc. v. McDonald*, 905 So. 2d at 1187, (Miss. 2005).** Relying on ***McDonald***, this Court reached the same result in ***Equifirst Corp. v. Jackson***. Just like the plaintiffs in ***Northwest Financial Mississippi***, Walker certainly does not lack a basic education. Rather, he is a sophisticated businessman, well versed in transactions of this nature. Moreover, just as in ***Northwest Financial Mississippi***, Walker signed multiple documents during this transaction, all of which contained arbitration agreements.

Walker and Big Shot's claims that the Complaint is based upon obligations or conduct outside the loan documents are not supported by any evidence. They are based solely upon the unsubstantiated naked allegations of the Complaint which were denied by AmSouth in their Answer. Therefore, there is insufficient evidence to establish that there is some external legal constraint which foreclosed arbitration. ***Equifirst Corp v. Jackson*, 920 So. 2d at 465**; ***Terminix International, Inc. v. Rice*, 904 So. 2d at 1057-1059**. Walker and Big Shot claim that Regions predecessor assumed an obligation to have accountants audit his business and protect him against actions of his business partner. Yet he produced no evidence of the same. Regions vehemently denies that any such obligation was undertaken. However, assuming for purposes of argument only that the obligation was undertaken, that obligation would still have arisen under the terms of the debtor-creditor relationship created by the loan documents. Any right of action, whether sounding in tort or contract, arising out of those documents would fall within the scope of the arbitration agreement. In ***Doleac v. Real Estate Professionals LLC*, 911 So. 2d 496 (Miss.**

2005), similar claims were the basis for a challenge to an arbitration provision in an asset purchase agreement but were rejected by this Court. This Court should do the same here.

CONCLUSION

Without a doubt this dispute is one arising out of a transaction touching on interstate commerce and is subject to the FAA. It is clear from the language of the arbitration agreements contained in the loan documents, that the broad scope of those agreements includes within their terms a dispute such as is raised by Walker and Big Shot in their complaint. It is also indisputable that there is no evidence in the record to support a claim for any cause of action that would foreclose the right of Regions to enforce the arbitration agreement. Consequently, the ruling of the Circuit Court for the Second Judicial District of Jones County, Mississippi should be reversed and this matter remanded with instructions that it be referred to arbitration.

RESPECTFULLY SUBMITTED, this the 24th day of September, 2008.

Regions Bank
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CERTIFICATE OF SERVICE

I, Paul J. Delcambre, Jr., do hereby certify that I have this date, September 24, 2008, forwarded via United States Mail, postage prepaid, a true and correct copy of the Brief of Appellant, Regions Bank.

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APPENDIX

*64856 9 U.S.C.A. § 1

UNITED STATES CODE ANNOTATED
TITLE 9. ARBITRATION
CHAPTER 1--GENERAL PROVISIONS

Current through P.L. 110-284 (excluding P.L. 110-234, 110-246, and 110-275) approved 7-23-08

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subjec of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

*64932 9 U.S.C.A. § 2

UNITED STATES CODE ANNOTATED
TITLE 9. ARBITRATION
CHAPTER 1--GENERAL PROVISIONS

Current through P.L. 110-284 (excluding P.L. 110-234, 110-246, and 110-275) approved 7-23-08

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

*65380 9 U.S.C.A. § 3

UNITED STATES CODE ANNOTATED
TITLE 9. ARBITRATION
CHAPTER 1--GENERAL PROVISIONS

Current through P.L. 110-284 (excluding P.L. 110-234, 110-246, and 110-275) approved 7-23-08

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial o the action until such 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 such arbitration.

*65542 9 U.S.C.A. § 4

UNITED STATES CODE ANNOTATED
TITLE 9. ARBITRATION
CHAPTER 1--GENERAL PROVISIONS

Current through P.L. 110-284 (excluding P.L. 110-234, 110-246, and 110-275) approved 7-23-08

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms o the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.