

2009-CA-01260-T

CERTIFICATE OF INTERESTED PERSONS

CASE NO. 2009-CA-01260; "DENNIS C. SWEET, III, and KIMBERLY NOEL-SWEET v. TCI MS, INC.; TCI MS INVESTMENTS, INC. (TCI MS INVESTMENT, INC.); and John Does 1-5"

Pursuant to the Mississippi Rules of Civil Procedure, as well as, Rule 28(a)(1) of the Mississippi Rules of Appellate Procedure, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made so that the Honorable Justices of the Supreme Court of the State of Mississippi and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Dennis C. Sweet, III, Appellant and Counsel for Appellants
2. Kimberly Noel-Sweet, Appellant
3. TCI MS, Inc., Appellee
4. TCI MS Investments, Inc. (TCI MS Investment, Inc.), Appellee
5. Michael V. Cory, in his Official Capacity as a Member and Principal in the Law Firm of Danks, Miller, Hamer & Cory, Appellee
6. Warren L. Martin, Jr., Counsel for Appellants
7. Thomas J. Bellinder, Counsel for Appellants
8. Rebecca B. Cowan, Counsel for Appellees
9. Whitman B. Johnson, Counsel for Appellees
10. Ray H. Montgomery, Special Chancellor, Hinds County Chancery Court

SO CERTIFIED this 19th day of November, 2009.

Respectfully submitted,

DENNIS C. SWEET, III, AND KIMBERLY
NOEL-SWEET

BY: _____

Thomas J. Bellinder
Dennis C. Sweet, III

Counsel for Appellants

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STATEMENT OF THE ISSUES

- I. ASSIGNMENT OF ERROR # 1: SUMMARY JUDGMENT IS IMPROPERLY GRANTED WHERE GENUINE ISSUES OF MATERIAL FACT ARE PRESENTED TO THE TRIAL COURT
- II. ASSIGNMENT OF ERROR # 2: THE BURDEN OF PROVING THAT NO DISPUTED FACT ISSUES EXIST RESTS WITH THE SUMMARY JUDGMENT MOVANT
- III. ASSIGNMENT OF ERROR # 3: SELF-SERVING TESTIMONY (i.e. A CONCLUSORY AFFIDAVIT) CANNOT BE THE BASIS FOR SUMMARY JUDGMENT
- IV. ASSIGNMENT OF ERROR # 4: EVERY CONTRACT IMPOSES UPON EACH PARTY A DUTY OF GOOD FAITH AND FAIR DEALING IN ITS PERFORMANCE AND ITS ENFORCEMENT
- V. ASSIGNMENT OF ERROR # 5: A PARTY SHOULD NOT RESIST DISCOVERY AND AT THE SAME TIME MOVE FOR SUMMARY JUDGMENT
- VI. ASSIGNMENT OF ERROR # 6: WHERE A CONTRACT IS SAID TO BE AMBIGUOUS WITHIN ITS FOUR CORNERS, SUMMARY JUDGMENT IS IMPROPER
- VII. ASSIGNMENT OF ERROR # 7: ENFORCING A CONTRACT'S CLAUSE ADDRESSING ATTORNEY'S FEES WITHOUT ENFORCING THE ENTIRE CONTRACT IS CONTRARY TO LAW

STATEMENT OF THE CASE

I. Nature of the Case

This is an appeal from an erroneous summary judgment granted by a fundamentally unfair adjudicatory process, which denied realistic discovery and allowed a dismissal of the lawsuit on the basis of a conclusory affidavit. This action by the trial court is contrary to established principles of Mississippi law.

The original suit brought by Dennis C. Sweet, III and Kimberly Noel-Sweet (hereinafter collectively referenced as "Sweet") was brought to recover earnest money under a written contract due to the breach of said contract, and a breach of the implied covenants of good faith and fair dealing. This appeal arises from an Amended Final Judgment of the Chancery Court of Hinds County where Special Chancellor Ray H. Montgomery granted a motion for summary judgment dismissing Sweet's claims, and granted an award of attorney's fees in favor of TCI MS, Inc. and/or TCI MS Investments, Inc. (TCI MS Investment, Inc.) (hereinafter collectively referenced as "TCI") in the amount of \$18,384.24. R. at 200. Contrary to the chancery court's conclusion, Sweet contends that the Special Chancellor erred in granting a motion for summary judgment and awarding attorney's fees, and that the judgment should be reversed.

II. Statement of the Facts

Sweet owns the property located at 158 East Pascagoula Street in Jackson, Mississippi. The property was purchased as a location for Dennis C. Sweet, III, to practice law. Sometime following initial renovations, Sweet was approached by representatives of TCI, who expressed interest in purchasing the property. TCI initially attempted to purchase the subject property, along with certain other properties, because of its proximity to the Convention Center in downtown Jackson. Sweet and TCI's representatives immediately began negotiating as to a fair and reasonable price; during this negotiation period, Sweet stopped their renovations with the understanding that the sale of the subject premises was imminent.

On or about June 26, 2007, Sweet reached an agreement to sell and TCI agreed to purchase the subject premises for the sum of One Million Two Hundred Thousand

Dollars (\$1,200,000.00). R. at 19. TCI agreed to proffer earnest money in the amount of Fifty Thousand Dollars (\$50,000.00), which was deposited by TCI in the trust account of Danks, Miller, Hamer & Cory. R. at 12. Pursuant to the contract, the closing date of the sale was to have taken place on or before August 15, 2007 at the offices of Danks, Miller, Hamer & Cory. R. at 20. At all relevant times, Sweet was fully ready, willing and able to perform all aspects of their obligations under the contract.

When it was determined that the other contemplated property purchases could not be made, TCI then attempted to breach the contract. TCI allowed the closing date to pass without making any effort to honor their duties and/or obligations under the contract in question, violating the implied covenants of good faith and fair dealing. (emphasis added) TCI's failure to close resulted in a breach of the contract. Further, TCI and Michael V. Cory, in his official capacity as a member and principal in the law firm of Danks, Miller, Hamer & Cory, willfully withheld the earnest money in the amount of Fifty Thousand Dollars (\$50,000.00) which was deposited by TCI into the trust account of Danks, Miller, Hamer & Cory. Discovery was propounded to TCI requesting documents demonstrating financing and financing attempts. To date, TCI has not produced any documents as to application, financing, rejection, etc. Without these documents, it is unclear as to what TCI's true motive was for breaching the contract.

III. Course of Proceedings and Disposition in the Court Below

Sweet filed their Original Complaint in this matter on or about February 29, 2008, alleging *inter alia* negligence, gross negligence, breach of contract, anticipatory breach of contract, detrimental reliance and conversion. R. at 1. Sweet filed their First Amended Complaint on or about March 3, 2008, alleging identical causes of action. R. at 10. TCI filed their Answer and Affirmative Defenses to Sweet's First Amended Complaint on or about September 24, 2008, which set forth their affirmative plea of avoidance. R. at 64.

On or about March 5, 2009, Special Chancellor Ray Montgomery entered an Order dismissing Michael V. Cory, in his Official Capacity as a Member and Principal in the Law Firm of Danks, Miller, Hamer & Cory, from the underlying lawsuit. R. at 88. On or about April 29, 2009, TCI filed its Motion for Summary Judgment. R. at 89. On or about May 6, 2009, Sweet filed their Response and Memorandum of Authorities in

Opposition to TCI's Motion for Summary Judgment, as well as their Notice of Service of Requests for Admissions, Interrogatories and Requests for Production. R. at 125, 130.

On or about July 24, 2009, oral arguments were heard before Special Chancellor Ray H. Montgomery. R. at Vol. 3 of 3, pg. 1-29. Special Chancellor Montgomery entered an Order Granting Summary Judgment the same day. R. at 160. On or about August 4, 2009, TCI filed its Motion for Attorneys' Fees and Costs. R. at 164. Sweet filed their Response in Opposition to TCI's Motion for Attorneys' Fees and Costs on or about August 11, 2009. R. at 192. On or about August 20, 2009, Special Chancellor Montgomery entered an Order Granting TCI's Motion for Attorneys' Fees and Costs, and amended the Final Judgment in this matter the same day. R. at 199. Sweet timely perfected their Notice of Appeal from the Amended Final Judgment on or about September 1, 2009. R. at 201.

STANDARD OF REVIEW

The Mississippi Supreme Court and Court of Appeals reviews a trial court's grant of summary judgment de novo. Please See *Moss v. Batesville Casket Co.*, 935 So.2d 393, 398(15) (Miss.2006) (citing *Stuckey v. Provident Bank*, 912 So.2d 859, 864(8) (Miss.2005)). A party is entitled to summary judgment where “the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” M.R.C.P. 56(c). The movant bears the burden of demonstrating that there is no genuine issue of material fact and the non-movant is afforded the benefit of any reasonable doubt. *Moss*, 935 So.2d at 398(16) (citing *Tucker v. Hinds County*, 558 So.2d 869, 872 (Miss.1990)).

“When reviewing an award of summary judgment, this Court views all evidence in the light most favorable to the non-movant, including ‘admissions in pleadings, answers to interrogatories, depositions, affidavits, etc.,’ and will presume that all evidence in the non-movant's favor is true.” *Downs v. Choo*, 656 So.2d 84, 85 (Miss. 1995) (citing *Daniels v. GNB, Inc.*, 629 So.2d 595, 599 (Miss.1993)). All summary judgment motions should be viewed with great skepticism and the trial court should err on the side of denying the motion. The non-movant gets the benefit of the doubt as to whether there is a fact issue. The court does not try issues of fact on a summary judgment motion but may only decide if there are issues to be tried. Please See *Daniels v. GNB, Inc.*, 629 So.2d 595 (Miss. 1993).

When a summary judgment motion is filed, the non-movant must rebut by producing significant probative evidence. However, the burden of rebuttal does not arise until the movant has satisfied its burden of showing that no genuine issue of material fact exists. Please See *Hurst v. Southwest Mississippi Legal Services Corp.*, 610 So.2d 374 (Miss. 1992). The burden of proving that no disputed issues of fact exist rests with the movant for summary judgment and the burden is one of persuasion and production not of proof. Please See *Frank v. Dore*, 635 So.2d 1369 (Miss. 1994).

A party does not have to submit an affidavit to negate a claim (e.g., an affirmative defense) of the other party on which the other party will bear the burden of proof at trial. Please See *Millican v. Turner*, 503 So.2d 289 (Miss. 1987). In considering a summary

judgment motion, the court should not accept a conclusory affidavit when it is not the best evidence that could be obtained, since to do so prohibits full development of all the facts which are necessary for a proper ruling. In such a case, the conclusory affidavit is more than formally defective. Please See *Scott v. City of Biloxi*, 592 So.2d 1003 (Miss. 1991).

Because self-serving testimony cannot be the basis for summary judgment, a party should offer something more than his own affidavit to support the motion. Statements in an affidavit must be based on personal knowledge. Where the credibility of the witness making the statements is at issue, i.e. is the witness testifying from personal knowledge, summary judgment is inappropriate. Please See *Quay v. Crawford*, 786 So.2d 76 (Miss.Ct.App.2001) (Please See Also Miss.R.Civ.P. 56(e)).

Although the district court may cut off discovery when the record shows that further discovery is not likely to produce the facts needed to withstand the motion for summary judgment, when a party is not given a full and fair opportunity to discover information essential to its opposition to summary judgment, the limitation on discovery is reversible error. Please See *Brown v. Mississippi Valley State University*, 311 F.3d 328 (Miss. Ct. App. 2002). A party should not resist discovery and at the same time move for summary judgment. *Smith v. H.C. Bailey Companies*, 477 So.2d 224 (Miss. 1985). The Mississippi Supreme Court and Court of Appeals reviews a district court's decision to cut off discovery in order to rule on summary judgment for an abuse of discretion. Please See *Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871, 876 (5th Cir.2000) and *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1441 (5th Cir.1993).

Where a case involves a contract or deed which was said to be ambiguous within its four corners, summary judgment is improper because the construction of the provisions involves fact issues. Please See *Pursue Energy Corp. v. Perkins*, 558 So.2d 349 (Miss. 1990), *Willis v. Mississippi Farm Bureau Mutual Ins. Co.*, 481 So.2d 256 (Miss. 1985) and *Sanford v. Jackson Mall Shopping Center Co.*, 516 So.2d 227 (Miss. 1987).

The Mississippi Supreme Court and Court of Appeals reviews a grant or denial of attorneys' fees under an abuse of discretion standard. *Mauck v. Columbus Hotel Co.*, 741 So.2d 259, 269(¶ 32) (Miss.1999). The Mississippi Supreme Court has stated that

“unless a statute or contract provides for the imposition of attorney fees, they are not recoverable.” *Hearn v. Autumn Woods Office Park Property Owners Ass'n*, 757 So.2d 155, 164 (Miss.1999). An award of attorney fees should not be used as means to penalize. *Lenoir v. Lenoir*, 611 So.2d 200 (Miss.1992).

SUMMARY OF THE ARGUMENT

Sweet has maintained a good claim for breach of contract, an even more meritorious claim for breach of the implied covenants of good faith and fair dealing, and yet the trial court sustained a dispositive motion on the sole basis of an affidavit to legal conclusions not based on personal knowledge of specific facts. The trial court erred in adjudicating the case on the basis of a conclusory affidavit rather than on the merits of Sweet's claims.

The only evidence, basis and/or grounds for TCI's summary judgment motion (which was based solely on TCI's contention that the 'obtain financing' provision of the contract was an unfulfilled condition precedent to contract enforcement) was a single, self-serving affidavit. The trial court made a credibility finding as to the validity and believability of the single affidavit. The basis of TCI's motion for summary judgment (alleged inability to obtain financing) is an affirmative plea or defense as to which TCI had the burden of proof, and which they did not meet. Because they offered no proof outside the one page, self-serving, conclusory affidavit, the burden of proof never shifted to Sweet.

The determination of credibility as to the affidavit is an issue of fact for the jury to determine, not the trial court. Absent any applications, contracts, statements of credit worthiness, proof or statements of assets of TCI companies and/or holdings, statements from bank officials or executives verifying that TCI applied for financing and was turned down, or any other such evidence, there can be no demonstration of a good faith effort on TCI's part to obtain financing.

If TCI claims that they had a reason to breach the contract, then the law requires them to **prove it**. (emphasis added) The trial court could not have properly determined that no genuine issues of material fact existed, absent a final statement from TCI that no financing application documents exist. If no financing documents exist, then TCI has breached their duties of good faith and fair dealing (the covenant contained in every contractual agreement entered into) by failing to make a good faith effort to obtain the requisite financing.

ARGUMENT

ASSIGNMENT OF ERROR # 1: SUMMARY JUDGMENT IS IMPROPERLY GRANTED WHERE GENUINE ISSUES OF MATERIAL FACT ARE PRESENTED TO THE TRIAL COURT

I. The trial court violated the requirements of Rule 56 in hearing and deciding the motion of summary judgment without meaningful discovery

The trial court did not follow Rule 56 of the Mississippi Rules of Civil Procedure, and was fundamentally unfair in attempting to arrive at summary judgment. In order to arrive at summary judgment, the trial court had to have every necessary fact for a judgment as a matter of law, without dispute; the trial court simply did not have every necessary fact before it. Summary judgment in this case was not supported by documents and did not speak to the elements of the case. The trial court suspended meaningful discovery and ruled on TCI's dispositive motion, despite Sweet's attempts to get the requested discovery. The trial court's preemption of the completion of meaningful discovery violated well-established principles of fundamental fairness and procedural due process.

A party is entitled to summary judgment where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." M.R.C.P. 56(c). The movant bears the burden of demonstrating that there is no genuine issue of material fact, and the non-movant is afforded the benefit of any reasonable doubt. *Moss*, 935 So.2d at 398(16) (citing *Tucker v. Hinds County*, 558 So.2d 869, 872 (Miss.1990)).

"When reviewing an award of summary judgment, this Court views all evidence in the light most favorable to the non-movant, including 'admissions in pleadings, answers to interrogatories, depositions, affidavits, etc.,' and will presume that all evidence in the non-movant's favor is true." *Downs v. Choo*, 656 So.2d 84, 85 (Miss. 1995) (citing *Daniels v. GNB, Inc.*, 629 So.2d 595, 599 (Miss.1993)). All summary judgment motions should be viewed with great skepticism and the trial court should err on the side of denying the motion. The non-movant gets the benefit of the doubt as to

whether there is a fact issue. The court does not try issues of fact on a summary judgment motion but may only decide if there are issues to be tried. Please See *Daniels v. GNB, Inc.*, 629 So.2d 595 (Miss. 1993); *Ratliff v. Ratliff*, 500 So.2d 981 (Miss. 1986); and *Brown v. Credit Center, Inc.*, 444 So.2d 358, 362 (Miss.1983).

In this case, a contract existed in two forms; a written contract, and the implied covenants of good faith and fair dealing. The trial court erred as a matter of law in acting as if there was only a written contract and nothing else. Sweet proved that they didn't cause any discovery delay, they filed the discovery in question, and moved the trial court to allow the discovery to be completed (in effect a Rule 56 motion). The requested discovery, if documents exist would have substantiated Sweet's breach of contract claim, or if nonexistent would have supported TCI's summary judgment motion.

The Trial Court committed reversible error in cutting off discovery and ruling on TCI's summary judgment motion before it was determined whether certain requested financing documents existed, thereby preventing Sweet from being provided a full and fair opportunity to discover information essential to its opposition to summary judgment. TCI breached the contract in question, and have provided no reason or evidence as to their nonperformance. In this instance, discovery must have been completed in order for the trial court to have had an adequate basis to grant a party judgment as a matter of law, and to find that no genuine issue of material fact exists.

Under established law, Sweet invoked the protections under Rule 56(f) of the Mississippi Rules of Civil Procedure by filing its Response to TCI's Motion for Summary Judgment (filed on or about May 6, 2009) wherein they specifically stated:

A. DISCOVERY IS NOT COMPLETE.

Several discovery items in this case are currently pending. The entry of an order granting Defendant's Motion for Summary Judgment would be premature at this point. There are currently outstanding discovery requests in this matter, including Requests for Admissions, Interrogatories and Requests for Production of Documents propounded upon Defendant TCI MS Investment, Inc. In an abundance of caution, this court should deny Defendant's Motion until discovery is complete, so as to fully flesh out arguments for both sides and prevent the premature entry of a decisive order dismissing Plaintiff's cause of action. Justice is best served in this matter to allow for the completion

of discovery, before this Honorable Court determines whether a genuine issue of material fact exists.

R. at 128.

TCI argues that no counter affidavit was presented by Sweet to counter Mark Small's testimony through his affidavit, and that this did not comply with Mississippi Rule of Civil Procedure 56(f). However, TCI is mistaken as to the legal requirements of Rule 56(f). A party does not have to submit an affidavit to negate a claim (e.g., an affirmative defense) of the other party on which the other party will bear the burden of proof at trial. Please See *Millican v. Turner*, 503 So.2d 289 (Miss. 1987). A party does not need to serve opposing affidavits if what he has already placed before the court shows a genuine issue of material fact. As long as the data before the court shows a genuine issue of material fact, the court must deny the summary judgment motion. Please See *Hurst v. Southwest Mississippi Legal Services Corp.*, 610 So.2d 374 (Miss. 1992).

In addition, the Mississippi Supreme Court has stated that in construing Rule 56, it can rely on federal law. *Page v. Wiggins*, 595 So.2d 1291 (Miss. 1992). It is widely accepted and established law that so long as the nonmoving party indicates to the court by "some equivalent statement, preferably in writing" of its need for additional discovery, the nonmoving party is deemed to have invoked the rule. Please See *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1266-67 (Tex.Ct.App.1991) [citing *Fontenot v. Upjohn Co.*, 780 F.2d at 1194 (citing *Littlejohn v. Shell Oil Co.*, 483 F.2d 1140, 1146 (5th Cir.) (*en banc*), *cert. denied*, 414 U.S. 1116, 94 S.Ct. 849, 38 L.Ed.2d 743 (1973))]; *accord Radich v. Goode*, 886 F.2d 1391, 1399 (3d Cir.1989) (Hutchinson, J., concurring); *Snook v. Trust Co. of Ga. Bank of Savannah, N.A.*, 859 F.2d 865, 870 (11th Cir.1988).

The trial court did not see a single document from any bank or lending institution, when the sole basis for TCI's summary judgment motion was paragraph five (5) of purchase contract, the contingency that TCI obtain financing. TCI's failure to use good faith in obtaining financing created a genuine issue of material fact. Sweet's invocation of the protections of Rule 56(f) were sufficient to place the trial court on notice of the incompleteness of discovery and the pendency of certain documents and evidence, thus creating a genuine issue of material fact sufficient to defeat summary judgment.

II. The trial court's limitation on Sweet's discovery is reversible error, as Sweet was not given a full and fair opportunity to discover information essential to its opposition to summary judgment

Prior to the Trial Court's ruling on TCI's Motion for Summary Judgment, Sweet propounded Requests for Admissions, Interrogatories and Requests for Production of Documents to TCI, with the specific intention of determining the circumstances surrounding the failed closing and what efforts, if any, had been made to acquire financing for the subject property. R. at 130. The scope of Sweet's several discovery requests included but were not limited to loan application documents, statements from banks and/or lending institutions where financing would have allegedly been applied for and denied, statements as to credit worthiness and overall ability to obtain financing; however, **no documents regarding TCI's alleged attempts to acquire financing were ever provided.** (emphasis added)

Mississippi law states that although the district court may cut off discovery when the record shows that further discovery is not likely to produce the facts needed to withstand the motion for summary judgment, when a party is not given a full and fair opportunity to discover information essential to its opposition to summary judgment, the limitation on discovery is reversible error. Please See *Brown v. Mississippi Valley State University*, 311 F.3d 328 (Miss. Ct. App. 2002).

Sweet's requested discovery was critical for a fair summary judgment process and hearing. These were not vague, ambiguous, or unclear discovery requests (the full extent of the requests are set forth hereafter under Assignment of Error #5). Suit was filed for the recovery of earnest money based on a breach of contract, specifically the implied covenants of good faith and fair dealing. TCI answered, denying all allegations and asserting the affirmative defense of avoidance, alleging that they were unable to obtain financing satisfactory to them. Sweet propounded discovery, requesting documents sufficient to prove TCI's use of good faith in their attempts to obtain the financing. No such documents were ever produced. TCI moved for summary judgment based on a completely insufficient and self-serving affidavit to legal conclusions.

TCI is the sole owner of an inventory of potential documents supporting their affirmative defense, including but not limited to correspondence to banks/lending

companies requesting financing, correspondence from said banks/lending companies denying the requested financing, appraisals, supporting documents, applications and the like. By its nature, proof of TCI's inability to get financing and their good faith efforts thereto is uniquely within TCI's possession. They are the only entities with any information on the subject, which plainly lends itself to the possibility of dishonesty and misdealing. Sweet did not base their opposition to the motion for summary judgment on wishful thinking or some baseless approach as to the existence of certain evidence; Sweet pointed this out specifically through its pleadings and the hearing before the trial court.

The trial court failed to allow outstanding discovery requests to be answered before ruling on the motion for summary judgment. TCI was allowed to provide insufficient, piecemeal answers and baseless objections to relevant discovery requests that should have been compelled. Summary judgment assumes some discovery; it is only appropriate where, after discovery, there is no genuine dispute over any material fact. Although a trial court may use its discretion in cutting off discovery when the record shows that further discovery is not likely to produce the facts needed to withstand the motion for summary judgment, when a party is not given a full and fair opportunity to discover information essential to its opposition to summary judgment, the limitation on discovery constitutes reversible error.

Here, the evidence which Sweet could have offered to create a factual dispute (i.e. the alleged financing documents, if they exist) remains in the exclusive possession of TCI. Sweet fully informed the trial court, both through its motion and through oral argument, that its diligent efforts to obtain evidence from the moving party had been unsuccessful. Therefore, the interests of justice required a continuance of a motion for summary judgment for purposes of discovery, as a matter of course. The trial court's failure to provide such a continuance constitutes reversible error.

ASSIGNMENT OF ERROR # 2: THE BURDEN OF PROVING THAT NO DISPUTED FACT ISSUES EXIST RESTS WITH THE SUMMARY JUDGMENT MOVANT

- III. The basis of TCI's motion for summary judgment, to wit: alleged inability to obtain financing, is an affirmative plea or defense as to which TCI had the burden of proof, and which they did not meet**

On or about September 24, 2008, TCI filed their Answer and Defenses to Sweet's First Amended Complaint. R. at 64. In paragraph 49 of their Answer, TCI asserted the affirmative defense of a condition precedent not having been met. TCI stated, "The alleged contract attached to the First Amended Complaint as Exhibit A was unenforceable because of the existence of certain contingencies that the parties were unable to satisfy"; "TCI was unable to obtain financing ... and, consequently, the contingency that obligated TCI to the contract never came into existence, such that the contract is unenforceable." R. at 69-70. This argument was specified as to paragraph five (5) of the Contract by counsel for TCI during the oral arguments heard before Special Chancellor Ray H. Montgomery.

The burden of proving that no disputed issues of fact exist rests with the movant for summary judgment and the burden is one of persuasion and production not of proof. *Frank v. Dore*, 635 So.2d 1369 (Miss. 1994). On an issue that is an affirmative plea or defense, the party setting forth said plea or defense has the burden of proof. The fact that TCI was "unable to get financing" is an affirmative plea. By asserting an affirmative plea of avoidance, TCI has the burden of proof. TCI's burden required them to show some evidence of their inability to obtain financing. This burden was not met by simply setting forth a self-serving affidavit to mere legal conclusions that amounted to notarized hearsay. Therefore, the trial court's entry of summary judgment was

IV. The evidence presented by TCI did not shift the burden of proof to Sweet

When a summary judgment motion is filed, the non-movant must rebut by producing significant probative evidence. However, the burden of rebuttal does not arise until the movant has satisfied its burden of showing that no genuine issue of material fact exists. Where none of the exhibits attached to a party's motion for summary judgment show that the party is entitled to prevail as a matter of law, **the burden of rebuttal does not shift to the non-movant.** Please See *Hurst v. Southwest Mississippi Legal Services Corp.*, 610 So.2d 374 (Miss. 1992) (emphasis added).

The burden of proof never shifted to Sweet, because TCI never made any proof. The trial court acted as if Sweet had the burden of proving the sufficiency of TCI's affirmative plea or defense, and then entered a summary judgment because of the conclusory affidavit. TCI's contention was an affirmative plea of avoidance, which

carries with it the same burden of proof on motion for summary judgment as in trial. Sweet does not have the burden to prove that TCI had no documents to prove their attempts to obtain financing; Sweet would be unable to prove this even if the burden did require it. Because the burden never shifted to Sweet, and because TCI failed to produce sufficient evidence to meet its burden of proof, the trial court committed reversible error in granting summary judgment.

ASSIGNMENT OF ERROR # 3: SELF-SERVING TESTIMONY (i.e. A CONCLUSORY AFFIDAVIT) CANNOT BE THE BASIS FOR SUMMARY JUDGMENT

V. The affidavit of Mark Small is insufficient as conclusory and not based on personal knowledge of specific facts

An affidavit in the form of legal conclusions is not sufficient to predicate summary judgment. In the only evidence submitted as proof of its affirmative plea of avoidance, TCI submitted the affidavit of Mark Small, president of “TCI MS, Investment, Inc., the buyer under the Sales Contract – Real Estate, which is attached as Exhibit “A” to the plaintiff’s complaint.” R. at 110. In his affidavit, Mark Small states that “Although TCI MS, Investment, inc. attempted to obtain financing satisfactory to it from numerous financial institutions prior to the August 15, 2007 closing date in the contract, it was unable to do so.” R. at 110-11.

Absent this four-paragraph, one-page, self-serving conclusory affidavit, no proof of efforts to obtain financing has been evidenced whatsoever. (emphasis added) Sweet made efforts to prove that the affidavit was insufficient during the summary judgment oral arguments. The trial court failed to recognize that if an individual or company were to use good faith in applying for financing to purchase real estate, certain documents would exist (applications, signed statements, etc.).

In considering a summary judgment motion, the court should not accept a conclusory affidavit when it is not the best evidence that could be obtained, since to do so prohibits full development of all the facts which are necessary for a proper ruling. In such a case, the conclusory affidavit is more than formally defective. Please See *Scott v. City of Biloxi*, 592 So.2d 1003 (Miss. 1991). Affidavits amount to notarized hearsay

without an expert to testify regarding causation or damages. Please See *Bailey v. Wheatley Estates Corp.*, 829 So.2d 1278 (Miss.Ct.App.2002).

Because self-serving testimony cannot be the basis for summary judgment, a party should offer something more than his own affidavit to support the motion. Statements in an affidavit must be based on personal knowledge. Where the credibility of the witness making the statements is at issue, i.e. is the witness testifying from personal knowledge, summary judgment is inappropriate. Please See *Quay v. Crawford*, 786 So.2d 76 (Miss.Ct.App.2001) (Please See Also Miss.R.Civ.P. 56(e)).

Under Rule 56(e), affidavits have to be statements based on personal knowledge. The affidavit of Mark Small is a legal conclusion, not specific facts. The mere conclusion of the pleader is not a fact. Summary judgment is inappropriate for a credibility finding as to the affiant's personal knowledge. The insufficiency of the affidavit of Mark Small is analogous to the insufficiency of the affidavit of Tyrone Lewis in *Davis v. Christian Brotherhood Homes of Jackson, Mississippi, Inc.*, 957 So.2d 390, 409 (Miss.Ct.App.2007) (as cited by *Rogers v. Barlow Eddy Jenkins P.A.*, 2009 WL 2232228 (Miss.Ct.App.2009)):

The plaintiffs in *Davis* brought a premises-liability claim. *Id.* at 394(¶ 1). In response to a motion for summary judgment, the plaintiffs presented the affidavit of Commander Tyrone Lewis of the Jackson Police Department. *Id.* at 408(¶ 43). Commander Lewis was designated as an expert in the field of security and law enforcement. *Id.* In his affidavit, Commander Lewis testified that the cause of Lucius Davis's death was the defendant's failure to have security guards or other security measures. *Id.* Commander Lewis testified that the security guards would have stopped Troy Younger from loitering and starting a fight with Lucius in the parking lot, which preceded Lucius's death. *Id.* Commander Lewis further stated that, on the issue of inadequate lighting, it was well known in his field of expertise "that inadequate lighting increases the chances of criminal activity" and the inadequate lighting at the complex on February 4, 2003, contributed to the death of Lucius. *Id.*

The trial court granted Christian Brotherhood's motion for summary judgment. The court concluded that Commander Lewis's affidavit was "**nothing more than just a compilation of conclusory statements and provides no factual basis.**" *Id.* (emphasis added) This Court affirmed the summary judgment and held that an expert's opinion must be supported by appropriate validation, i.e., good grounds based on what is known and that the trial judge did not abuse his discretion as the

gatekeeper in ruling that the opinions contained in Commander Lewis's affidavit were merely conclusory statements and had no factual basis.

Rogers, 2009 WL 2232228 (Please See Also *McIntosh v. Victoria Corp.*, 877 So.2d 519 (Miss.Ct.App.2004) (holding that although McIntosh presented the court with affidavits from herself and an artificial nail applicator, both **affidavits made mere conclusory statements** that Victoria Corporation was negligent **and were therefore insufficient to sustain her burden of proof by showing that genuine issues of material fact existed, so as to defeat summary judgment**)) (emphasis added).

The trial court erred in treating the Affidavit of Mark Small as summary judgment evidence of proof of facts not there. Assuming as true that the affidavit had something to do with the affirmative defense of breach of contract, taking the affidavit as true on its face does not negate the elements of a breach of the implied covenant of good faith and fair dealing. The affidavit does not show that TCI didn't 'hide the ball', or lie, or make false representations. At a minimum, the trial court should have looked beyond the four (4) paragraph, one (1) page affidavit submitted by TCI and allowed discovery to conclude itself, thereby providing the trial court a basis to determine whether genuine issues of material fact exist; the trial court did not do this. TCI has denied having such documents in their possession, and have stated they would supplement. No such supplementation has been received by Sweet.

Had the lower court allowed discovery to have been completed, and had TCI produced **any** documents regarding their good faith attempts to obtain financing, it is Sweet's contention that they would be in a far different position today. (emphasis added) However, no such documents have been produced. If TCI's representations to the lower court are correct, then discoverable documents would exist as proof; as of the date of the filing of this Brief, no such documents have been identified or produced. The Trial Court erred in failing to provide fundamental fairness in the process leading to summary judgment by considering a single conclusory affidavit, in the form of mere legal conclusions, as having made uncontradictable evidence.

ASSIGNMENT OF ERROR # 4: EVERY CONTRACT IMPOSES UPON EACH PARTY A DUTY OF GOOD FAITH AND FAIR DEALING IN ITS PERFORMANCE AND ITS ENFORCEMENT

VI. TCI breached the Inherent Covenants of Good Faith and Fair Dealing by failing to make reasonable efforts to obtain financing, thereby creating a genuine issue of material fact before the trial court sufficient to defeat summary judgment

By entering into the subject real estate sales contract with Sweet, TCI had a duty to take some affirmative steps to cooperate in achieving the goal of obtaining financing. Sweet was not involved in any way in the financing application process, and has no personal knowledge as to any efforts on TCI's part to obtain financing. TCI failed to submit any applications for loans to banks or lending institutions. The only evidence, basis and/or grounds for TCI's summary judgment motion was a single, self-serving affidavit. R. at 110. TCI breached the contract in question and breached the implied covenants of good faith and fair dealing, and have provided no reason or evidence as to their nonperformance. The trial court made a credibility finding as to the validity and believability of the single affidavit submitted as evidence. The determination of credibility as to the only evidence supporting the assertion that the implied covenants of good faith and fair dealing were not breached (i.e. the affidavit) is an issue of fact for the jury to determine, not the trial court. This credibility finding by the trial court constitutes an abuse of discretion and reversible error under Mississippi law.

"All contracts carry an inherent covenant of good faith and fair dealing." *Johnston v. Palmer*, 963 So.2d 586, 595 (Miss.Ct.App.2007) (citing *Ferrara v. Walters*, 919 So.2d 876, 883(¶ 19) (Miss.2005) and *Cenac v. Murry*, 609 So.2d 1257, 1272 (Miss.1992)). The Mississippi Supreme Court has explained that, "The breach of good faith is bad faith characterized by some conduct which violates standards of decency, fairness or reasonableness." *Cenac*, 609 So.2d at 1272. "[B]ad faith' is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity." *Bailey v. Bailey*, 724 So.2d 335, 338(¶ 9) (Miss.1998). Under the duty of good faith and fair dealing, a party has a duty "not only to refrain from hindering or preventing the occurrence of conditions of his own duty or the performance of the other party's duty, but also to take some affirmative steps to cooperate in achieving these goals." *Cenac*, 609 So.2d at 1272. (emphasis added)

The comment to Section 205 of the Restatement (Second) of Contracts states that good faith is defined as “honesty in fact in the conduct or transaction concerned.” Restatement (Second) of Contracts § 205 cmt. a (1981). “Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving ‘bad faith’ because they violate community standards of decency, fairness or reasonableness.” *Id.* The approach to contract interpretation exemplified by the Restatement Second, which not only tolerates but encourages the exercise of judicial power in facilitating contract interpretation and enforcement, emphasizes the context of an agreement-usage, course of dealing, course of performance, and other factors present in the relationship that gave rise to the agreement.

The trial court could not have properly determined that no genuine issues of material fact existed, absent a final statement from TCI that no financing application documents exist. If no financing documents exist, then TCI has breached their duties of good faith and fair dealing (the covenant contained in every contractual agreement entered into) by failing to make a good faith effort to obtain the requisite financing. Contracts for the sale and purchase of real property are no exception to this requirement.

As to the affirmative duties TCI was required to carry out, the trial judge was required to disregard mere legal conclusions and require them to make proof sufficient to meet their burden. Absent any applications, contracts, statements of credit worthiness, proof or statements of assets of TCI companies and/or holdings, statements from bank officials or executives verifying that TCI applied for financing and were turned down, or any other such evidence, there can be no demonstration of a good faith effort on TCI’s part to obtain financing. The failure of TCI to use good faith in their effort to obtain financing constituted a breach of the inherent covenant of good faith and fair dealing, and created a genuine issue of material fact before the trial court.

TCI failed to submit any applications for loans to banks or lending institutions. The only evidence, basis and/or grounds for TCI’s summary judgment motion was a single, self-serving affidavit. If TCI claims that they had a reason to breach the contract, then the law requires them to prove it. (emphasis added) Under *Cenac*, TCI was

required to take some affirmative steps in obtaining financing, in order to satisfy the 'condition precedent' of paragraph five (5) of the Contract.

TCI argues that the *Austin v. Carpenter* case is dispositive of the 'satisfaction of the condition precedent' issue herein. In *Austin*, the buyer and seller entered into a contract with the requirement that an acceptable survey must be done. 3 So.3d 147 (Miss.Ct.App.2009). Once the survey was completed, it was determined that the part of the land that the sellers had agreed to sell included a portion of the cabin they were currently living in, unbeknownst to them at the time of the agreement. (emphasis added) The court held that because the condition precedent of obtaining an acceptable survey was not satisfied that the contract was no longer enforceable.

The case *sub judice* is clearly distinguishable from the *Austin* case, because in *Austin*, good faith efforts were made to comply with the condition precedent. A survey was actually completed, documents were filled out, and a record was made as to the steps taken to ensure compliance with all conditions of the contract. In this situation, TCI has failed to make the good faith effort required under Mississippi contract law.

Sweet has maintained a good prima facie case to enforce the contract, and for the breach of the implied covenant of good faith and fair dealing, which should have sufficed for the denial of summary judgment. There is not a word in the record regarding TCI's proof of full disclosure, proof of use of best efforts in obtaining financing, or their lack of compliance with industry standards. Discovery requests are on file for these areas. The summary judgment entered by the trial court cannot stand unless this Court finds there was summary judgment evidence sufficient to prove that TCI acted in good faith in their efforts to obtain financing. Absent any applications, contracts, statements of credit worthiness, proof or statements of assets of TCI companies and/or holdings, statements from bank officials or executives verifying that TCI applied for financing and were turned down, or any other such evidence, there can be no demonstration of a good faith effort on TCI's part to obtain financing.

ASSIGNMENT OF ERROR # 5: A PARTY SHOULD NOT RESIST DISCOVERY
AND AT THE SAME TIME MOVE FOR SUMMARY JUDGMENT

VII. The trial court suspended meaningful discovery and ruled on TCI's dispositive motion, despite Sweet's attempts to get the requested discovery

At the time of the hearing on TCI's Motion for Summary Judgment, Sweet had pled and was prepared to show proof of the existence of a valid and binding contract, TCI's breach of said contract, and that Sweet had been thereby damaged monetarily, as is required by Mississippi law. Sweet contends that in this instance, discovery must have been completed in order for the trial court to have had an adequate basis to grant a party judgment as a matter of law, and to find that no genuine issue of material fact exists. If there are documents in existence that relate to financing or to the buyers' inability to obtain financing, those documents should have been produced by TCI; they were not. Sweet's discovery requests were clear in this regard. Relevant Requests for Admissions included:

REQUEST NO. 14: Please admit that you failed to notify the Plaintiffs of any anticipated problems regarding the closing or the Contract.

RESPONSE NO. 14: Denied.

R. at 140.

In response to Sweet's Request for Admission No. 14, TCI denies that they failed to notify Sweet of any anticipated problems regarding the closing or the contract. TCI's response is in essence a sworn statement that they did notify Sweet of anticipated problems regarding the closing or the Contract, i.e. their claimed inability to obtain financing; **something they did not do**. (emphasis added)

Interrogatories and Requests for Production of Documents and Things relevant to evidence and proof of TCI's contention that they were unable to obtain satisfactory financing (propounded by Sweet and brought to the trial court's attention) included:

INTERROGATORY NO. 4: Please describe any and all efforts on the part of TCI to close the sale on the contracted date, including what action, if any, TCI took to prevent the Contract from being breached.

RESPONSE NO. 4: The contract was not breached by the Defendant. TCI met or communicated with multiple lenders, but was unable to secure satisfactory financing. TCI also attempted to

negotiate an extension of the closing date with the Plaintiffs, but was unable to reach an agreement with the Plaintiffs on the terms of such an extension.

R. at 146.

In response to Interrogatory No. 4, TCI stated that "TCI met or communicated with multiple lenders, but was unable to secure satisfactory financing"; if this sworn discovery response is correct, **then it is without question that discoverable documents would exist as proof.** (emphasis added)

INTERROGATORY NO. 10: Please list all documents, photos, demonstrative evidence, records, statements and/or oral testimony you will or intend to use at the trial of this matter.

RESPONSE NO. 10: The Defendant objects to the Plaintiffs' seeking information about any impeachment evidence it may use at the trial of this matter. Without waiving the aforesaid objection, the Defendant has not made any determination as to what exhibits it plans to introduce at trial. When it makes this determination, it will supplement its answer to this Interrogatory. However, the Defendant reserves the right to introduce the subject Contract as well as any document or other evidence identified or produced by any party during that course of discovery.

R. at 147.

REQUEST (FOR PRODUCTION) NO. 2: Please provide all documents, written statements, notices of claims, recordings, telephone messages, surveillance, writings, tests, medical texts, treatises, periodicals, memorandums, notes, reports, tangible things, records, maps, charts, plats, diagrams, drawings, photographs, video/audio tapes, motion pictures or other any evidence to be introduced at the trial of this cause by you or on your behalf that have been prepared, obtained or which reflect in any way or are in any way concerned with this cause of action and the Contract.

RESPONSE NO. 2: The Defendant objects to any documents sought in this Request because the Plaintiffs' description of these documents is vague and overly-broad, and because the Request seeks documents that may be protected as work product or that are privileged under the attorney/client privilege. Without waiving the aforesaid objections, the Defendant has not made any determination as to what documents it will seek to introduce into evidence at the trial of this matter. When it makes this determination, it will produce those

documents to the Plaintiffs, except for any evidence it intends to introduce while impeaching any witness.

R. at 149.

Sweet specifically requested the discoverable documents referenced in Request for Admissions No. 4 via Interrogatory No. 10, “all documents, photos, demonstrative evidence, records, statements and/or oral testimony you will or intend to use at the trial of this matter”, and Request for Production No. 2, “Please provide all documents, written statements ... writings ... memorandums, notes, reports, tangible things, records ... or other any evidence to be introduced at the trial of this cause by you or on your behalf that have been prepared, obtained or which reflect in any way or are in any way concerned with this cause of action and the Contract.” If TCI’s defense at trial (the Contract it entered into with Sweet became unenforceable as to the purchase of the real property once TCI was unable to obtain financing satisfactory to them) is to be based on anything other than the unsubstantiated word of the parties themselves, then such requested documents would clearly exist and are required to be produced by law under the Mississippi Rules of Civil Procedure.

INTERROGATORY NO. 13: Please provide any oral, written or recorded statement(s) made by or for any party or witness pertaining to the facts of this case.

RESPONSE NO. 13: The Defendant objects to any information sought in this Interrogatory that is protected as work product or that is privileged under the attorney/client privilege. Without waiving the aforesaid objections, the Defendant does not have any such statements at the present time.

R. at 148.

Interrogatory No. 13 clearly contemplates **any** written statement made by the parties to this lawsuit (i.e. a representative of TCI MS, Inc.) pertaining to the facts of this case (i.e. a financing application or credit verification form). Such documents would not be made in preparation for the trial of this matter and would not be a confidential communication between attorney and client; therefore, no privilege would apply. Without waiving their objections, TCI states that “the Defendant does not have any such statements at the present time.” Therefore, at the time of the filing of their sworn

Responses to Sweet's discovery requests, either 1) no written financing application had been entered into by TCI, or 2) TCI's sworn Response to Interrogatory No. 13 was made in error. No matter which explanation TCI chooses, a genuine issue of material fact sufficient for a denial of summary judgment was created.

REQUEST (FOR PRODUCTION) NO. 1: Please provide all documents referred to or identified in your answers to Plaintiffs' First Set of Interrogatories.

RESPONSE NO. 1: A copy of the Real Estate Sales Contract has already been produced by Defendant to Plaintiffs.

R. at 149.

As was clearly stated in TCI's Response to Interrogatory No. 4, "TCI met or communicated with multiple lenders, but was unable to secure satisfactory financing." However, without waiving their objections to Interrogatory No. 13, TCI state that they do not have any such written statements made by the parties to this lawsuit (i.e. a representative of TCI MS, Inc.) pertaining to the facts of this case (i.e. a financing application or credit verification form) at the present time. Therefore, TCI again makes a sworn discovery response contending that they do not possess any proof that an application for satisfactory financing **was ever made at any point.** (emphasis added)

REQUEST (FOR PRODUCTION) NO. 3: Please provide all reports, tests, examinations or other documents, which any person has produced for the Defendant(s) for purposes of this cause of action.

RESPONSE NO. 3: The Defendant is not aware of any information responsive to this request.

R. at 149.

In their sworn Response to Request for Production No. 3, TCI again contends that no document from any bank or lending institution exists that would substantiate their claim that good faith efforts were made on their part to obtain satisfactory financing.

REQUEST (FOR PRODUCTION) NO. 7: Please provide any and all documents, forms and things which contain information upon which the Defendant(s) used either to answer, to gather information which went into, or was otherwise consulted or seen in connection with the preparation of Defendant(s)'s answer to the Complaint filed by the Plaintiff.

RESPONSE NO. 7: The Defendant objects to any documents sought in this Request because the Plaintiffs' description of these documents is vague and overly-broad, and because the Request seeks documents that may be protected as work product or that are privileged under the attorney/client privilege. Without waiving the aforesaid objections, Defendant would state that no documents or other things were used or needed to provide the answers to the Complaint.

R. at 150.

REQUEST (FOR PRODUCTION) NO. 15: Please produce all documents upon which you rely in support of any of your affirmative defenses.

RESPONSE NO. 15: The Defendant objects to the Plaintiffs' seeking legal conclusions and theories from it insofar as the basis of its affirmative defenses asserted in this matter. Without waiving the aforesaid objection, the Defendant would show that the Contract it entered into with the Plaintiffs became unenforceable as to the purchase of the real property once Defendant was unable to obtain financing satisfactory to it for the purchase of the Plaintiffs' real estate and again once the Plaintiffs did not submit the required survey.

R. at 150.

Sweet specifically requested all documents, forms or things that contain any information regarding TCI's contention that they were unable to obtain financing. In their sworn discovery Responses, TCI states that "no documents or other things were used or needed to provide the answers to the Complaint." Therefore, a situation again arose where, at the time of the filing of their sworn Responses to Sweet's discovery requests, either 1) no written financing application had been entered into by TCI, or 2) TCI's sworn Response to Requests for Production Nos. 7 and 15 were made in error. No matter which explanation TCI chooses, a genuine issue of material fact sufficient for a denial of summary judgment was created.

REQUEST (FOR PRODUCTION) NO. 14: For any documents which are being withheld pursuant to any claim of privilege, work product or being overly burdensome, please list those documents being withheld by stating the following:

- a. The name or description of the document;

- b. The date of the document;
- c. The author of the document;
- d. The recipient of the document;
- e. A general description of the type of information contained in the document;
- f. The location of the document;
- g. The number of pages contained in the document; and
- h. The reason why said document is not being produced.

RESPONSE NO. 14: The Defendant Objects to request No. 14 to the extent that the same exceeds the scope of discovery permissible under Rule 26 of the Mississippi Rules of Civil Procedure. Further, disclosure of this information is itself an invasion of the various privileges.

R. at 152.

Sweet's Request for Production No. 14 was the request for a privilege log, which has yet to be provided. If the financing documents addressed herein do in fact exist, TCI had a duty to comply with Request for Production No. 14 by creating a privilege log identifying what documents, if any, are being withheld due to a certain legal privilege. No privilege log has been propounded by TCI.

A party should not resist discovery and at the same time move for summary judgment. *Smith v. H.C. Bailey Companies*, 477 So.2d 224 (Miss. 1985). TCI's actions in refusing to answer discovery and/or answering in error, then moving for summary judgment is contrary to principles of Mississippi law. The trial court's entry of summary judgment, where discovery was incomplete, was improper and constitutes reversible error.

ASSIGNMENT OF ERROR # 6: WHERE A CONTRACT IS SAID TO BE AMBIGUOUS WITHIN ITS FOUR CORNERS, SUMMARY JUDGMENT IS IMPROPER

VIII. The Paragraph Five (5) Clause of the Contract was ambiguous and created a genuine issue of material fact before the trial court sufficient to defeat summary judgment

TCI argues that paragraph five (5) of the real estate purchase contract was a condition precedent to the execution and enforcement of said contract. Paragraph five (5) of the real estate purchase contract reads, in its entirety:

5. **CONTINGENCIES.** The obligations of the Buyer herein, including forfeiture of any Earnest Money, are subject to the Buyer obtaining financing; zoning; approvals, and certain environmental permits, satisfactory to the Buyer prior to the Closing Date.

R. at 19.

A requirement that financing be obtained which is satisfactory to the buyer is no contingency at all; it is an escape route for a buyer on shaky financial ground to enter into a real estate purchase contract, decide that it is unhappy with the rates it has been given by a bank or lending institution, then back out of a contractual agreement without the seller having any recourse.

Ambiguous words and terms should be construed against the party who has drafted them, and where language of an otherwise enforceable contract is subject to more than one fair reading, court will give that language the reading most favorable to the non-drafting party. Please See *Theobald v. Nosser*, 752 So.2d 1036 (Miss.1999) (Please See Also *Leach v. Tingle*, 586 So.2d 799, 801-02 (Miss.1991)). The subject Contract was not drafted by Dennis C. Sweet, Kimberly Noel-Sweet, or any representative of Sweet & Associates, P.A.

Ambiguity exists in paragraph five (5) of the real estate sales contract regarding the terms 'satisfactory' and 'obtain financing'. If the term denotes an obligation to obtain financing satisfactory as to the buyer themselves, then the term creates no binding obligation whatsoever. At that point, the contract ceases to become a contract at all; there is no binding agreement between the parties, no bargained-for exchange, and no consideration. The clause does not set forth what percentage of financing is required to be obtained, whether it be complete, partial, or a certain set percentage. The ambiguities in the contract leave room for varying interpretations. The subjective nature of paragraph five (5) allows for variance between what is acceptable and what is not acceptable, and leaves that interpretation solely at the discretion of the buyer themselves. The ambiguities provide leeway for the buyer to say, if at any point before closing personal

financial issues arise, I can say I never obtained 'satisfactory' financing and be free and clear of my contractual obligations.

A plain reading of paragraph five (5) of the real estate sales contract evidences certain ambiguities in the drafting of the condition precedent clause for enforceability. These ambiguities create questions of fact to be determined by a jury, and establish genuine issues of material fact sufficient to defeat summary judgment. The trial court failed to accept counsel for Sweet's arguments regarding these ambiguities, and failed to construe them in favor of the non-drafting party, thereby constituting reversible error.

ASSIGNMENT OF ERROR # 7: ENFORCING A CONTRACT'S CLAUSE ADDRESSING ATTORNEY'S FEES WITHOUT ENFORCING THE ENTIRE CONTRACT IS CONTRARY TO LAW

IX. The Trial Court's award of attorney's fees was improper and constitutes reversible error

In their Motion for Attorney's Fees, TCI turns their entire argument into a two-sided contradiction of legal principles. TCI has repeatedly and consistently argued that the real estate purchase contract is unenforceable in its entirety as to the condition precedent of 'obtaining financing' not having been met. No evidence has been put forth (and TCI has not claimed) that Sweet's claims were frivolous or otherwise without basis in law. Yet, in their Motion for Attorney's Fees, TCI argues that the contract's provision regarding attorney's fees should be enforceable. TCI's request for, and the trial court's improper grant of, attorney's fees defies principles of equity and fundamental justice.

Just as "enforcing a contract without enforcing the contract's clause addressing attorney fees is contrary to the law", *Industrial and Mechanical Contractors of Memphis, Inc. v. Tim Mote Plumbing, LLC*, 962 So.2d 632 (Miss.Ct.App.2007), enforcing a contract's clause addressing attorney fees without enforcing the entire contract is contrary to the law. TCI is trying to have it both ways; it is improper for TCI to argue that the contract cannot be enforced in its entirety, then attempt to reinstitute and enforce a single provision of a contract which they had consistently argued to the Court was unenforceable. The trial court's award of attorney's fees, based on a provision of an unenforceable contract, constitutes reversible error.

CONCLUSION

Sweet stated good claims against, the essence of which were a breach of both a written contract and the implied covenant of good faith and fair dealing. TCI then argued for summary judgment on the sole evidentiary basis of a single, self-serving affidavit which is at most a conclusion of the pleader, plainly insufficient for the grant of summary judgment. The trial court ruled as if the only question was 'is there a written contract'; it was not. The trial court ruled as if the only issue was the escape clause; it was not. The trial court ruled as if the only proof was exclusively in their hands, and that no one could produce conflicting evidence; it was not.

The Trial Court committed reversible error in cutting off discovery and ruling on TCI's summary judgment motion before it was determined whether certain requested financing documents existed, thereby preventing Sweet from being provided a full and fair opportunity to discover information essential to its opposition to summary judgment. In this instance, discovery must have been completed in order for the trial court to have had an adequate basis to grant a party judgment as a matter of law, and to find that no genuine issue of material fact exists. If there are documents in existence that relate to financing or to the buyers' inability to obtain financing, those documents were requested by Sweet and should have been produced by TCI; however, they were not.

Absent any applications, contracts, statements of credit worthiness, proof or statements of assets of TCI companies and/or holdings, statements from bank officials or executives verifying that TCI applied for financing and was turned down, or any other such evidence, there can be no demonstration of a good faith effort on TCI's part to obtain financing. The trial court could not have properly determined that no genuine issues of material fact existed, absent a final statement from TCI that no financing application documents exist. If no financing documents exist, then TCI has breached their duties of good faith and fair dealing (the covenant contained in every contractual agreement entered into) by failing to make a good faith effort to obtain the requisite financing. The trial court's finding that genuine issues of material fact did not exist as to TCI's breach of their duties of good faith and fair dealing was reversible error.

A plain reading of paragraph five (5) of the real estate sales contract evidences certain ambiguities in the drafting of the condition precedent clause for enforceability.

These ambiguities create questions of fact to be determined by a jury, and establish genuine issues of material fact sufficient to defeat summary judgment. The trial court failed to accept counsel for Sweet's arguments regarding these ambiguities, and failed to construe them in favor of the non-drafting party, thereby constituting reversible error.

Just as enforcing a contract without enforcing the contract's clause addressing attorney fees is contrary to the law, enforcing a contract's clause addressing attorney fees without enforcing the entire contract is contrary to the law. The trial court's entry of an Order granting attorney's fees was improper and in error.

WHEREFORE, based on the foregoing, the trial court's ruling should be reversed with all rights and privileges being restored to the Appellants, along with all other relief as this Honorable Court deems just.

Respectfully submitted, this the 19th day of November, 2009.

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BY: TH B

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CERTIFICATE OF SERVICE

I, Thomas J. Bellinder, one of the attorneys of record for the Appellants do hereby certify that I have this day mailed a true and correct copy of the foregoing to the following:

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So certified, this the 17th day of November, 2009.

BY: 
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