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## ARGUMENT

William P. Knox ("Knox") relies upon his Appellant Brief and stands by his arguments therein; however, he hereby replies to issues raised by BancorpSouth Bank ("BancorpSouth")'s Appellee Brief:

A. BANCORPSOUTH WAIVED ALL AFFIRMATIVE DEFENSES BY ITS DELAY

BancorpSouth brought its motion for summary judgment for hearing in this case 512 days after filing its answer and 54 days before trial was to begin. R. 5, 32, 58, 355. BancorpSouth claims that this delay was justified because BancorpSouth needed to conduct "an appreciable amount of discovery for fact development" prior to pursuing any affirmative defenses. R. 334; Appellee's Br.11-22. This argument fails for several reasons.

BancorpSouth recognizes that merger is an affirmative defense. Appellee's Br. 11. An affirmative defense is only successful if that defense would succeed to bar a plaintiff's claim even assuming that all facts as alleged or asserted by the plaintiff can be proven true. *Ashburn v. Ashburn*, 970 So.2d 204 (¶24) (Miss. Ct. App. 2007) (quoting *Hertz Commercial Leasing Div. v. Morrison,* 567 So.2d 832, 835 (Miss.1990)). Thus, a party asserting an affirmative defense has no need for extensive factual discovery, as that party must take the plaintiff's allegations as true. For this reason, Mississippi law requires that affirmative defenses be plead in the answer and be pursued without delay. (*See, e.g.,* Miss. R. Civ,. P. 12(b); *MS Credit Center, Inc. v. Horton*, 926 So. 2d 167 (¶¶ 44-45) (Miss. 2006).

For example, the discovery necessary to assert merger is: Here is a subsequent contract. On its face, it states that it contains the parties' entire agreement and references the previous agreements which have merged, and the contract plaintiff seeks to enforce is among those agreements. *Carroll v. Henry*, 798 So. 2d 560, ¶ 7 (Miss. Ct. App. 2001) (quoting *Security Mutual Finance Corp. v. Willis*, 439 So. 2d 1278, 1281 (Miss. 1983); *Singing River Mall Co. v.*

*Mark Fields, Inc.*, 599 So. 2d 938, 944 (Miss. 1992); *B.C. Rogers Poultry, Inc. v. Wedgeworth*, 911 So. 2d 483, ¶¶ 20-22 (Miss. 2005). If those were the facts in this case, Knox's claims would be barred and no discovery would be necessary beyond reading a copy of the subsequent contract. Obviously, that is not the situation in this case. The June, 2006, pay-off offer does not unambiguously state on its face that it contains the parties' entire agreement and subsumes the oral contract for the equity loan. The fact that BancorpSouth cannot, by its own admission, prevail on its merger argument defense when taking all of Knox's allegations as true is very telling of the fact that the June, 2006, document is not sufficient to satisfy the requirements of the merger doctrine at the summary judgment stage. The ambiguities and disputed factual issues involved require resolution by a jury. Likewise, the discovery necessary to assert waiver should be merely a reading of the subsequent contract: Here is a subsequent contract, which says on its face that it renews and replaces a previous agreement. Again, in this case, the pay-off offer is not sufficient to satisfy the requirements of a valid waiver defense when taking all of Knox's assertions as true, and thus this defense cannot operate to dispose of Knox's claims at the summary judgment stage.

Even if discovery were necessary for these defenses, 512 days to complete that necessary discovery is unreasonable when contrasted with the U.R.C.C.C.'s 90-day discovery period. Further, nothing in BancorpSouth's brief addresses its delay in pursuing the defenses after the necessary discovery was completed. Written discovery between the parties commenced in January, 2007, shortly after BancorpSouth filed its answer. R. 3, 34. BancorpSouth deposed Knox in April, 2007. R. 49. It did not file its motion for summary judgment until March, 2008, and then, after filing the motion, waited another three months to bring the motion for hearing. R. 5, 68, 355. This is exactly the kind of delay that the Mississippi Supreme Court and Court of

Appeals have repeatedly proscribed[1] and which constitutes a waiver of the delayed affirmative defenses.

B. BANCORPSOUTH WAIVED THE DEFENSE OF MERGER BY FAILING TO PLEAD THE DEFENSE IN ITS ANSWER

Even if BancorpSouth had presented evidence of "extreme and unusual circumstances" to justify its delay,[2] that does not change the fact that it failed to plead the affirmative defense in its Answer, and raised the defense for the first time in its motion for summary judgment. BancorpSouth argues that it was unnecessary to plead merger as a defense because pleading the parol evidence rule as an affirmative defense is sufficient to serve as having plead both defenses. However, contrary to BancorpSouth's assertions in its brief, the merger doctrine and the parol evidence rule are not identical, nor are these "merely two names" for the same doctrine. Even if asserting the merger doctrine "triggers" the parol evidence rule,[3] the converse is not necessarily true, as every application of the parol evidence rule does not involve merger. The parol evidence rule can operate to exclude any evidence that contradicts the written terms of a contract. The merger doctrine only operates to bar enforceability of (and thus evidence of) prior written agreements. *Carroll,* 798 So. 2d at ¶ 7 (quoting *Security Mutual Finance Corp.,* 439 So. 2d at 1281). While pleading merger may be sufficient notice to an opposing party that the parol evidence rule will come into play, pleading the parol evidence rule is not sufficient to assert the merger doctrine. Merger is an affirmative defense which, like other affirmative defenses, is waived if not raised in a responsive pleading.

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[1] See Appellant's Br. 10 n. 6.

[2] As required by *Horton,* 926 So. 2d at ¶ 45, when the delay is eight months or longer.

[3] As BancorpSouth points out in its brief, in Texas, invoking the doctrine of merger "triggers" the parol evidence rule. Appellee's Br. 22 (quoting *Williams v .Colonial Bank, N.A.,* 199 Fed. Appx. 399, 402 (5th Cir. 2006) (applying Texas law)).

C. THERE EXIST GENUINELY DISPUTED ISSUES OF MATERIAL FACT SO AS TO PRECLUDE SUMMARY JUDGMENT

BancorpSouth argues that there are no genuinely disputed issues of material fact, yet its own arguments are dependent on the resolution of disputed facts.

For example, the existence and terms of the oral contract for the equity loan. These are clearly factual issues, and BancorpSouth's own brief quotes testimony from various witnesses with regard to its terms, asking this Court to weigh their credibility and make determinations therefrom. Appellee's Br. 19-22. Such a task is clearly within the province of the fact-finder.

Another such example is the characterization of the parties' various agreements. Knox swears there were three separate, valid agreements for three separate amounts, while BancorpSouth swears there was only an original line of credit and its renewal. BancorpSouth admits that, if Knox's version of the facts is correct, it would preclude the application of the merger doctrine. Appellee's Br. 14-15. Yet, BancorpSouth asks this court to apply the merger doctrine and thus to find that BancorpSouth's version of the facts is correct. Merger is, after all, "largely a matter of the intentions of the parties." *Kona Technology Corp. v. Southern Pacific Transportation Co.,* 225 F.3d 595, 612 (5th Cir. 2000). "Before one contract is merged into another, the subsequent contract must ... have been so intended by the parties." *Id.* When one party swears one factual account is true and the other swears otherwise, there exists a genuine issue of fact which precludes summary judgment. *Yowell v. James Harkins Builder, Inc.*, 645 So. 2d 1340, 1343 (Miss. 1994).

D. BANCORPSOUTH'S NEW DEFENSES ARE INSUFFICIENT FOR SUMMARY JUDGMENT

BancorpSouth raises two additional defenses in its Appellee's Brief: (1) that the terms of the parties' oral contract for the equity loan are too vague to be enforced; and (2) that by signing the payoff offer, Knox waived his right to enforce the oral contract for the equity loan.

BancorpSouth admits in its brief that the trial court has already found that the oral contract for the equity loan was a valid, binding agreement. Appellee's Br. 24. Knox does not appeal this finding, and the time for BancorpSouth to appeal it has expired. Thus, whether the oral contract was valid and enforceable by Knox is not an issue before this Court. The issue is whether the trial court erred in ruling, at the summary judgment stage, that the enforceable oral contract later merged into the June, 2006, payoff offer. However, Knox briefly addresses BancorpSouth's waiver argument out of an abundance of caution.

In its waiver argument, BancorpSouth relies heavily on *Austin Development Co. v. Bank of Meridian*, 569 So. 2d 1209 (Miss. 1990) (and on *Holland v. People's Bank & Trust Co.*, 3 So. 3d 94 (Miss. 2008). which relies wholly upon *Austin* for this issue). *Austin* is readily distinguishable from the instant case. In the *Austin* case, a note was in default and the bank failed to utilize its collateral, therefore leaving only the defendant on the hook for the note. 569 So. 2d at 1210-11. As consideration for the bank not taking collection action against him on the defaulted note, the defendant renewed it (five times) without the collateral but eventually defaulted again. *Id.* The bank sued on the defaulted note, and the defendant argued, in essence, that the bank should have utilized its collateral if it wanted to get paid. *Id.* at 1211-12. The *Austin* Court found that the defendant had waived his right to that defense by executing the renewal notes (with no collateral). *Id.*

The *Austin* case concerned the enforceability of the renewal note, which the defendant claimed not to owe. The instant case, however, is not concerned with the enforceability of the June, 2006, payoff offer. Rather, Knox is seeking to enforce the oral contract for the equity loan.

## CONCLUSION

BancorpSouth's arguments would require the Court to make findings of fact, and to make those findings in the light most favorable to BancorpSouth. In addition, the arguments are, at

times, self-contradicting. BancorpSouth argues that merger is so fact-intensive as to require a year of fact discovery, but then argues that there are no factual issues with regard to merger. It argues that contract construction is a matter of law, but then argues that the terms of the oral contract are too vague to be construed. It argues that no valid oral contract for an equity loan ever existed, but then argues that the June, 2006, payoff offer is merely a renewal of the non-existent oral contract. Clearly, BancorpSouth failed to meet its burden under Miss. R. Civ. P. to resolve all factual issues beyond a reasonable doubt and to show that it is entitled to judgment as a matter of law. Consequently, the trial court's order granting summary judgment should be reversed, and the case should be remanded for trial.

SUPREME COURT OF MISSISSIPPI

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| WILLIAM P. KNOX<br>Appellant<br><br>vs.<br><br>BANCORPSOUTH BANK<br>Appellee | Case No. **2008-CA-01390** |

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has this day, by United States Mail, First Class, postage prepaid, sent a true and correct copy of the following items:

(✓) a. Appellant's Reply Brief

(✓) b. Certificate of Service

to the following person(s):

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

This the 19th day of October, 2009.

PAIGE McDOWELL
Certifying Attorney