

NOT DESIGNATED FOR PUBLICATION

DOMINION CREDIT, LLC * **NO. 2012-CA-1420**
VERSUS *
SAMUEL BAILEY, JR., D/B/A * **COURT OF APPEAL**
LOUISIANA DEMOLITION * **FOURTH CIRCUIT**
AND SAMUEL BAILEY, JR. * **STATE OF LOUISIANA**
* * * * *

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2011-06688, DIVISION "G-11"
Honorable Robin M. Giarrusso, Judge

* * * * *

Judge Madeleine M. Landrieu

* * * * *

(Court composed of Judge Roland L. Belsome, Judge Paul A. Bonin, Judge Madeleine M. Landrieu)

BONIN, J., CONCURS WITH REASONS

Edward H. Arnold, III
Benjamin W. Janke
BAKER DONELSON BEARMAN CALDWELL & BERKOWITZ, PC
201 St. Charles Avenue
Suite 3600
New Orleans, LA 70170

COUNSEL FOR PLAINTIFF/APPELLEE

Joseph Paul Rumage, Jr.
LAW OFFICE OF PAUL RUMAGE
13541 Tiger Bend Road
Baton Rouge, LA 70817

COUNSEL FOR DEFENDANT/APPELLANT

**REHEARING GRANTED;
JUDGMENT AFFIRMED ON
REHEARING**

MAY 8, 2013

ON REHEARING GRANTED

The case is before us on an application for rehearing filed by appellants, Samuel Bailey, Jr., d/b/a Louisiana Demolition, Inc. and Samuel Bailey, Jr. We grant the application for the sole purpose of correcting the court's misplaced reliance on *Filson v. Windsor Court Hotel*, 2004-2893 (La. 6/29/05), 907 So.2d 723 which has been legislatively overruled in part.

Irrespective of the court's reliance on *Filson*, the appellants' defense to the motion for summary judgment is that they did not have time to conduct discovery. In its answer, appellants raise the following affirmative defenses: fault of petitioner, reasonableness of actions, compliance with all regulations, estoppel, failure to mitigate, and offset, counter-claim, and credit.

Under Louisiana Code of Civil Procedure article 966, a motion for summary judgment is appropriate only after "adequate discovery." However, it is not an abuse of the trial court's wide discretion in discovery matters to entertain a motion for summary judgment before discovery has been completed. *Simoneaux v. E.I. du*

Pont de Nemours & Co., Inc., 483 So.2d 908 (La.1986). It is within the trial court's discretion to render a summary judgment or require further discovery. *Eason v. Finch*, 32,157 (La.App. 2d Cir. 8/18/99), 738 So.2d 1205, writ denied, 99–2767 (La.12/10/99), 751 So.2d 861. As the Court held in *Simoneaux*, “[t]he only requirement is that the parties be given a fair opportunity to present their claim. Unless plaintiff shows a probable injustice a suit should not be delayed pending discovery when it appears at an early stage that there is no genuine issue of fact.” 483 So.2d at 912–13; *Mitchell v. Valteau*, 09–1095, p. 13 (La.App. 4 Cir. 1/27/10), 30 So.3d 1108, 1116; *Smith v. City of New Orleans ex rel. Shires*, 2010-1464 (La. App. 4 Cir. 7/6/11), 71 So. 3d 525, 529.

Under the facts of this case, appellants did not need discovery from the other party to defeat summary judgment. In his affidavit, Mr. Bailey admits that he signed the promissory note and the guaranty dated January 27, 2009. as the trial court indicated, if the appellants’ defense was that they had paid the obligation, the appellants themselves would be in control of any evidence of such payment. However, appellants did not submit any such evidence in opposition to the summary judgment, even in the form of an affidavit that might have placed the issue in dispute. Appellants failed to raise a single genuine issue of material fact to show an absence of factual support for one or more elements essential to Dominion Credit’s claim.

Accordingly, for the reasons enunciated in this court's original opinion and the reasons stated herein, the judgment of the trial court is affirmed.

**REHEARING GRANTED;
JUDGMENT AFFIRMED ON
REHEARING**