IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI

NO. 1999-CA-00230-COA

D. H. DEW, JR. **APPELLANT**

v.

TCHULA GRAIN COMPANY, A CORPORATION D/B/A TCHULA WAREHOUSE **APPELLEE**

DATE OF JUDGMENT:	10/16/1998
TRIAL JUDGE:	HON. JANNIE M. LEWIS
COURT FROM WHICH APPEALED:	HOLMES COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	CHRIS H. DEATON
ATTORNEY FOR APPELLEE:	H. D. BROCK
NATURE OF THE CASE:	CIVIL - CONTRACT
TRIAL COURT DISPOSITION:	SUMMARY JUDGMENT GRANTED AS TO BREACH OF SETTLEMENT CLAIM
DISPOSITION:	AFFIRMED IN PART REVERSED IN PART: 1/16/01
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/6/2001

BEFORE SOUTHWICK, P.J., BRIDGES, AND THOMAS, JJ.

BRIDGES, J., FOR THE COURT:

¶1. This case comes from the Circuit Court of Holmes County, Hon. Jannie Lewis presiding. It is an appeal from the trial court's grant of a motion for summary judgment against D.H. Dew Jr. This was an action by Tchula Grain Company against Dews for a breach of contract. Both parties made proper filings (Dew filed a counter claim) and had started discovery when Tchula moved for summary judgment, which Dew challenged. The trial court found for the Tchula, and after trying to get the trial court to reconsider, Dew appeals to this Court, citing these issues:

1. WHETHER THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHERE QUESTIONS OF FACT EXIST REGARDING SET OFFS AGAINST THE TOTAL AMOUNT OF D.H. DEW, JR.'S INDEBTEDNESS TO TCHULA GRAIN AS A RESULT OF TCHULA GRAIN'S SEIZURE OF CHEMICAL REBATES DUE D.H. DEW, JR. AND TCHULA GRAIN'S RETENTION OF D.H. DEW JR.'S BEANS?

2. WHETHER THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT

WHERE QUESTIONS OF FACT EXIST REGARDING TCHULA GRAIN'S FAILURE TO ACCEPT D.H. DEW, JR.'S TENDER OF STOCK PURSUANT TO AN AGREEMENT ENTERED INTO BETWEEN TCHULA GRAIN AND D.H. DEW, JR?

3. WHETHER THE TRIAL COURT ERRONEOUSLY REFUSED TO CONSIDER D.H. DEW, JR.'S ALLEGATION THAT HE WAS FRAUDULENTLY INDUCED TO SIGN THE NOTE IN RELIANCE ON TCHULA GRAIN'S OFFER TO ACCEPT D.H. DEW, JR.'S TENDER OF STOCK?

4. WHETHER THE TRIAL COURT ERRONEOUSLY AND APPARENTLY WITHOUT REASON DISMISSED D.H. DEW, JR.'S COUNTER-CLAIM AGAINST TCHULA GRAIN FOR TCHULA GRAIN'S BREACH OF CONTRACT TO PROVIDE D.H. DEW, JR. WITH THE SPECIFIC TYPE AND VARIETY OF SOYBEANS BOOKED BY D.H. DEW, JR?

We affirm in part and reverse in part.

STATEMENT OF THE FACTS

¶2. This case is based on several transactions that occurred between Mr. Dew and Tchula Grain Company. The subject of Dew's permissive counter claim occurred in the spring of 1994. Dew booked 1000 bushels of group 4 and 5 type soybeans from Tchula Grain. When Dew called for delivery of the soybeans, Tchula told Dew it had sold the soybeans Dew had booked to another soybean purchaser. Dew was forced to take another group of soybeans from Tchula causing Dew damages in the amount of $180,000.

¶3. The subject of Tchula's cause of action, the one on direct appeal today, came about in 1995, when Dew was indebted to Tchula for the sum of $94,581.12. The two parties worked out a settlement agreement for repayment of the debt in which Dew gave Tchula a promissory note for $72,181.12 and was to transfer 56 shares of stock in the Good Hope Gin Company to Tchula.

¶4. It is at this point that the parties have different views of the facts. Tchula claims there was no transfer of the stock and that Dew in fact transferred the stock to a third party for cash. Dew claims he attempted to transfer the stock, but it was refused by Tchula's grain assignees because the Gin put a restriction on the stock which required the assignees to gin all of their cotton at the Good Hope Gin. Dew also claimed Tchula seized certain chemical rebates owing to Dew for Dew's purchase of chemicals and retained a certain amount of Dew's soybeans. Tchula did not deny this, but claimed that in the debt settlement agreement, Dew waived any right to any offsets so Dew had no claim to the property.

¶5. Tchula sued Dew for breach of contract on February 24, 1997, for failure to fulfill the settlement agreement by not tendering the stock. Dew answered and discovery ensued. Tchula moved for summary judgment, and the trial court, over Dew's objection, granted it.

DISCUSSION

STANDARD OF PROOF

¶6. The proper standard to be applied in reviewing the trial court's grant of summary judgment is found in the case of *Simmons v. Thompson Machinery of Mississippi*, 631 So 2d 798, 801 (Miss. 1994). A judge

enters summary judgment "if 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. *Simmons*, 631 So. 2d 801. The burden is thus on the moving party to show there is no issue of material fact.

¶7. To survive a motion for summary judgment, all a non-moving party must do is establish that there is an issue of material fact. *Id*. at 801. A non-movant cannot just sit back and rely on its pleadings to prove on their own that there is a genuine issue of material fact. *Newell v. Hinton*, 556 So. 2d 1037, 1041 (Miss. 1990). Such things as admissions in pleadings, answers to interrogatories, depositions, and affidavits can all be presented to the trial court to prove or disprove a genuine issue of material fact. *Short v. Columbus Rubber and Gasket Co., Inc.*, 535 So. 2d 61, 63 (Miss. 1988). In addition, the evidence must be viewed in the light most favorable to the party against whom the motion has been made. *Id*. at 63.

ANALYSIS OF THE LAW

I. WHETHER THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHERE QUESTIONS OF FACT EXIST REGARDING SET OFFS AGAINST THE TOTAL AMOUNT OF D.H. DEW, JR.'S INDEBTEDNESS TO TCHULA GRAIN AS A RESULT OF TCHULA GRAIN'S SEIZURE OF CHEMICAL REBATES DUE D.H. DEW, JR. AND TCHULA GRAIN'S RETENTION OF D.H. DEW JR.'S BEANS?

¶8. In this case, Dew claims there were material questions of fact that the trial judge ignored. First of all, Dew claims the amount of the debt he owed to Tchula is in question because Tchula seized some chemical rebates Dew was owed and some of Dew's soybeans. Dew argues that because of this, he is entitled to off-sets in the amount of the debt owed equal to the value of the rebates and soybeans. Tchula replies to this in his brief by pointing out that off-sets and other claims were waived in the promissary note.

¶9. In examining this issue it is important to look at the promissory note intended by the parties to take care of the debt, and then look at the time at which the set offs and rebates actually occurred. In the last paragraph of the promissory note, the maker, Dew, waives several things including "all off-sets and opposing claims." In the judge's order granting summary judgment, he makes reference to the off-sets coming from the 1994 transaction. Since these occurred before the parties entered the promissory note these off-sets may have been waived. However, no reference is made in the promissory note to any off-sets, rebates, or opposing claims which may occur in the future. This note was created in 1995 and suit was commenced in 1997, thus allowing two years in which the rebates owed Due could have occurred. Nothing in the record indicates whether or not these rebates occurred before the promissory note or after it was created. The promissory note's reference to all set-offs can be interpreted as dealing only with all set-offs existing at that time. After examining the record, this Court was unable to determine when the rebates came into being. Because we were unable to determine when they came into existence we will not then determine whether or not they were barred by the note, but hold this is a matter to be decided by the trial court.

¶10. This Court has long held that motions for summary judgment should be viewed with great skepticism and that if there is any doubt as to whether there is a material fact, the non-moving party should get the benefit of the doubt. *Simmons*, 631 So 2d at 801, *Donald v. Reeves Transport Co. of Calhoun, Georgia*, 538 So. 2d 1191, 1195 (Miss. 1989). This taken in mind with the fact that the evidence should be viewed in the light most favorable to the non-moving party causes this Court to find for Dew in regard to this issue.

¶11. Whether or not Dew is allowed to claim an off-set affects the amount of the debt in controversy. If he is not barred by the promissory note, then he could claim the rebates, and this affects the amount in controversy which is definitely material. In addition, if Tchula was wrong in keeping the rebates and the soybeans, then there is a possibility Tchula could be unjustly enriched if it is allowed to keep them. This Court finds there was a material question of fact in regard to this issue; therefore, the trial court was in error in granting summary judgment as to this issue. For these reasons, we reverse on this issue.

II. WHETHER THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHERE QUESTIONS OF FACT EXIST REGARDING TCHULA GRAIN'S FAILURE TO ACCEPT D.H. DEW, JR.'S TENDER OF STOCK PURSUANT TO AN AGREEMENT ENTERED INTO BETWEEN TCHULA GRAIN AND D.H. DEW, JR?

¶12. Dew also claims error by stating he did in fact tender the stocks to Tchula's assignees, and they refused to accept them. Dew acknowledges he did not deliver the stock, but the reason he did not do so is because he knew Tchula's assignees would not accept them. Dew claims Tchula's assignees stopped Dew one day and claimed the Gin would not reissue the stock in their names unless they signed an agreement stating they would gin their cotton at Good Hope exclusively. Tchula claims Dew never delivered the stock, and for this reason he breached the settlement agreement. Tchula also claims that Dew knew the Gin would not reissue the stock.

¶13. As stated above, summary judgment motions are to be viewed with much skepticism and the facts should be viewed in a light most favorable to the non-moving party. *Simmons,* 631 So 2d at 801. Also, "[I] n a motion for summary judgment a genuine issue of material fact is obviously present where one party testifies to one account of the matter in interest and the other party swears otherwise." *Id.* at 802.

¶14. In looking at the promissory note, it states:

> The conveyance by Debtor to W. E. Diggs, Jr. and W. E. Diggs, III, as Assignee's of Tchula Grain, of 56 shares of common stock in Good Hope Gin Co., which conveyance shall be free and clear of all liens, encumbrances, and claims of third Parties;

The requirement that the assignees sign an agreement to gin their cotton only at Good Hope Gin in order to get the stock reissued to them could be argued to be an encumbrance on the stock. However, the stock restriction was not a lien, or a claim, and it could be argued the restrictions were not an encumbrance on the stock at all as they were simply a part of the stock. It could also be argued that the actual conveyance occurred with the formation of the promissory note. If either of the above were what happened, then Tchula was wrong for refusing the stock. This issue could be argued both ways with the facts before this Court, and because of this, Dew should receive the benefit of the doubt.

¶15. In addition, whether or not Dew actually tried to deliver the stock is in question. Dew claims he did and Tchula claims he did not. As stated above, where there are two versions of what happened then there is a question of material fact. *Id.* at 802. In regard to this issue, one party claims one thing while the other claims something else. The determination of this issue is material to this case because it answers whether or not Dew breached the agreement. These questions, taken with the above facts, cause this Court to find there was a material question of fact as to whether or not Dew conveyed the stock. For these reasons we reverse as to this issue.

III. WHETHER THE TRIAL COURT ERRONEOUSLY REFUSED TO CONSIDER D.H. DEW, JR.'S ALLEGATION THAT HE WAS FRAUDULENTLY INDUCED TO SIGN THE NOTE IN RELIANCE ON TCHULA GRAIN'S OFFER TO ACCEPT D.H. DEW, JR.'S TENDER OF STOCK?

¶16. The next reason Dew gives for why the trial court was mistaken in its grant of summary judgment is the trial court refused to consider his allegations that Tchula committed fraud in the inducement. Fraud is an affirmative defense, and it must be plead with specificity in the pleadings. *Mississippi State Tax Comm'n v. 3300 Corp.*, 515 So. 2d 912, 915 (Miss. 1987). Dew did not mention fraud in his answer and would therefore be barred from bringing it up later in the case. However, there is authority stating that with a motion for summary judgment, the pleadings are reduced in importance, imperfections in the pleadings are not decisive, and if it appears from the record that the evidence is sufficient to create a genuine issue of material fact then that should be considered in deciding if the summary judgment was correctly granted. *Id*. at 915.

¶17. In this case, Dew claims such proof of fraud, while not found in the pleadings, was present in the interrogatories and was enough to create a material issue of fact thus making the trial court's grant of grant summary judgment an error. The only evidence in the record indicating fraud in this case is found in two admissions to interrogatories sent to Dew by Tchula. In the *Mississippi State Tax Commission* case cited above, the amount of proof of fraud was substantially greater than it is in this case. *Mississippi State Tax Comm'n v. 3300 Corp.*, 515 So. 2d 912 (Miss. 1987). For this reason, this Court does not think enough evidence was presented in this case to show a genuine issue of material fact as to fraud, and therefore Dew should not be allowed to claim the affirmative defense of fraud because he did not plead it. Therefore, we affirm as to this issue.

IV. WHETHER THE TRIAL COURT ERRONEOUSLY AND APPARENTLY WITHOUT REASON DISMISSED D.H. DEW, JR.'S COUNTER-CLAIM AGAINST TCHULA GRAIN FOR TCHULA GRAIN'S BREACH OF CONTRACT TO PROVIDE D.H. DEW, JR. WITH THE SPECIFIC TYPE AND VARIETY OF SOYBEANS BOOKED BY D.H. DEW, JR?

¶18. The fourth ground upon which Dew claims summary judgment was incorrect is based on the dismissal of his counter claim. Dew states he was damaged by Tchula's breach of the 1994 contract in which Tchula was to sell Dew group 4 and group 5 soybeans, but instead sold him group 6 soybeans.

¶19. Since Dew had an open account with Tchula, and the promissary note was to take care of the past debts of Dew, the ajudication of this claim is barred by the promissary note. The law favors settlement agreements and, under most circumstances, will enforce them. *McBride v. Chevron* U.S.A., 673 So. 2d 372, 379 (Miss. 1996), *McManus v. Howard*, 569 So. 2d 1213, 1215 (Miss. 1990). The language of the promissary note states that the note is for the purpose of paying Dew's past debts, and in it the maker (Dew) waives several things, including "protest" and "all opposing claims." Since this counter-claim deals with the past debts Dew owed Tchula, and since Dew has waived any claims dealing with this past debt, the trial court judge was not in error in dismissing this claim. Therefore, this Court affirms as to this issue.

¶20. In conclusion, we find that the trial court was in error in granting summary judgment as to the first two issues listed above, and because of this we reverse summary judgment for these two issues. However, we find that the trial court was correct in granting summary judgment in regards to the last two issues, and thus

we affirm its holdings for those two matters.

¶21. **THE JUDGMENT OF THE CIRCUIT COURT OF HOLMES COUNTY IS REVERSED IN ITS GRANT OF SUMMARY JUDGMENT IN ISSUES ONE AND TWO AND IS REMANDED FOR FURTHER PROCEEDINGS. THE JUDGMENT OF THE HOLMES COUNTY CIRCUIT COURT IS AFFIRMED IN THE GRANT OF SUMMARY JUDGMENT IN ISSUES THREE AND FOUR. COSTS OF THIS APPEAL ARE ASSESSED HALF TO THE APPELLANT AND HALF TO THE APPELLEE.**

KING, P.J., LEE, MYERS, PAYNE, AND THOMAS, JJ., CONCUR. SOUTHWICK, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY McMILLIN, C.J. AND IRVING, J. CHANDLER, J., NOT PARTICIPATING.

SOUTHWICK, P.J., DISSENTING:

¶22. The parties entered a settlement contract in 1995 to resolve their business disputes. The defendant signed a promissory note and agreed to tender certain stock to satisfy an agreed indebtedness of about $94,500. Four issues are considered by the majority, and reversal is ordered based on two of them. I agree with one ground, but believe we should affirm on the other. With respect for the analysis of my colleagues, I will review each argument to explain my disagreement.

¶23. First, certain facts are disputed. Whether those disagreements are material is part of our review. What is agreed includes that the parties entered a settlement in 1995 regarding Dew's obligations to Tchula. That agreement required Dew to pay about $72,000 to Tchula as evidenced by a promissory note and also to transfer to Tchula 56 shares in Good Hope Gin Company. There is evidence that an explicit condition of stock ownership was to gin all cotton at Good Hope. There is no assertion that Tchula knew of that requirement prior to executing the settlement agreement. The 1995 settlement agreement provided that the conveyance of stock by Dew to Tchula would "be free and clear of all liens, encumbrances, and claims of third parties. . . ." It is also agreed that Dew no longer owns the stock as he assigned all the shares to a third party in 1997. It is further agreed that no payments on the note have been made by Dew.

¶24. What is disputed is whether Tchula's owners refused to accept the stock because of the ginning requirement or instead never had it tendered. It is also disputed whether at the time of the 1995 settlement, there were other differences between the parties. Dew alleges in the present litigation that Tchula had breached an obligation to deliver a certain variety of soybeans and instead provided a lesser grade. Dew denied that occurred. Dew made this dispute a counterclaim to Tchula's action to enforce the 1995 settlement agreement. Another dispute arises from alleged setoffs due because of rebates given Tchula by others on Dew's behalf and payments in kind by Dew to Tchula. No specific amounts, dates, or sources of the money are alleged by Dew.

¶25. Tchula sought and on summary judgment received enforcement of the settlement. The majority reverses because it finds material factual issues as to some aspects of Tchula's claim.

1. Setoff amounts

¶26. The majority finds error in granting summary judgment when there were disputes of material fact as to credits that Dew should receive. These setoffs are briefly described in Dew's response to summary judgment. He alleges that Tchula "maintained chemical rebates for chemical purchases" and "took direct

payment for receipt of things in lieu of cash." There is disagreement about whether language in the promissory note executed as part of the 1995 settlement applies to these amounts. The note stated that "all off-sets and opposing claims are hereby waived."

¶27. The majority finds no evidence that would explain whether these claims of off-setting entitlements arose before or after the settlement. Therefore the majority finds error in granting summary judgment. To the contrary, I find the complete absence of any proof regarding Dew's claim- dates, amounts, sources, or other details of the most minimal sort - means that there was nothing to override Tchula's right to judgment. To defend against a properly supported motion for summary judgment, a party may not rely on mere denial of material facts nor on unsworn allegations in the pleadings. Neither do arguments and assertions constitute an adequate defense. M.R.C.P. 56(e). Dew's response, in its sworn affidavit and unsworn pleadings, set forth no specific facts revealing a genuine issue for trial.

¶28. The majority's concern that the off-sets and other claims might or might not have arisen after the 1995 settlement agreement reveals the precise problem with Dew's response. There was no reason to deny judgment based on speculation. Had a trial been held based on this absence of evidence of the setoffs, a directed verdict rejecting the claim would have been necessary. Summary judgment tests whether there is anything to try. On this issue there was not. Therefore I respectfully disagree with the majority that the setoff issue is a basis to reverse.

2. Tchula's refusal to accept Dew's alleged tender of Good Hope Gin stock

¶29. The 1995 settlement agreement provided for Dew to assign shares of Good Hope Gin to the owners of Tchula, who are W. E. Diggs, Jr. and W. E. Diggs, III. The stock was to be "free and clear of all liens, encumbrances, and claims" by other parties. Dew no longer owns the stock as he assigned the shares in 1997 to someone else. The factual issue asserted by Dew is whether he had soon after the 1995 agreement attempted to assign the stock to Tchula's owners, but they had refused to accept it. The proof from each party on this issue is as follows.

> Dew's evidence: 1) In answers to interrogatories signed by Dew's attorney, it was claimed that W.E. Diggs, III approached him about purchasing the stock. Diggs had prepared the necessary documents and received Dew's signature on them. Later Diggs "complained to [Dew] about having trouble obtaining the stock from Good Hope Gin." The problem was said to be that Good Hope wanted Diggs to sign an agreement to gin all of his cotton there, something Diggs apparently was unwilling to do. A second filing of these interrogatory answers that occurred after the motion for summary judgment was granted included an affidavit by Dew that the answers were correct.
>
> 2) Also in the interrogatory answers, Dew asserted that the stock was assigned in 1997 to a third party for $100 per share, a transaction that was needed because the assignee controlled the bank at which Dew did business and Dew continued to need credit from the bank.
>
> 3) In an affidavit, Dew stated that he had tendered the stock to "Walter Diggs and Sonny Diggs," and that they refused it.
>
> Tchula's evidence: 1) In answers to interrogatories signed by W.E. Diggs, Jr., it was asserted that Dew told him that Good Hope would not reissue the stock in Diggs' name and therefore Dew refused to transfer the stock.

2) In answers to admissions, Diggs denied that the stock was ever tendered either to himself or his son.

¶30. I agree with the majority that a factual dispute exists. Whether the point of departure of the two versions of events is material needs further discussion.

¶31. What Tchula is not arguing might be noted first. It has not alleged that the requirement that owners of the stock agree to gin all their cotton with Good Hope violated the 1995 settlement agreement's prohibition on "liens, encumbrance, and claims of third parties" on the stock. Instead, Tchula argued that the fact dispute was immaterial since Dew could have satisfied his obligation by delivering the stock to Good Hope Gin and instructing them to transfer it. Dew has now made compliance with this part of the settlement impossible by assigning the stock to a third party.

¶32. Thus we must consider whether Dew's assertions in discovery that he signed documents to transfer the Good Hope stock, but Tchula's owners never received the stock because those owners asserted that they would have to gin all their cotton at Good Hope, is a material factual matter. I have noted that Dew's initial interrogatory answers were not sworn as is required. M.R.C.P. 33 (a). Though interrogatory answers can be considered in resolving motions for summary judgment, that in part arises from the fact that proper interrogatory answers are sworn and thus are the equivalent of an affidavit from the responding party. M.R.C.P. 56(c). Unless they are sworn, interrogatory answers serve no better purpose than unsworn pleadings that specifically are not to be considered. M.R.C.P. 56(e). Tchula never complained of that omission and a post-judgment filing of sworn answers occurred. I note also that an affidavit from Dew is sworn and alleges that he tendered the stock to Tchula's owners and it was rejected.

¶33. Since Dew by sworn affidavit in effect asserted that he complied with the tender of stock requirement, then a dispute of material fact exists as to that issue. If that assertion is proven, then the fact that two years later he assigned the stock to someone else does not necessarily end the question of an adjustment to his 1995 contractual obligations to Tchula. Even if it is true that Dew could always have just delivered the shares to Good Hope in compliance with his obligation, that is not specifically what the 1995 agreement provided. The means to comply were unstated. A permissible means under the agreement might have been to tender the stock to Tchula, and that is what Dew asserts that he did. If Dew can prove that events occurred as he asserts, can prove that the attempted assignment complied with the agreement, and then can demonstrate some damage to himself by Tchula's breach, then there may be relief that is appropriate. Whether any requirement to gin all cotton at Good Hope was an improper "encumbrance" under the settlement agreement could also be considered.

¶34. Thus I agree that we should reverse summary judgment relating to the stock. I do not find that this reversal affects the remainder of Dew's possible obligation to Tchula under the settlement. There was to be paid about $72,000 in cash with the stock representing means to pay the remainder of the overall $94,500 that Dew in 1995 agreed that he owed Tchula. I will examine the remaining issues to determine if judgment for the remaining $72,000 should remain unaffected.

3. Fraudulent inducement

¶35. There was a legal dispute below of the effect of Dew's failure to plead fraud. In answers to requests for admissions, Dew denied the enforceability of the 1995 agreement by saying that he was fraudulently induced to sign it. Just the bald statement was made without elaboration. The only potential description of

the fraud that appears anywhere is in Dew's affidavit, in which he asserts that he "relied upon the representations of Tchula Grain's representatives that they would accept tender of my stock in partial satisfaction of debts owed to Tchula Grain." If that is the fraud, then it solely applies to the question of the stock.

¶36. Fraud is not a lightly made allegation to be supported by inference and general statements. When fraud is alleged, "the circumstances constituting fraud or mistake shall be stated with particularity." M.R.C.P. 9(b). "The circumstances of the alleged fraud such as the time, place and contents of any false representations or conduct must be stated." *Brabham v. Brabham*, 483 So.2d 341, 342 (Miss.1986). The majority explains that Dew's pleading obligations on summary judgment were reduced, but there at least must be some sworn evidence of the particulars of the alleged fraud. Among other elements of fraud that we must infer from bare responses to answers to admissions and this statement in the affidavit, are that Dew could prove that Tchula's owners knew of the problems with the stock from the beginning, or for other reasons never intended to accept it, or in some other way had plans at the time of the execution of the agreement that were inconsistent with what they had just signed. Dew could have attempted to show that Tchula never presented the stock to Good Hope Gin, or any such restriction on ownership did not exist, or if it existed Tchula always knew about it. Instead, the bare facts that Dew asserts, even if proven, are entirely consistent with a post-agreement discovery by Tchula that acquiring the stock would require Tchula's owners to gin all their cotton at Good Hope. It is not Tchula's burden on summary judgment to disprove fraud, but Dew's obligation to show some factual basis to continue.

¶37. In a similar precedent, summary judgment was upheld because any jury that would have applied the required standard of clear and convincing evidence could not reasonably have found fraud. *Haygood v. First Nat'l Bank of New Albany*, 517 So.2d 553, 555-56 (Miss.1987). I find nothing in what was presented to the trial court that should have kept the issue of fraud alive. I agree with the majority that summary judgment was properly granted on this question.

4. Dismissal of counterclaim for $180,000.

¶38. I agree with the majority's resolution of this issue. Dew did not provide any evidentiary basis to overcome summary judgment.

Conclusion

¶39. I would remand only on the factual question of whether Dew tendered the stock to Tchula but had it refused. Those questions solely relate to the means by which Dew was to pay about $22,000 of his agreed obligation. Tchula's entitlement to the remaining $72,000 has not been affected by anything Dew introduced on summary judgment, and I would affirm.

McMILLIN, C.J., AND IRVING, J., JOIN THIS SEPARATE OPINION.