SUPREME COURT OF MISSISSIPPI

WILLIAM P. KNOX Appellant	
vs.	Case No. 2008-CA-01390
BANCORPSOUTH BANK Appellee	

Appeal From Circuit Court of Desoto County, Mississippi

BRIEF FOR APPELLEE

J. PATRICK CALDWELL, ESQ. (MS BAR [redacted]
KEVIN B. SMITH, ESQ. (MS BAR [redacted]
Riley, Caldwell, Cork & Alvis, P.A.
207 Court Street (38804)
Post Office Box 1836
Tupelo, Mississippi 38802-1836
Phone: 662-842-8945
Fax: 662-842-9032

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons have an interest in the outcome of the case. These representations are made in order that the Justices of the Mississippi Supreme Court or the Judges of the Mississippi Court of Appeals may evaluate possible disqualification or recusal:

Name	Connection and Interest
William P. Knox (individually and as Trustee of the William P. Knox Revocable Living Trust)	Appellant
BancorpSouth Bank	Appellee
Honorable Robert P. Chamberlin	Circuit Court Judge
Goeldner, Porter & McDowell	Attorneys for William P. Knox
Riley Caldwell Cork & Alvis, P.A.	Attorneys for BancorpSouth Bank
BancorpSouth, Inc.	Holding Company of Appellee

J. PATRICK CALDWELL, ESQ. (MS BAR [redacted]
KEVIN B. SMITH, ESQ. (MS BAR [redacted]
Riley, Caldwell, Cork & Alvis, P.A.
207 Court Street (38804)
Post Office Box 1836
Tupelo, Mississippi 38802-1836
Phone: 662-842-8945
Fax: 662-842-9032

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

OTHER

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is an action by a borrower, the William P. Knox Revocable Living Trust, by and through the trustee, William P. Knox ("Knox"), against BancorpSouth Bank ("BancorpSouth"), for breach of contract, tortious breach of contract, promissory and equitable estoppel, and infliction of mental anguish. Knox claims that BancorpSouth breached an oral contract upon which Knox alleges to have relied.

II. COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW

Knox filed suit against BancorpSouth on December 6, 2006, and BancorpSouth filed its Answer on January 18, 2007. R. 8, 32. The parties proceeded to engage in litigation, and on March 14, 2008, BancorpSouth filed a Motion for Summary Judgment. R. 68. An Amended Scheduling Order was filed on October 23, 2007, setting a dispositive motion deadline for March 15, 2008. R. 59. BancorpSouth brought the Motion for hearing on June 12, 2008, and after hearing arguments, the trial court granted the Motion. R. 424. Knox appealed. R. 432.

III. STATEMENT OF RELEVANT FACTS

In January 2005, representatives from BancorpSouth, including Michael Anderson, Tony Vanderford, and Brian Walhood, met with Plaintiff William Knox, Jane Brown, Barry Hunt, and another representative from Knox's office. R. 241. At said meeting, Knox made his request to borrow $2 million on a line of credit for Knox to use as working capital in his business endeavors. *Id.* The discussion between BancorpSouth representatives and Knox

and his representatives entailed that Knox's loan request would be submitted to and require the approval of BancorpSouth's loan administration. *Id.*

As a result of the request by Knox from the January 2005 meeting, BancorpSouth made a loan in the amount of $2 million to the William P. Knox Revocable Living Trust for the term of one year bearing rate of interest of 5.5%, with said loan being secured by commercial property owned by separate Plaintiff William P. Knox Revocable Living Trust. R. 245. Nothing in this February 14, 2005 note reflects that said loan would be replaced by another loan with a longer maturity.

Knox's mortgage broker, Barry Hunt, and Knox's assistant, Jane Brown, have different remembrances of the terms of the oral contract allegedly arising from the January 2005 meeting. R. 256, 263. Specifically, Barry Hunt testified in his deposition that Knox desired a permanent loan for a term of 20 years, but that during the January 2005 meeting with BancorpSouth representatives, Hunt did not think that Knox ever asked for a specific length of term. R. 257, 261. Further, Hunt, who was present at the January 2005 meeting at the behest of Knox and serving as a "facilitator" for Knox, testified that the topic of an interest rate for the requested loan was not even discussed at the January 2005 meeting. R. 262. Next, Knox's bookkeeper and his self-described "utmost advisor" who was present at the January 2005 meeting testified in her deposition that she did not recall any details of the requested loan by Knox at said meeting. R. 265. Like Hunt, Brown testified that the topic of interest rate for the requested loan was not discussed at the January 2005 meeting. R. 266. Further, it was Brown's testimony that there were not any specific terms committed to by any BancorpSouth representatives from the January 2005 meeting. R. 268.

On June 19, 2006, a meeting was called between BancorpSouth representatives Tony Vanderford, Ty Warren, and Mike Anderson with Knox and Jane Brown to discuss the line of credit from the $2 million note provided by BancorpSouth to Knox. R. 161. The substance of this June 19, 2006 meeting was memorialized in a memo generated by Knox. R. 160. As can be see from this memo, there were numerous concerns over the financial viability of Knox's companies, to-wit: "ratio to debt had increased by 80%. Liabilities had doubled. A number of new banks were giving loans to Security Builders[1] and there could be a market slow down as interest rates are up." *Id.*

In addition to the foregoing concerns, BancorpSouth had been alerted by the United States Attorney's Office of a federal grand jury investigation via a subpoena of Knox's financial records. R. 217. This information, although known by BancorpSouth loan administration personnel in its decision to not extend further credit to Knox, was of a confidential nature at the time and therefore not communicated at the June 19, 2006 meeting. *Id.*

Notwithstanding the foregoing concerns over Knox's creditworthiness, rather than calling the existing loan as due and payable, BancorpSouth, at the June 19, 2006 meeting, gave Knox the option to renew the loan from the note taken on February 14, 2005. R. 162. Ultimately, this loan was renewed by Knox's execution of a renewal note on June 19, 2006 with a 15-year amortization and a three-year balloon at 8.5% interest. R. 270. At all times from and after the February 14, 2005 note through present, Knox has had access to the line

---

[1]Security Builders was one of Knox's entities that would have been mostly involved with the loan. R. 278, 279.

of credit issuing from the original note and the renewed note from June 19, 2006. R. 245, 270.

SUMMARY OF THE ARGUMENT

The trial court correctly ruled in favor of BancorpSouth, granting its Motion for Summary Judgment. The parol evidence rule necessarily entails the doctrine of merger, and as such, the trial court's application of the doctrine of merger was proper. First, BancorpSouth timely and reasonably raised and pursued the enforcement of its affirmative defenses. The discovery conducted by BancorpSouth was necessary to identify the specifics of Knox's claims pertaining to an alleged separate, stand-alone, oral contract, the terms of which could not be ascertained in the absence of discovery. It was only through discovery that BancorpSouth could establish Knox's execution of a renewal note was not attended by any duress or coercion, contrary to what was alleged by Knox in his Complaint. Through discovery, BancorpSouth was able to reveal the inconsistencies and material omissions associated with the alleged oral contract. BancorpSouth's Motion for Summary Judgment was brought timely within the constraints of the trial court's Scheduling Order that provided a deadline for bringing dispositive motions.

The trial court, upon review of information gleaned via discovery, appropriately determined that the alleged oral contract merged into the June 19, 2006 renewal note, as it involved the same transaction, subject matter, and parties as is required for merger. Application of the doctrine of merger / parol evidence rule by the trial court necessarily recognized the existence of an oral agreement as alleged by Knox, but that said agreement

was absorbed into the subsequent contract being the June 19, 2006 renewal note. As such, there no longer existed any questions of fact as to the existence of an oral contract, but rather questions of law for the trial court regarding construction of the contract.

Furthermore, Knox waived all of his defenses and causes of action against BancorpSouth by his voluntary and informed execution of the June 19, 2006 renewal note.

STANDARD OF REVIEW

"This court reviews a motion for summary judgment under a *de novo* standard, and a motion for summary judgment is granted only when the trial court finds that the plaintiff would be unable to prove any facts to support his claim." *Robinson v. Singing River Hosp. Sys.*, 732 So.2d 204, 207 (Miss. 1999). Further, it has been observed:

> In spite of this requirement of caution in granting summary judgment, this court has held that the non-moving party must be diligent in opposing the motion for summary judgment. Moreover, in order for summary judgment to be inappropriate, there must be genuine issues of *material* fact; the existence of a hundred contested issues of fact will not thwart summary judgment where none of them is material. A fact issue is material if it tends to resolve any of the issues properly raised by the parties.

Spann v. Diaz, 987 So.2d 443, 447 (Miss. 2008). (Emphasis in original.)

ARGUMENT

I. BANCORPSOUTH DID NOT WAIVE ANY OF ITS AFFIRMATIVE DEFENSES

Knox relies heavily on *MS Credit Center, Inc. v. Horton*, 926 So.2d 167 (Miss. 2006) and its progeny for the position that BancorpSouth waived its affirmative defenses by failing to timely pursue said defenses. Relevant language from *Horton* reads:

> A defendant's failure to timely and reasonably raise and pursue the enforcement of any affirmative defense or other affirmative matter or right which would serve to terminate or stay the litigation, coupled with active participation in the litigation process, will ordinarily serve as a waiver.

Horton at 180.

It is to be noted that *Horton* involved a written arbitration agreement which was known by the defendants and used as an affirmative defense in their answer. *Id.* at 172. In the case *sub judice*, the relevant affirmative defense (parol evidence rule/doctrine of merger) would not "serve to terminate or stay the litigation" without discovery to define the terms and substance of the alleged oral contract. *Id.* at 180. Because Knox's claim of an oral contract entailed undocumented terms, BancorpSouth was compelled to discover factual components as claimed by Knox and his representatives.

Knox claims that BancorpSouth's use of its affirmative defenses were untimely based on the *Horton* ruling that "absent extreme and unusual circumstances - an eight month unjustified delay in the assertion and pursuit of any affirmative defense or other right which, if timely pursued, could serve to terminate the litigation, coupled with active participation in the litigation process, constitutes waiver as a matter of law." *Horton* at 181. Knox weilds

this language for the proposition that BancorpSouth engaged in unnecessary delay or was otherwise dilatory in bringing on for hearing its dispositive motion, as it was brought beyond eight months from answering the Complaint and asserting its affirmative defenses. Appellant's Brief at 10-11. However, the eight month time period stated in *Horton* was in the context of a straightforward, written arbitration agreement that was known to all the parties. The alleged oral contract in the case at bar was attended by undefined terms and varied recollections among the parties. R. 257, 261, 262, 265, 268. As such, there was no unjustified delay by BancorpSouth in the assertion and pursuit of fully developing the underlying facts necessary to pursue its affirmative defenses.

After engaging in written discovery, BancorpSouth continued to timely pursue its affirmative defenses by deposing Knox in April 2007 and Knox's associates on December 19, 2007. R. 60, 62. BancorpSouth reasonably asserted and pursued its affirmative defenses by securing the necessary discovery.

The Supreme Court made clear in *Horton* that there is no "minimum number of days which will constitute unreasonable delay in every case, but rather we defer such findings for the trial court on a case by case basis." *Horton* at 181. In that regard, the trial court in the present case observed:

> Obviously, the discovery process can always be a little quicker probably than it is, but I think at our hearing the hearing had a lot to do with the events which led up to the contract in question. Discovery was presented by both sides as to why the court should grant or deny the motion. I mean, simply stated, if the appeals court were to find in this particular case that the defendant had to bring this motion forward on a motion to dismiss immediately, then it's the court's opinion the bank would be robbed of the defense in that they would be unable to present their motion until they had gone through the appropriate discovery with Mr. Knox and certainly be able

to present what the parties' understanding of the oral and written contract were.

RE. 49, 50.

As can be seen, the trial court considered the length of time taken by BancorpSouth in bringing its dispositive motion and in the exercise of its discretion determined that under the circumstances it was not unreasonable.

Of the line of cases following *Horton*, *Spann v. Diaz*, 987 So.2d 443 (Miss. 2008) provides instruction for the case at bar. In *Spann*, the plaintiff claimed that because the defendant "did not raise his statute of limitations defense in a motion for summary judgment until July 19, 2006, more than a year after Spann commenced this action, and that because Diaz actively participated in litigation by deposing Spann, Diaz waived his affirmative defense." *Spann* at 447. In *Spann*, the original complaint was filed on August 15, 2005, and a first amended complaint was filed on April 12, 2006 that was answered by the defendant on May 9, 2006. *Id.* at 448. Thereafter, the defendant filed his motion for summary judgment on July 19, 2006. *Id.* Accordingly, the defendant's dispositive motion in *Spann*, based upon the straightforward affirmative defense of statute of limitations, was brought on for hearing more than eight months from its answer to the original complaint. *Id.* However, the *Spann* court ruled that the defendant's filing his dispositive motion 71 days following his answer to the first amended complaint was timely and that he did not waive his affirmative defense. *Spann* at 448. In so doing, the Court observed that "[w]hile substantial and unreasonable delay in pursuing a particular right, coupled with active participation in the litigation process, could constitute a waiver . . .," the defendant in *Spann* brought his motion

for summary judgment without substantial and unreasonable delay. *Id.*[2] Likewise, BancorpSouth timely filed its Motion for Summary Judgment.

The Knox Complaint makes the ambiguous allegation that "to discharge his duty to mitigate damages, Knox accepted a loan for a lesser amount, for a higher interest rate, and for a shorter term, but that action did only diminish, but not eliminate, the loss caused by bank." R. 8. As a result, BancorpSouth had to pinpoint and establish the relevant facts that comprised Knox's claim of an oral contract and to connect it with the June 19, 2006 renewal note and thus, intelligently argue application of the merger doctrine.[3]

The potential for distraction caused by undeveloped allegations attendant with an alleged oral contract is underscored by Knox's own Appellant Brief in this appeal. This is shown in the following language regarding the January 2005 meeting: "At this meeting, Knox and representatives of BancorpSouth entered into two oral agreements." Appellant's Brief at 2. Next, Knox asserts that "[t]he equity loan, line of credit, and pay-off offer are three distinct agreements involving three distinct amounts of money to be loaned and three distinct terms over which repayment was to be made." *Id.* at 14. The premise undergirding Knox's entire cause of action against BancorpSouth is that there was a *separate* oral contract at the January 2005 meeting which falls outside the purview of the renewal note executed by Knox, thereby eliminating application of the doctrine of merger. As can be seen from

---

[2]The case *sub judice* is similar to the circumstances in *Spann* in that a dispositive motion was brought by the defendant within the appropriate motion deadline set by the trial court and agreed upon by the parties. R. 59.

[3]Knox had significant interactions and dealings with BancorpSouth as evidenced by his more than 200 loans with the bank. R. 291.

Knox's own language from excerpts in his Complaint and Appellant's Brief, he has strategically disavowed any connection between the alleged oral contract for an "equity loan" and the renewal note.[4] As such, BancorpSouth, in order to sufficiently apprise the trial court of the nexus of the alleged oral contract to the June 19, 2006 renewal note, was required to conduct discovery to establish its defenses.

Next, Knox's causes of action in his Complaint claimed tortious breach of contract, alleging BancorpSouth's "conduct was attended by such intentional wrong as to amount to an independent tort," entitling Knox to compensatory and punitive damages. R. 14. Further, Knox alleges that BancorpSouth's conduct resulted in the foreseeable consequence of Knox suffering mental anguish, thereby entitling him to compensatory damages. *Id.* Such allegations necessarily raise the specter of intentional and wrongful conduct unrelated to contract performance. Accordingly, such allegations are capable of being interpreted of showing that the renewal contract was executed under coercion, duress, and/or fraud. Even though coercion, duress and/or fraud were not specifically alleged, the tenor of these allegations left the door open for such additional claims. Certainly, a claim for punitive damages arising from intentionally foreseeable wrongful acts resulting in infliction of mental anguish had to be challenged and shown to be without merit via discovery before proceeding to summary judgment. In other words, an early dispositive motion, made with the mere presentation of a renewal note in light of unchallenged claims that the renewal note was

---

[4]Knox initially referred to the alleged oral contract at issue as a "permanent loan" and not an "equity loan." R. 11.

stained with intentionally wrongful conduct, would have been premature for summary judgment purposes.

The critical nature of BancorpSouth's need to develop certain facts through discovery is borne out through the trial court's ruling in its Order granting BancorpSouth's Motion for Summary Judgment, which states in pertinent part:

> The plaintiff makes no showing that he was forced to enter into said notes by any type of duress, economic or otherwise. The record makes clear that he was at all times a savvy businessman who made a strategic economic decision to enter into the written contracts, specifically, the June 19, 2006 renewal note.

R. 426.

Obviously, the trial court's detailed finding that Knox had full knowledge of his business interests upon entering the renewal note without any fraud or duress could not have been made without sufficient discovery to support same.

Because Knox's claims are built upon the premise that there were "three distinct agreements involving three distinct amounts of money to be loaned and three distinct terms," BancorpSouth was compelled to conduct a sufficient amount of discovery to ensure that it could defeat all such contentions by Knox in order to rely upon its position that the renewal note integrated all other oral communications under the doctrine of merger. It is noteworthy that Knox had two of his representatives present with him at the January 2005 meeting where the alleged oral contract was formed.[5] But it was only through the discovery process and

---

[5]Knox's mortgage broker, Barry Hunt, and a personal assistant, Jane Brown, were present at the January 2005 meeting and provided via deposition testimony varied and inconsistent testimony regarding their recollection of the terms and/or absence of critical terms to the alleged oral contract. R. 256, 263.

depositions of Knox and his representatives that BancorpSouth was able to demonstrate to the trial court that the alleged oral contract involved the same subject matter and the same parties as the June 19, 2006 renewal note. RE. 50. An early dispositive motion brought on for hearing without first establishing the substance and terms of the alleged oral contract would have left BancorpSouth unable to candidly argue that the alleged oral contract was subject to the doctrine of merger.

The very nature of Knox's claim that an oral contract was formed in the midst of other agreements and negotiations necessarily requires a certain amount of fact development to link the alleged oral contract to the ultimate written document. In other words, oral contracts, being amorphous in nature, can only be established by renditions of the parties involved. Faced with such a prospect and Knox's efforts to paint the alleged oral contract as separate and distinct from the renewal note required BancorpSouth to engage in discovery. In that vein, instructive authority provides, "[t]he writing cannot prove its own completeness and accuracy . . . the evidence that the [parol evidence] rules seems to exclude must sometimes be heard and weighed before it can be excluded by the rule." *Donoghue v. IBC USA, Inc.*, 70 F.3d 206, 216 (1st Cir. 1995) *citing* Arthur L. Corbin, Corbin on Contracts, Section 582 at 448-50 (1960), quoted in E. Allan Farnsworth, Contracts, Section 7.3 at 474 (2nd Ed. 1990). Indeed, the alleged oral contract had to be examined under the light of discovery in order to show that it did pertain to the same parties and subject matter to thereby properly invoke application of the parol evidence rule.

In *Beck v. Goodwin*, 456 So.2d 758 (Miss. 1984), the Mississippi Supreme Court upheld the trial court's finding that an alleged oral agreement to lend was too vague and

indefinite to be enforced. In *Beck*, the plaintiff alleged that the continuing availability of financing through the bank by such alleged representations as "financing would never be a problem and that as long as the bank had sufficient funds for this purpose that [plaintiff] would be a preferred customer . . . that [defendant] would never arbitrarily cut off financing to him as they were aware that this was the very heart of his business." *Beck* at 759. In its observation that this agreement was too vague and indefinite to be enforced, the *Beck* court observed that "an offer must be so definite in its terms, or require such definite terms in the acceptance, that the promises and performances to be rendered by each party are reasonably certain." 456 So.2d at 760, *quoting Izard v. Jackson Production Credit Corp.*, 195 So. 331 (1940) (holding agreement to lend money was too indefinite to constitute a contract). *See also First Money, Inc. v. Frisbee*, 369 So.2d 746 (Miss. 1979) (holding agreement did not amount to a contract to lend money because it was too indefinite); *Patton v. State Bank & Trust Co.*, 936 So.2d 391 (Miss. Ct. App. 2006) (Summary judgment affirmed in favor of bank because agreement to lend money was too indefinite for form a contract.)

Under *Izard v. Jackson Production Credit Corp.*, 195 So. 331 (Miss. 1940), the holding reflects that verbal representations of promises to lend money may be disposed of at the trial court level by summary judgment. Thus, the trial court in the case at bar correctly reached the proper conclusion due to the vague and indefinite nature of the oral contract as alleged by Knox. Of further import, this independent basis warranting summary judgment in favor of BancorpSouth defeats the *prima facie* elements of Knox's claim, not by an affirmative defense, but through fact development fleshed out through discovery. As such, there even exists an independent basis supporting summary judgment in favor of

BancorpSouth that is not within the purview of the *Horton* line of cases addressing the timeliness of pursuing and enforcing affirmative defenses.

Not only are the terms of the alleged oral contract too indefinite for enforcement, but the terms allegedly addressed at the January 2005 meeting are incapable of being consistently ascertained as developed through discovery:

William Knox version of "oral contract"

Knox's own inconsistencies demonstrate the vague and indefinite nature of the alleged oral contract. Knox's Complaint at ¶ 12(d) alleges that the permanent loan would be "for a term of ten (10) years"; however, Knox's own sworn deposition testimony was that BancorpSouth "would give me permanent financing, 80% of value on a 15-year fixed." R. 290.

In discovery requests to the Plaintiffs for any documents or materials associated with the January 2005 meeting to support the existence of the alleged oral contract, the Plaintiffs responded with nothing more than a document prepared by Plaintiff's counsel. R. 311, 312. This document is clearly inconsistent with the testimony of his other representatives regarding the January 2005 meeting.

Additional inconsistencies arising from Knox's remembrance of the terms of the alleged oral contract are borne out through the conduct of the parties with respect to the "temporary" note executed on February 14, 2005. Knox testified "my only issue there is that the line of credit [February 14, 2005 note] should never have went to a year. It was supposed to be in effect after appraisal." R. 292. Again, Knox's understanding of how the alleged oral contract was to be effectuated is markedly at odds with the conduct of the parties in that the

appraisal was completed on February 4, 2005, and the "temporary" loan was not restructured until well later on June 19, 2006, with the renewal note. R. 270.

Barry Hunt version of "oral contract"[6]

Hunt, a mortgage broker, was engaged by Knox to help seek out the alleged permanent financing which Knox claims arose under the alleged oral contract with BancorpSouth. R. 258. In this regard, Hunt was questioned regarding the term of years Knox was desiring for his "permanent financing," and he answered in this deposition it was for "20" years. R. 257. Hunt's role at the January 2005 meeting is not to be regarded lightly as a retained expert who, by his own deposition testimony, stated that for the purposes of said meeting "I was a facilitator . . ." R. 258.

Upon being questioned about the $2 million loan and how it was to be used, Mr. Hunt testified: "However he wanted to, you know. There was no restrictions at the meeting there that he couldn't use it for Tunica, or he couldn't buy land with it. There were no restrictions whatsoever on it." R. 260. This flippant testimony as to how Knox may have used and the circumstances under which BancorpSouth would have loaned $2 million is contrary to Knox's assertion that the loan was to be for working capital. Finally, Hunt provided telling deposition testimony showing the total absence of an essential term to a contract to loan money, the rate of interest:

---

[6]Hunt was also designated as an expert witness by the Plaintiffs. R. 52.

Q. You mentioned a fixed loan, meaning the fixed rate as well?
A. Right.
Q. Was rate discussed at this meeting?
A. No.

R. 262.

Jane Brown version of "oral contract"

Serving as Knox's bookkeeper for several of his companies, Brown was present at the January 2005 meeting. R. 264. Brown confirmed that the January 2005 meeting was "chaired" by Hunt and that Hunt did most of the talking and he laid out the plan. R. 265. Even though Brown was present at the January 2005 meeting and is intimately involved in Knox's business operations, when asked if she remembered any details of the requested loan from the January 2005 meeting, she responded "No, I don't . . ." *Id.* However, when probed further whether either Hunt or Knox made any specific requests for a loan from BancorpSouth, she responded "they wanted a permanent loan for 5 to 15 years . . ." R. 266. Further, when questioned whether an interest rate was discussed at the January 2005 meeting, Brown testified "no". *Id.*

Brown, who Knox regards as his "utmost advisor" and that she "keeps the books, and keeps us on teel, and reports to me [Knox] whatever I need to know," revealed her perspective of the January 2005 meeting as follows:

Q. . . . In other words, did Mr. Knox or Mr. Hunt go with - - prepared with the kind of things that were necessary to get a loan?
A. No. It was my perception that it was a talking meeting, you know, this is what we want.

****

Q. Alright. Was there any response beyond just we'll work with you concerning - - you said 5 to 15 years. Were there any specific terms committed to by anybody at BancorpSouth that day?

A. I was not aware of any specific terms.
Q. Alright. Was there any understanding made that day about any temporary loans? Were those discussed?
A. I was not aware of it.

R. 267, 268.

As can be seen from above, it was only through discovery that BancorpSouth was able to demonstrate the vague and indefinite nature of the alleged oral contract as contrasted with the mere claim of an oral contract by Knox's Complaint. R. 8.

II. BANCORPSOUTH'S ASSERTION OF THE PAROL EVIDENCE RULE AS AN AFFIRMATIVE DEFENSE NECESSARILY INCLUDED THE DOCTRINE OF MERGER

Knox foists the argument that the parol evidence rule and the doctrine of merger are not merely two names for the same doctrine, but that the two are somehow separate and exclusive of one another. Appellant's Brief at 13. Such a position is without merit. Indeed, the "merger doctrine triggers the parol evidence rule, precluding enforcement of prior agreements." *Williams v. Colonial Bank, N.A.*, 199 Fed.Appx. 399, 402 (5th Cir. 2006).

BancorpSouth was correct in relying upon the properly asserted affirmative defense of the parol evidence rule as encompassing the doctrine of merger. *See Kona Technology Corp. v. Southern Pacific Transportation Co.*, 225 F.3d 595 (5th Cir. 2000) (the "merger doctrine" is an analogue of the parol evidence rule); *Christophe v. Parker Drilling Co.*, 329 F.Supp.2d 849 (S.D. Tex. 2004) (The rule of merger, a corollary to the parol evidence rule provides, "absent pleading and proof of ambiguity, fraud, or accident, a written instrument presumes that all the parties' earlier agreements relating to the transaction have merged into the written instrument.")

Further, Knox contends that the merger doctrine excludes prior agreements "only when the written contract, on its face, contains an integration clause . . ." Appellant's Brief at 13-14. Such a position is specious and conflicts with the authority on which he relies, *B.C. Rogers Poultry, Inc. v. Wedgeworth*, 911 So.2d 483 (Miss. 2005). Rather, relevant authority has utilized the doctrine of merger to hold that previous negotiations are merged into the final document as expressing the intention of the parties, which *did not* involve an integration/merger clause. *See e.g., Singing River Mall, Co. v. Mark Fields, Inc.*, 599 So.2d 938 (Miss. 1992); *Hoerner v. First National Bank of Jackson*, 254 So.2d 754 (Miss. 1972); *Continental Gin Co. v. Freeman*, 237 F.Supp. 240 (N.D. Miss. 1964). For all of these reasons, BancorpSouth plainly put the doctrine of merger into play, and the trial court correctly applied it.

III. THE TRIAL COURT DID NOT ERR IN FINDING THAT KNOX'S CLAIMS ARE BARRED BY THE DOCTRINE OF MERGER

Knox focuses on a Fifth Circuit case which holds that the doctrine of merger applies only to prior agreements which involve the same parties, the same subject matter, and the same transaction. *Williams v. Colonial Bank, N.A.*, 199 Fed.Appx. 399, 402 (5th Cir. 2006). In reliance upon that holding, Knox strains mightily to characterize his dealings with BancorpSouth as three distinct agreements to thereby remove application of the doctrine of merger.[7] However, the underlying facts developed through discovery established for the benefit of the trial court that the renewal note of June 2006, along with the alleged oral

[7]Notably, the section of Appellant's Brief seeking to establish that there were three distinct agreements entails a litany of factual assertions devoid of any record references. Appellant's Brief at 14-16.

agreements involved the same parties, the same subject matter, and the same transaction, and thus, required invocation of the doctrine of merger. In fact, the trial court reinforced the necessity of discovery to establish application of the doctrine of merger when it observed:

> I feel like the facts of the case, as set forth in the arguments made, the motions filed, and the ruling of the court are clear that the underlying oral agreement was subsequently merged into the written agreement of the parties. There was no further oral agreement.

RE. 50.

Because merger "refers to the absorption of one contract into another subsequent contract . . .," the logical conclusion to be gleaned from the trial court's application of the doctrine of merger demonstrates that it did in fact find there was a separate prior contract (Knox's alleged oral contract), which ultimately was absorbed into the June 2006 renewal note. *Kona Technology Corp.* at 612. Having been given the benefit of acknowledging a prior formed oral agreement, Knox now is without cause to argue for the existence of any factual questions regarding the existence of an oral contract as "questions concerning the construction of contracts are questions of law that are committed to the court rather than questions of fact committed to the fact finder." *Parkerson v. Smith*, 817 So.2d 529, 532 (Miss. 2002); *Miss. State Hwy. Comm'n. v. Patterson Enters. Ltd.*, 627 So.2d 261, 263 (Miss. 1993). Ultimately, the alleged oral contract was acknowledged and construed by the trial court as was its prerogative and was correctly determined to be merged into the June 2006 renewal note. R. 50.

IV. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT AS THERE WERE NO GENUINE ISSUES OF MATERIAL FACT

The language relied upon by Knox from *Singing River Mall Co. v. Mark Fields, Inc.*, 599 So.2d 938 (Miss. 1992) is inapplicable to the matter at hand. Indeed, Knox mischaracterizes the holding in *Singing River Mall* when he states, "the Supreme Court has recognized that, as in the present case, the existence and terms of an oral contract are questions of fact to be left to the trier of fact." Appellant's Brief at 17. Instead, *Singing River Mall* concerned an existing written lease agreement and the question of whether a subsequent meeting between the parties which was memorialized in a letter modified the lease. *Singing River Mall Co.* at 946-47. The fact question of whether an existing written agreement was modified by a subsequent writing between the parties does not support Knox's proposition that a fact question exists under the facts of the case at bar.

Knox also makes the flawed assertion that merger "is largely a matter of the intention of the parties," and is therefore a factual question to be determined by the trier of fact. Appellant's Brief at 17, *quoting Kona Technology Corp.*, 225 F.3d at 612. Rather, it is well-settled law in Mississippi that the parol evidence rule is a rule of substantive law. *See Continental Gin Co. v. Freeman*, 237 F.Supp. 240, 244 (N.D. Miss. 1964); *Edrington v. Stephens*, 148 Miss. 583, 114 So. 387 (Miss. 1927); *Fuqua v. Mills*, 221 Miss. 436, 73 So.2d 113, 118-119 (Miss. 1954). Accordingly, the trial court's determination that there was a merger of prior oral discussions, negotiations, or agreements into the final written document was not a fact issue, but instead a determination under substantive law.

V. KNOX'S CLAIMS TO THE ALLEGED ORAL CONTRACT HAVE BEEN WAIVED BY HIS EXECUTION OF THE RENEWAL NOTE

While BancorpSouth certainly agrees with the trial court's decision ordering summary judgment in its favor based upon merger / parol evidence rule, there exists another basis otherwise justifying summary judgment in favor of BancorpSouth. In that regard, it is settled law that, "[a] longstanding rule of this court is that we will not reverse a lower court's decision where that court reaches the right conclusion although for the wrong reason." *Aldridge v. West*, 929 So.2d 298, 303 (Miss. 2006). Thus, even if this Court were to disagree with the lower court's ruling based upon the doctrine of merger / parol evidence rule, any claims or defenses by Knox to the alleged oral contract have been waived by execution of the renewal note on June 19, 2006. R. 270.

It is well-settled law that "when a party has full knowledge of all defenses to a note and executes a new note, payable at a future date, he then waives all his defenses and becomes obligated to pay the new note." *Turner v. Wakefield*, 481 So.2d 846, 849 (Miss. 1985), *quoting Tallahatchie Home Bank v. Aldridge*, 169 Miss. 597, 604; 153 So. 818 (1934); *see also, Brickell v. First National Bank*, 373 So.2d 1013 (Miss. 1979) (the renewal of a note with full knowledge of the facts constituting a defense to the note being renewed constitutes a waiver of that defense). Knox, a man having experience with multi-million dollar projects, having loaned money to individuals through his business ventures, having entered into over 200 loans and having aggregate debt in the neighborhood of $50 million through his affiliated business ventures, had "full knowledge of all defenses" to the note he executed on June 19, 2006. R. 276, 282, 287, 288, 289, 291. Indeed, Knox being better

informed and more sophisticated than an average borrower due to his vast experience chose to execute the June 19, 2006 renewal note from a position motivated by sophisticated business concerns rather than a lack of knowledge of defenses to the note. This is borne out in the following exchange from Knox's deposition:

> Q. . . . Why did you sign it? Why didn't you get up and leave?
> A. If I had got up and walked out when this news hit the streets, every banker I have would have sure enough reason to worry if Bancorp cut me off and pulled loans. They know that the majority of my collateral is pledged to Bancorp.
>
> ****
>
> Q. . . . My question was: did anybody keep you from leaving?
> A. Nothing other than everything I had ever worked for would have been in jeopardy if I stepped through that door without satisfying them, and they knew it.
> Q. That was your choice, though?
> A. My choice was to sign that letter or carry it somewhere, and get it funded.

R. 300, 301.

As can be seen from this testimony, it is clear that Knox chose to execute the renewal note as a tactical measure for preserving his perceived reputation in the community.

Certainly, a waiver resulting from execution of a renewal note must be taken in proper context that "where the facts and circumstances are such that a reasonably prudent person, judged by normal standards, would or should have made inquiry, which inquiry, if reasonably pursued and with ordinary diligence, would have led to full knowledge of his defenses, then it becomes the duty of the party or parties to make such inquiry or investigation before executing the renewal note, and if he fails to do so, he is as much bound as if he had actual knowledge of all the facts." *Austin Development Co., Inc. v. Bank of*

Meridian, 569 So.2d 1209, 1212 (Miss. 1990). BancorpSouth, of necessity, had to develop the "facts and circumstances" to advance its argument for summary judgment.

In *Austin Development*, the plaintiffs were "well aware of the circumstances surrounding the bank's failure to call upon the letter of credit before they executed the renewal note . . ." *Austin Development* at 1213. Likewise, Knox was made fully aware by BancorpSouth representatives of the decision regarding Knox's creditworthiness and plans for renewing the loan (thereby dissipating Knox's real or manufactured belief that BancorpSouth thought there existed an oral contract) prior to his execution of the renewal note of June 19, 2006. R. 161, 162. There is no evidence that Knox was coerced into executing the renewal note or that there were any unequal bargaining positions vis-a-vis Knox and BancorpSouth representatives, but quite to the contrary, Knox was more than capable of assessing the situation and handling himself with full knowledge of his rights due to his extensive and varied experiences with banks and borrowing. R. 287-289. Knox has a level of sophistication and experience well-beyond the "reasonably prudent person" standard which thereby obligated him with a duty to make an inquiry or investigation of any claims or defenses to the renewal note. In sum, Knox must face the same consequence as the plaintiff in *Austin Development* where the Mississippi Supreme Court noted the result was the plaintiff "waived any defense or cause of action that he had against the bank." *Id.*

A recent decision of the Mississippi Supreme Court strikingly similar to the facts at bar supports application of waiver as found in *Austin Development*. In *Holland v. The Peoples Bank & Trust Co.*, 3 So.3d 94 (Miss. 2008), the relevant observations of the Court were:

> Holland argues that the workout agreement pertained to other loans and did not relate to the bank's alleged misappropriation of the $237,000.00 from the Lafayette County land sale. Therefore, according to Holland, the trial court erred in granting summary judgment based on its view that Holland had waived his claim by participating in the workout agreement, because only a jury could make a factual finding as to the agreement's terms. The bank argues that all possible defenses and claims relating to the notes and otherwise available to Holland were waived at the time Holland renewed the promissory note and signed the workout agreement.

Holland at 102.

In affirming the trial court's award of summary judgment in favor of the bank, the Supreme Court relied on the language in *Austin Development* which provided that all of the plaintiff's claims were waived by the workout agreement and the renewal notes. Likewise, all of Knox's claims against BancorpSouth were waived by his execution of the renewal note. *Id.* at 103.

CONCLUSION

The trial court properly granted BancorpSouth's Motion for Summary Judgment. The judgment of the trial court should be affirmed.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I have filed an original and three copies of Appellee's brief and have served a true and correct copy of the foregoing document via United States mail, postage prepaid, on the following:

Goeldner Porter & McDowell
Post Office Box 1468
Southaven, MS 38671

Hon. Robert P. Chamberlin
DeSoto County Circuit Court Judge
P.O. Box 280
Hernando, MS 38632-0280

This 2nd day of October, 2009.

J. PATRICK CALDWELL, ESQ. (MS BAR [redacted]
KEVIN B. SMITH, ESQ. (MS BAR [redacted]