UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1263
Summary Calendar

RESOLUTION TRUST CORPORATION,
as receiver for Southwest
Federal Savings Association,

Plaintiff-Appellee,

VERSUS

THOMAS L. MORAN, ET AL.,

Defendants,

THOMAS L. MORAN, and
JAN THORNTON SCOTT,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
(5:91-CV-41-C)

(December 29, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Thomas L. Moran and Jan Thornton Scott challenge the district court's refusal to grant their motions for judgment as a matter of law. We **AFFIRM.**

I.

Western Village Ltd. (Western), through its appropriate agents, executed a promissory note in 1985 with an original principal of $1,763,000, payable to Briercroft Savings Association (Briercroft). [RE Tab 6 22] The note was sought by Western to finance the construction of a shopping center in Amarillo, Texas. [R4 52 et seq.] The note was secured by a deed of trust on the shopping center [RE Tab 8 Loan Memo; R4 28], and Briercroft also received unconditional personal guaranties from Moran and Scott as part of the loan transaction. [RE Tab 6 22; R4 28-30]

Western declared bankruptcy in October, 1987. [R4 25] In March, 1988, Briercroft filed a state action against Moran and Scott, seeking recovery under the personal guaranties. [R4 106-07] Not long thereafter, Briercroft went into FSLIC receivership. [RE Tab 6 at 24] The FSLIC transferred Briercroft's assets, including

the Western note and the personal guaranties, to Southwest Savings Association (Southwest). [Id. at 24] Less than one month later, Southwest was declared insolvent, and subsequently was placed under the supervision of the Resolution Trust Corporation (RTC). [Id.] The RTC promptly removed the pending state action to federal court. [R1 1] Ultimately, the RTC obtained a jury verdict against Moran and Scott for $936,915.87. [R 505]

II.

Moran and Scott challenge that judgment, contending that the district court should have entered a judgment as a matter of law in their favor.[2] The parties agree that our review of this issue is guided by the familiar standard promulgated in ***Boeing Co. v.***

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[2] Moran and Scott moved for a "directed verdict" at the close of the RTC's case. [Moran Brief at 5; R 4 at 50] Similarly, they moved for a "directed verdict" at the conclusion of their defense. [R 4 at 123] Finally, they moved for a "Judgment Not Withstanding [sic] the Verdict" after trial. [R 3 at 501] All of these motions are accurately characterized under the Federal Rules of Civil Procedure as motions for "judgment as a matter of law". Fed. R. Civ. P. 50.

Shipman, 411 F.2d 365 (5th Cir. 1969) (en banc). Under ***Boeing***, we will reverse the district court only "[i]f the facts and inferences point so strongly and overwhelmingly in favor of" Moran and Scott that no reasonable jury could return a verdict against them. *See* ***id.*** at 374.

Moran and Scott contend that no reasonable jury could find that the personal guaranties were accepted by Briercroft or its successors. They note that paragraph ten of both guaranties provides that "[t]he Guarantor agrees that this Guaranty shall not be effective until accepted in writing by Briercroft." [RE Tab 5] Moran and Scott assert that such written acceptance never occurred.

A.

Inasmuch as Moran and Scott assume that a written acceptance requires a written notice to the guarantor, their contentions are misguided. Each of the guaranties provides in paragraph five that "[t]he Guarantor waives notice of acceptance of this Guaranty". [RE Tab 5] Under Texas law,[3] no notice of acceptance need be given

[3] The parties agree that Texas law governs this dispute.

where the unconditional guaranty agreement "does not by its terms require notice of acceptance". ***Cobb v. Texas Distrib., Inc.***, 524 S.W.2d 342, 345 (Tex. Civ. App. 1975). Indeed, notice of acceptance can be expressly waived in a guaranty offer. ***Eastman Oil Well Survey Co. v. Hamil***, 416 S.W.2d 597, 605 (Tex. Civ. App. 1967) ("Notice of acceptance is not required if it appears from the expression of an offer of guaranty . . . that no notice of acceptance was expected or desired by the offeror."); *see generally* Peter A. Alces, *The Efficacy of Guaranty Contracts in Sophisticated Commercial Transactions*, 61 N.C. L. Rev. 655, 667 (1983) ("Notice of acceptance may be waived by the guarantor when he executes the guaranty contract.") (footnote omitted); Richard F. Dole, Jr., *Notice Requirements of Guaranty Contracts*, 62 Mich. L. Rev. 57, 67 (1963) ("Notice of intention to accept can be waived in the offer of guaranty. ... If the offer expressly waives notice it is clearly consonant with the rationale of the notice requirement to respect this manifestation of intent.") (footnotes omitted). Here, Moran

and Scott expressly waived any requirement that they be notified of Briercroft's acceptance.

In an effort to surmount the obstacle Texas law places in their way, Moran and Scott assert that the contract is ambiguous because it provides both for written acceptance and for no notice of acceptance; therefore, Moran and Scott contend that, resolving the alleged ambiguity in their favor, "the provision requiring acceptance in writing supersedes the provision purporting to waive defendants' right to notice of acceptance, and notice of acceptance is required under the proposed guaranty agreement." [Reply Brief at 3-4] We disagree. By the terms of the offer, Briercroft had to accept in writing, but it did not need to notify Moran and Scott of that written acceptance. While the terms of the offer were not particularly favorable to Moran and Scott, they were not ambiguous.

In fact, the famous case of ***International Filter Co. v. Conroe Gin, Ice & Light Co.***, 277 S.W. 631 (Tex. Comm'n App. 1925), involved a similar situation. The offer in that case recited that there would be no contract until an executive officer of

International Filter approved the offer, i.e., accepted it. ***Id.*** at 631. The court in ***International Filter*** determined that such acceptance took place when an officer signed and dated the offer, and wrote "O.K." on it. ***Id.*** at 632. Because the terms of the offer did not provide for notification of that acceptance, a contract arose upon the writing made by the executive officer. ***Id.*** In the instant case, a contract likewise would arise if Briercroft accepted the offer in writing, even though it gave no notice to Moran and Scott. Like the ***International Filter*** court, we will not "wrench[]" the terms of these offers from their "obvious meaning" in an effort to find ambiguity. *See* ***id.*** at 633.

B.

Thus, the remaining question before us is whether there was written acceptance of the offers.[4] The RTC proffers four separate writings from which it asserts a reasonable jury could find such written acceptance: (1) a "Mortgage Loan Summary" listing Moran

[4] Needless to say, "acceptance itself is not waived by mere waiver of notice of acceptance." Alces, *supra* at 667 n.72.

and Scott as personal endorsers; (2) a "Loan Memorandum" listing Moran and Scott as "Guarantors"; (3) a demand notice sent to Moran and Scott 30 days prior to the filing of the original state court action; and, (4) the original complaint filed against Moran and Scott. Moran and Scott counter that documents (3) and (4) were neither timely nor adequate as acceptances, while documents (1) and (2) were timely but not adequate.

We do not address the timeliness of the last two writings, because we determine that the "Loan Memorandum" provided the jury with sufficient evidence to find a written acceptance. The memorandum apparently was presented to the Briercroft Loan/Credit Committee so that it could approve the loan to Western. The memorandum identifies, in writing, Moran and Scott as "GUARANTORS" of the loan. [Ex 22; also RE Tab 8] In addition, it lists the net worth of each: For Moran, approximately $950,000; for Scott, approximately $1,885,000. [Id.] A reasonable jury could find that this document constituted a written acceptance of Moran's and

Scott's offers to serve as guarantors.[5] Thus, we see no need to disturb the jury's verdict.

III.

For the foregoing reasons, the judgment entered by the district court is

AFFIRMED.

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[5] We note that the offers to serve as guarantors contained no restrictions upon the type of writing that could serve as an acceptance (for example, there was no requirement that Briercroft prepare a separate memorandum of acceptance); thus, any writing that manifested assent to the terms of the offer would suffice. *See* Restatement (Second) of Contracts § 50(1) (1979) ("Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer."). A reasonable jury could conclude that the writings contained in the "Loan Memorandum", in which Moran and Scott are identified as "GUARANTORS" and in which each one's net worth is reflected, manifested an assent by Briercroft to Moran's and Scott's offers to serve as guarantors.