

TRIPLE B FOODS, INC.

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NO. 2002-CA-1034

VERSUS

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COURT OF APPEAL

**THE CLAIRE COMPANY,
INC., DIVERSIFIED FOODS,
INC. AND TAB DAMIENS**

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FOURTH CIRCUIT

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STATE OF LOUISIANA

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2000-8655, DIVISION "E-9"
Honorable Gerald P. Fedoroff, Judge

Charles R. Jones
Judge

(Court composed of Judge Charles R. Jones, Judge Terri F. Love, and
Judge Max N. Tobias, Jr.)

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AFFIRMED

The Appellant, Triple B Foods, Inc., appeals the judgment of the district court dismissing its suit on open account against The Claire Company, Inc., and Tab Damiens. We affirm.

Triple B Foods, Inc., (hereinafter “Triple B”) and the Appellees, The Claire Co., Inc., along with its president Tab Damiens, and Diversified Foods, Inc., are in the business of wholesale food products. Both companies buy and sell “foodstuffs” among themselves and other companies of the like. In July of 1997, Triple B was having financial difficulties. It owed the Appellees \$49,110.78. At the same time, the Appellees owed Triple B \$19,961.16. Eventually, Triple B went bankrupt, and one of its officers and directors, Donna Buren, went to work for the Appellees. Ms. Buren worked for the Appellees from August of 1997 to October of 1999, at which time she was terminated.

In June of 2000, Triple B filed suit on open account for the amount of Twenty Thousand Six Hundred-Fifty dollars and ten cents (\$20,650.10). The petition sought monies due on the open account from the Appellees. The

Appellees answered the petition alleging settlement, compensation, and accord and satisfaction, as the debt owed to Triple B was used as a setoff to the monies owed to the Appellees. In the alternative, the Appellees alleged that Triple B owed them for an unpaid open account in the amount of \$49,110.78. After a bench trial on the merits, the district court rendered judgment in favor of the Appellees, dismissing Triple B's claims. The district court concluded that the Appellees proved that the amount owed had been extinguished under the theory of set-off or compensation.

On appeal Triple B asserts three assignments of error, including the argument that the district court erred in finding that The Claire Co., Inc., stipulated that the obligation of \$19,961.16 was extinguished by settlement, compromise or accord and satisfaction. Triple B, further argues that the district court erred in placing the burden of disproving the affirmative defense raised by the Appellees in its "late-filed" amended answer on Triple B and that the district court erred in ignoring the uncontroverted evidence that the separate and distinct debt owed by Triple B to the Appellees had been extinguished by payment and had been reduced to zero dollars as of October 28, 1997.

Although Triple B raises various assignments of error, we are of the opinion that a review of the proceedings in the district court suggests that the

sole issue on appeal is whether the district court was manifestly erroneous in dismissing the claims of Triple B.

At trial, it was stipulated that as of August, 1997, Triple B owed the Appellees \$49,110.78, and the Appellees owed Triple B \$19,961.16. Ms. Buren testified at trial that she returned foodstuffs to Diversified Food in order to reduce the monies owed to Diversified Food by Triple B. She testified that Mark Landry, a salesman for Diversified, assisted in the return of the products. However, Ms. Buren did not produce any documentation, except for her own handwritten notes, to support her contention that she returned foodstuffs to the Appellees in order to reduce the debt of Triple B to zero. Ms. Buren further testified that she was forced to resign from the Appellees when Mr. Damiens learned in October of 1999, that she instructed her attorney to file suit to recover the monies owed by the Appellees to Triple B.

Mr. Damiens testified at trial that he did not receive any foodstuffs back from Triple B in order to reduce its account to zero. He testified that he was aware in July of 1997 that Triple B was going out of business due to financial difficulties. He testified that Diversified Food employee, Mark Landry, approached him about the possibility of hiring Ms. Buren, since her company was closing. Mr. Damiens hired Ms. Buren in August of 1997, and

agreed to offset the monies due to the Appellees by Triple B with the monies owed by the Appellees to Triple B. The entire account of Triple B with the Appellees was written off in August of 1997. Mr. Damiens testified that the Appellees did not receive anything of value for writing off the account. He further testified that any such activities would have been documented through purchase orders, credit tickets and delivery/pickup slips. However, there was no documentation evidencing such a return of foodstuffs. Mr. Damiens testified that during the entire time that Ms. Buren worked for him (August, 1997 to October, 1999), Ms. Buren never raised the issue of the parties' account. Ms. Buren never presented him with an invoice nor demand for monies allegedly due. Mr. Damiens testified that Ms. Buren was terminated in October of 1999, for neglect of duty and that Ms. Buren had allowed her husband to use a company vehicle without authorization and her husband was involved in an accident while driving the vehicle. Ms. Buren was also reprimanded for purchasing certain materials without authorization, and bringing those items into the warehouse of the Appellees. Mr. Damiens further acknowledged that Ms. Buren and the Appellees are involved in other litigation concerning her employment with them.

Mr. Landry was employed by the Appellees in 1997 as a salesman. He handled Triple B's account for the Appellees. In July of 1997, he

became aware that Triple B was going out of business. He testified at trial that he arranged for Ms. Buren to return foodstuffs to Triple B in order to reduce the monies owed to the Appellees. Mr. Landry testified that the foodstuffs were probably picked up by drivers for the Appellees and returned to the warehouse of the Appellees. Mr. Landry testified that he did not see the foodstuffs being returned to the Appellees warehouse, nor did he prepare the purchase orders needed to have the products picked up by the drivers. Mr. Landry admitted that he did not see any documentation showing that the foodstuffs were returned to the Appellees. Mr. Landry also acknowledged that he and Ms. Buren, along with several other former employees of the Appellees, are presently employed by P. A. Menard, a competitor of the Appellees.

Glen Segura, a warehouseman for the Appellees in 1997, and Lionel Washington, a driver for the Appellees in 1997, testified that they recall receiving foodstuffs back from Triple B around the time that Triple B was going out of business. Mr. Segura was responsible for checking foodstuffs and other deliveries received by the Appellees. Mr. Segura admitted at trial that when merchandise was returned to the Appellees, a credit ticket would be written out and turned into the accounting office. Mr. Washington claimed that he picked up some of the merchandise returned by Triple B.

However, Mr. Washington acknowledged that before he would normally pick up merchandise from other vendors, he would be given a pick-up slip by the Appellees authorizing the pick up of merchandise. Mr. Washington testified further that copies of the pick-up slip would be sent to the accounting office. Both Mr. Segura and Mr. Washington admitted on cross-examination that they are presently employed by P.A. Menard and are co-workers with Ms. Buren and Mr. Landry.

After hearing the testimony presented by the parties, the district court concluded that the Appellees proved that the monies owed by them to Triple B were setoff against the monies they owed Triple B. The statutory requirements of setoff, or compensation as it is called in the Civil Code, are set forth in La. C.C. art. 1893, as follows:

Compensation takes place by operation of law when two persons owe to each other sums of money or quantities of fungible things identical in kind, and these sums or quantities are liquidated and presently due.

In such a case, compensation extinguishes both obligations to the extent of the lesser amount.

Delays of grace do not prevent compensation.

For compensation to apply, two distinct debts equally liquidated and demandable must exist contemporaneously. American Bank v. Saxena, 553 So.2d 836 (La. 1989). Compensation takes place by operation of law when

two persons are mutually indebted to each other. In such a case, compensation extinguishes both obligations to the extent of the lesser amount. United States Fidelity & Guaranty Company v. Southern Excavation, Inc., 480 So.2d 920 (La.App. 2 Cir.1985). “[A] liquid debt [is] one whose existence is certain and its quantity determined. A disputed debt is not liquid and cannot be admitted as susceptible of compensation unless the one who asserts compensation has in hand the proof of the existence of the disputed debt and is thus in a position to prove it promptly.” 4 Aubry & Rau, Cours de Droit Civil Francais, s. 326 (6th ed. 1965). A claim is liquidated when the debt is for an amount capable of ascertainment by mere calculation in accordance with accepted legal standards. Sims v. Hays, 521 So.2d 730, 733 (La.App. 2 Cir.1988). Thus, a determination as to the liquidity of a claim is an essential prerequisite to deciding whether such a claim is a proper basis for a plea of compensation. Lack of sufficient liquidity and demandability will preclude such a plea. Hartley v. Hartley, 349 So.2d 1258 (La.1977).

La. C.C. art. 1893 must be read in conjunction with La. C.C. art. 1831, which provides that a party who asserts that an obligation is null, or that it has been modified or extinguished, must prove the facts or acts giving rise to the nullity, modification, or extinction. Under these rules, the burden of

proof is placed on the proponent of the plea of compensation. American Bank v. Saxena, supra. To sustain this burden, the proponent must prove by a preponderance of the evidence that the claim urged as a set-off to plaintiff's claim is equally liquidated and demandable, i.e., that the amount of each is for a certain amount capable of ascertainment by mere calculation in accordance with accepted legal standards. United States Fidelity & Guaranty Company v. Southern Excavation, Inc.; Powerhouse Wholesale Elec. Supply, Inc. v. Spartan Bldg. Corp., 525 So.2d 1216(La.App. 1 Cir. 1988).

In the present case, the district court considered all the testimony and chose to accept the testimony of Mr. Damiens which established that Triple B and the Appellees agreed to a setoff of the monies due. Issues of credibility are best left to the discretion of the trial court because of its better position to observe and evaluate live witnesses. Cowley Corp. v. Shreveport Packing Co., Inc. of Kansas, 440 So.2d 1345 (La.App. 2 Cir.1983). The record reveals no abuse of that discretion. The parties stipulated that each owed money on open accounts to the other as of July, 1997. Thus, two distinct debts equally liquidated and demandable existed contemporaneously in July of 1997. Mr. Damiens testified that he and Ms. Buren spoke about the existing debts when he hired Ms. Buren in August of 1997, after Triple B

went out of business. Mr. Damiens testified that he informed Ms. Buren that he would write off the debt owed by Triple B to the Appellees and use the monies owed by the Appellees to Triple B as a setoff. Mr. Damiens produced documentation that the open account of Triple B with the Appellees, was written off in August of 1997. While Ms. Buren disputes Mr. Damiens' testimony and argues that she returned the merchandise to the Appellees, she failed to produce any documentation in support of her argument. Mr. Damiens testified at trial that had Triple B returned merchandise to the Appellees, there would be documentation in its records. Even Mr. Landry, Mr. Segura and Mr. Washington acknowledged at trial that the return of the merchandise would had have been documented by the Appellees. Mr. Damiens testified that he searched the business records and found no evidence of any merchandise being returned by Triple B.

The Appellees produced sufficient evidence to prove that the account owed to Triple B by the Appellees had been setoff; therefore, there was no error by the district court.

Decree

For the reasons stated herein the judgment of the district court dismissing the claims of Triple B against The Claire Co., Inc., and Diversified Foods, Inc., is hereby affirmed.

AFFIRMED