

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Sean Z. Sheikh,
Appellant-Defendant,

v.

Hinsdale Bank & Trust
Company, N.A.,
Appellee-Plaintiff.

March 31, 2021

Court of Appeals Case No.
20A-MF-1244

Appeal from the Lake Superior
Court

The Honorable Calvin D. Hawkins,
Judge

Trial Court Cause No.
45D02-1712-MF-218

Bailey, Judge.

Case Summary

[1] This appeal arises from Countryside Bank's/Hinsdale Bank's¹ ("Lender") commercial loan enforcement and mortgage foreclosure action against multiple defendants, including the principal borrowers, Central Market of Indiana, Inc. ("CMI") and 3232 Central Avenue LLC (collectively, "Borrowers") and one of the unconditional guarantors of the Borrowers' debt, Sean Z. Sheikh ("Sheikh"). Sheikh, pro se, appeals the order granting Lender summary judgment against him.

[2] We affirm.

Issues²

[3] Sheikh raises seven issues which we consolidate and restate as the following dispositive issues:

- I. Whether the trial court followed the proper procedure when it resumed jurisdiction over the case following the federal court's remand pursuant to 28 U.S.C. § 1447(c).
- II. Whether Lender properly filed its Motion for Summary Judgment after the expiration of twenty days from the

¹ Countryside Bank was initially the Lender and was succeeded due to merger by Hinsdale Bank.

² Lender has filed a cross-appeal in the alternative; that is, Lender cross-appeals only if we reverse in Sheikh's appeal and vacate summary judgment against Sheikh. Because we affirm summary judgment in Lender's favor, we do not address Lender's cross-appeal. By separate order we have denied, as moot, Sheikh's motion to dismiss the cross appeal.

commencement of this action in accordance with Indiana Trial Rules 3 and 56(A).

- III. Whether the trial court erred when it refused to consider Sheikh's summary judgment filings that were submitted after the time to respond to Lender's summary judgment motion had expired under Indiana Trial Rule 56(C).
- IV. Whether the trial court erred when it granted Lender's motion for summary judgment.

Facts³ and Procedural History

[4] The material undisputed facts are as follows.

[5] On May 14, 2015, Borrowers entered into a Loan Agreement with Lender under which Lender agreed to loan Borrowers \$1,837,000. Borrowers executed a promissory note ("Note") promising to repay the loan in monthly installments. Borrowers' debt was secured by a Mortgage and Assignment of Rents in favor of Lender. The Mortgage gave Lender the right to elect and pursue any and all of its remedies, including the remedy of judicial foreclosure.

³ Much of Sheikh's Statement of Case and Statement of Facts fail to provide citations to the record, in violation of the requirements of Indiana Appellate Rule 46(A). Therefore, Lender asks that we disregard Sheikh's Statement of Facts in its entirety. It is true that pro se litigants are held to the same standard as licensed attorneys and are thus bound to follow the established rules of procedure. *E.g., Lowrance v. State*, 64 N.E.3d 935, 938 (Ind. Ct. App. 2016), *trans. denied*. And, under Indiana Appellate Rule 42, we "may order stricken from any document any redundant, immaterial, impertinent, scandalous or other inappropriate matter." However, Sheikh's Statement of Facts is not so grossly inappropriate or impertinent that it is necessary to strike or disregard it in its entirety. *See Beta Steel v. Rust*, 830 N.E.2d 62, 68 (Ind. Ct. App. 2005). Rather, we disregard only those statements for which Sheikh provides no citation to the record.

[6] Sheikh guaranteed Borrowers' payment obligations under the Note by executing an Unconditional Guarantee⁴ which lists Sheikh as the Guarantor and Countryside Bank as the Lender. The Unconditional Guarantee states, in relevant part:

1. GUARANTEE:

Guarantor unconditionally guarantees payment to Lender of all amounts owing under the Note. This Guarantee remains in effect until the Note is paid in full. Guarantor must pay all amounts due under the Note when Lender makes written demand upon Guarantor. Lender is not required to seek payment from any other source before demanding payment from Guarantor.

* * *

4. LENDER'S GENERAL POWERS:

Lender may take any of the following actions at any time, without notice, without Guarantor's consent, and without making demand upon Guarantor.

* * *

⁴ The noun may be spelled "guarantee" or "guaranty." Webster's Dictionary, www.merriam-webster.com. Because the document in the instant case is entitled "Unconditional Guarantee," we use "guarantee" in this decision.

- B. Refrain from taking any action on the Note, the Collateral, or any guarantee;
- C. Release any Borrower or any guarantor of the Note;
- D. Compromise or settle with the Borrower or any guarantor of the Note;

* * *

- H. Exercise any right it has, including those in the Note and other Loan Documents.

These actions will not release or reduce the obligations of Guarantor or create any rights or claims against Lender.

* * *

6. RIGHTS, NOTICES, AND DEFENSES THAT GUARANTOR WAIVES:

To the extent permitted by law,

- A. Guarantor waives all rights to:

- 1) Require presentment, protest, or demand upon Borrower;

* * *

- C. Guarantor waives defenses based upon any claim that:

* * *

- 12) Lender did not seek payment from the Borrower, any other guarantors, or any Collateral before demanding payment from Guarantor;

* * *

- 15) Borrower has avoided liability on the Note;
or
- 16) Lender has taken an action allowed under the Note, this Guarantee, or other Loan Documents.

* * *

9. GENERAL PROVISIONS:

- A. ENFORCEMENT EXPENSES. Guarantor promises to pay all expenses Lender incurs to enforce this Guarantee, including, but not limited to, attorney's fees and costs.

* * *

- H. ORAL STATEMENTS NOT BINDING: Guarantor may not use an oral statement to contradict or alter the written terms of the Note or this Guarantee, or to raise a defense to this Guarantee.

* * *

11. GUARANTOR ACKNOWLEDGMENT OF TERMS.

Guarantor acknowledges that Guarantor has read and understands the significance of all terms of the Note and this Guarantee, including all waivers.

12. GUARANTOR NAME(S) AND SIGNATURE(S):

By signing below, each individual or entity becomes obligated as Guarantor under this Guarantee.

Sheikh App. v. 2 at 55-57. Sheikh signed the Unconditional Guarantee.

[7] On December 27, 2017, Lender filed its “Complaint to Foreclose Commercial Mortgage and for Other Relief” in which it alleged, among other things, that Sheikh was liable under the Unconditional Guarantee for the minimum amount of \$1,831,380.28, not including interest, costs of collection, and attorney’s fees. *Id.* at 27. Along with its complaint, Lender filed summonses—including one for Sheikh—and paid the required filing fees. The trial court served the summons on Sheikh by certified mail at his residential address in Austin, Texas, and, on January 16, 2018, the trial court received the return receipt confirming service of process on Sheikh. The return receipt was signed by Paul D. Flores, the doorman of the apartment building where Sheikh lived.

[8] On March 14, 2018, Lender filed a Motion for Summary Judgment, including a request for summary judgment against Sheikh based on his Unconditional

Guarantee. In its motion, Lender noted that Sheikh had failed to appear, answer, or otherwise defend against the Complaint, that his responsive pleading to the Complaint was past due, and that he was in default. Lender served its Motion for Summary Judgment on Sheikh by regular first-class mail to the residential address in Austin, Texas.

[9] On March 16, 2018, the trial court entered summary judgment in favor of Lender and against Sheikh on his Unconditional Guarantee (the “March 2018 Judgment”). The trial court concluded that Sheikh was liable in the minimum amount of \$1,904,522.26,⁵ not including interest, costs of collection, and attorney’s fees. The trial court found no just reason for delay and directed the entry of final judgment.

[10] Sheikh filed a Motion for Relief from the March 2018 Judgment on June 19, 2018. Sheikh claimed he never received Lender’s Complaint and Summons, and he argued that service of process signed by the doorman of the apartment building where Sheikh lived was not effective service under Trial Rule 4.1(A). Lender filed its response to the motion and, on July 26, 2018, the trial court granted Sheikh’s motion on the grounds that he had not been “properly served with [the] Summons and Complaint.” Sheikh App. v. 2 at 16.

⁵ The pleadings and orders refer to various amounts owing, depending upon the principal, interest, and costs due at any given time.

[11] On September 17, 2018, Sheikh removed the case to the United States District Court for the Northern District of Indiana on the basis of diversity jurisdiction and filed an Answer to the Complaint in federal court. On September 19, 2018, Lender filed a Motion for Summary Judgment in federal court against Sheikh on the Unconditional Guarantee. Sheikh filed a response in opposition to Lender's summary judgment motion in which he designated material facts in dispute and included affidavits of Sheikh and Zafar Sheikh. However, the federal court ultimately determined that it lacked diversity jurisdiction. On February 5, 2020, the federal court entered an order remanding the case back to the trial court and noted in the federal docket that the remand order was sent to the trial court. In light of the remand, the federal court denied Lender's Motion for Summary Judgment as moot.

[12] On February 7, 2020, Countryside Bank, by its successor by merger, Hinsdale Bank, filed a Corrected Motion for Substitution of Party Plaintiff informing the trial court that Hinsdale Bank had "merged with and succeeded to all interests of Countryside Bank effective November 1, 2019, including its rights in these proceedings." Sheikh App. v. 2 at 139. Hinsdale Bank asked to be "substituted for Countryside Bank due to the transfer of such interest." *Id.* On February 7, the trial court entered an Order of Substitution directing that Hinsdale Bank be "substituted as Plaintiff in these proceedings." *Id.* at 138.

- [13] On February 14, 2020, Lender⁶ filed another Motion for Summary Judgment in the trial court and served the motion on Sheikh by regular first-class mail. The Bank also emailed a courtesy copy of its motion to Robert A. Habib (“Habib”)—the attorney who had represented Sheikh in federal court—although Habib had not yet filed an Appearance in the trial court.
- [14] On March 27, 2020, Sheikh filed, by his counsel, a motion for leave to file his response to Lender’s motion for summary judgment. Sheikh noted that Lender had filed “the same” motion for summary judgment in federal court prior to remand. Sheikh App. v. 2 at 154. Sheikh attached the response he had filed to Lender’s motion in federal court and requested that the trial court grant him leave to file that response.⁷ On March 31, 2020, Lender filed an Objection to Sheikh’s Motion for Leave, asserting among other things that the trial court lacked discretion to allow an untimely response to its Motion for Summary Judgment. On April 1, 2020, Sheikh filed an amended motion for leave to file a response to which he attached the summary judgment exhibits from the federal court, which he had omitted as attachments to his initial motion for leave to respond.

⁶ Lender’s February 14 motion was styled as one filed by “Plaintiff Countryside Bank” due to an inadvertent carryover from earlier filings in the case. However, the Chronological Case Summary (“CCS”) reflects that the Motion for Summary Judgment was “Filed By: Plaintiff HINSDALE BANK & TRUST COMPANY[.]” Sheikh App. v. 2 at 9; Lender App. v. 2 at 113.

⁷ Sheikh inaccurately stated in his March 27 filing that the motion for summary judgment was still pending in federal court. In fact, the motion had been denied as moot.

- [15] On May 20, 2020, the trial court entered its Order granting summary judgment in favor of Lender and against Sheikh on his Unconditional Guarantee (the “May 2020 Judgment”). The trial court stated that “because [Sheikh] neither filed a response nor requested a continuance within the 30-day response period under Trial Rule 56, the Court lacks discretion to allow an extension of time and cannot consider his summary judgment filings[,]” including his summary judgment response he had filed in federal court. Sheikh App. v. 2 at 18. The court concluded that Sheikh was liable on his Unconditional Guarantee in the minimum amount of \$2,328,386.68, not including interest, costs of collection, and attorneys fees. On June 2, 2020, Sheikh filed a motion to reconsider and correct error in which he alleged that the deadline to file his summary judgment response had been tolled by order of the Indiana Supreme Court due to the COVID-19 pandemic. The trial court denied the latter motion on June 9, 2020.
- [16] Also on June 9, 2020, the trial court vacated a default judgment it had previously entered against one of the Borrowers, CMI. This prompted Sheikh to file a Motion for Relief from the May 2020 Judgment against him, which the trial court denied on June 15, 2020. The trial court amended its May 2020 Judgment nunc pro tunc to include language making it a final appealable judgment. This appeal ensued.
- [17] We provide additional facts below, as necessary.

Discussion and Decision

Procedural Error -- Waiver

[18] Sheikh contends that the trial court “was without jurisdiction to proceed in this matter” following remand from federal court because, he alleges, the federal court “failed to certify and mail a copy of the Remand Order.” Sheikh’s Br. at 29. Sheikh maintains that a state court is not “reinvest[ed] ... with jurisdiction” over a case remanded from federal court until the state court receives the certified remand order. *Id.* at 28. Although it is unclear whether Sheikh asserts that the state court lacked *subject matter* jurisdiction, it is beyond dispute that state superior courts have original and concurrent jurisdiction in all civil cases. Ind. Code § 33-29-1-1.5(1). Nor does Sheikh challenge personal jurisdiction in his claim regarding alleged procedural irregularities in the remand from federal court.⁸ What Sheikh actually challenges is a procedural error.

[19] However, alleged procedural error must be timely objected to in the trial court or it is waived. *See, e.g., Packard v. Shoopman*, 852 N.E.2d 927, 931-32 (Ind. 2006); *K.S. v. State*, 849 N.E.2d 538, 542 (Ind. 2006). Before this appeal, Sheikh

⁸ Sheikh may have meant that the state court lacked “jurisdiction over the case;” however, our Supreme Court has effectively discarded that term. *Packard v. Shoopman*, 852 N.E.2d 927, 929-30 (Ind. 2006); *K.S. v. State*, 849 N.E.2d 538, 540 (Ind. 2006). Rather, as the Court noted in *K.S.*, there are two kinds of jurisdiction: subject matter and personal. 849 N.E.2d at 540. Other terms, such as “jurisdiction over the case,” while still used by some courts, *see, e.g., R.W. v. J.W.*, 160 N.E.3d 195, 200 (Ind. Ct. App. 2020), “confuse actual jurisdiction with legal error,” *K.S.*, 849 N.E.2d at 540. *See also Packard*, 852 N.E.2d at 929-30 (noting “‘jurisdiction over the particular case’ is something of a misnomer and refers to failure to meet procedural requirements but does not constitute a limitation on subject matter jurisdiction in the sense that the court cannot hear cases of the same general class”).

did not object to the alleged failure to follow the proper procedures in remanding the case from federal court. Therefore, he has waived his claim regarding that alleged procedural error. *Id.* See also, e.g., *Reynolds v. Reynolds*, 64 N.E.3d 829, 834 (Ind. 2016) (noting an issue raised by the appellant for the first time on appeal is waived).

Commencement of the Action

[20] Sheikh maintains that Lender’s February 14, 2020, Motion for Summary Judgment was filed in violation of Trial Rule 56(A), which permits the filing of such a motion only at “any time after the expiration of twenty (20) days from the commencement of the action.” Sheikh asserts that a case remanded from federal court back to state court “commences” on the date of remand, rather than the date the case was originally filed in the trial court before removal to federal court. Thus, he reasons, Lender’s February 14, 2020, motion was filed too soon – i.e., before twenty days from the date the state case “commenced” again on remand on February 5, 2020.

[21] Sheikh cites no relevant legal authority supporting his contention, and we find none. The trial rules provide, in relevant part, that “[a] civil action is commenced by filing with the court a complaint ..., by payment of the prescribed filing fee ..., and, where service of process is required, by furnishing to the clerk as many copies of the complaint and summons as are necessary.” Ind. Trial Rule 3; see also, e.g., *Holmes v. Celadon Trucking Serv. of Ind., Inc.*, 936 N.E.2d 1254, 1256 (Ind. Ct. App. 2010) (noting the action commenced, for

statute of limitations purposes, when plaintiff filed the original and necessary copies of the complaint, the prescribed filing fee, and the original and necessary copies of the summons). Furthermore, an order removing an action to federal court

does not absolutely divest the state court of its jurisdiction but merely suspends or holds that jurisdiction in abeyance either until the action is terminated in the Federal court or until the latter court remands the action to the state court; and *in the event of a remand, the state court's continuous, though dormant, jurisdiction is revived and such court then proceeds to a final determination of the action in the exercise of its continuing original jurisdiction which was acquired when the action was originally commenced....* The effect of an order remanding is not to invest the state court with a new jurisdiction but merely to revive a jurisdiction previously acquired but held in abeyance.

Peoples Tr. & Sav. Bank v. Humphreys, 451 N.E.2d 1104, 1108-09 (Ind. Ct. App. 1983) (emphasis added) (quotation and citation omitted).

[22] Lender filed its complaint, filing fees, and summonses—including a summons for Sheikh—on December 27, 2017. Therefore, per Trial Rule 3, this action “commenced” on that date. Lender was thus permitted to file a motion for summary judgment at any time after the expiration of twenty days from December 27, 2017. T.R. 56(A). The removal of the action to federal court and the subsequent remand to state court did not change the date this action was commenced, i.e., December 27, 2017. T.R. 3; *Humphreys*, 451 N.E.2d at 1108-09. Lender’s February 14, 2020, summary judgment motion was filed in compliance with the time restrictions of Trial Rule 56(A).

Consideration of Sheikh's Response to Motion for Summary Judgment

[23] Sheikh appeals the trial court's decision that it had no discretion to consider his response to Lender's summary judgment motion. Trial Rule 56(C) provides that the party against whom a summary judgment motion is made "shall have thirty (30) days after service of the motion to serve a response and any opposing affidavits." Generally, "[w]hen a non-moving party fails to respond to a motion for summary judgment within thirty days ... the trial court cannot consider summary judgment filings of that party after the thirty-day period." *State v. Gonzalez-Vazquez*, 984 N.E.2d 704, 706 (Ind. Ct. App. 2014) (citing *HomEq Servicing Corp. v. Baker*, 883 N.E.2d 95, 98-99 (Ind. 2008)), *trans. denied*; see also *State ex rel. Hill v. Jones-Elliott*, 141 N.E.3d 1264, 1267-68 (Ind. Ct. App. 2020) (noting the "bright-line rule" that a trial court has no discretion to allow a non-movant to file its response and designated evidence after the thirty-day deadline). Sheikh did not file his response to Lender's February 14, 2020, Motion for Summary Judgment until March 27, 2020, i.e., forty-two days later. Nor did Sheikh seek an extension of time to file his response within the thirty-day deadline. Therefore, the trial court determined that it had no discretion to consider Sheikh's response.

[24] However, Sheikh maintains that his March 27 response attaching the materials he had previously filed in federal court should have been considered by the trial court as his response to the February 2020 motion—even though the thirty-day deadline had passed—because he was responding to a successive summary

judgment motion.⁹ A party opposing a successive summary judgment motion—i.e., one that is relevant to the same factual circumstances as a previously filed motion for summary judgment—is not required to re-designate its evidence “[a]s long as the trial court is aware of the materials a party relies upon in opposition.” *Justice v. Clark Mem’l Hosp.*, 718 N.E.2d 1217, 1219 n.2 (Ind. Ct. App. 1999), *trans. denied*. Moreover, when a trial court is presented with such successive motions and materials in opposition, it has discretion to grant the non-movant additional time to respond to the successive summary judgment motion. *Simon Prop. Grp., L.P. v. Acton Enter., Inc.*, 827 N.E.2d 1235, 1240 (Ind. Ct. App. 2005), *trans. denied*.

[25] Lender contends that its February 2020 summary judgment motion could not be successive to the September 2018 summary judgment motion because the latter was filed in federal, not state, court. “The effect to be given pleadings filed in federal court after a removed case is remanded back to state court is a state court determination.” *Jontra Holdings Pty Ltd v. Gas Sensing Tech. Co.*, 2021 WL 302500, *10 (Wyo. Jan. 29, 2021) (citing *Ayres v. Wiswall*, 112 U.S. 187, 190-91 (1884)). In Indiana, we have held that a state court may rule upon motions properly made but not ruled upon on the merits in federal court.

⁹ Lender contends that Sheikh waived the argument regarding successive summary judgment motions because he failed to raise it in the trial court. While Sheikh did not use the word “successive” in his March 27 motion for leave to file his summary judgment response, he did ask the trial court to consider his response to the federal summary judgment motion because the latter motion was “the same” as the February 2020 summary judgment motion. Sheikh App. v. 2 at 154. We conclude that Sheikh sufficiently raised the claim that Lender had filed successive summary judgment motions.

Citizens Nat'l Bank of Grant Cnty. v. First Nat'l Bank in Marion, 165 Ind. App. 116, 331 N.E.2d 471, 476 (1975). Thus, our state courts do not ignore pleadings made in cases that had been removed to federal court; rather, the trial court may consider those pleadings on remand. *Id.*

[26] Lender's February 2020 summary judgment motion was "successive" to its September 2018 summary judgment motion filed in federal court prior to remand. That is, those two motions were the same in all relevant factual respects.¹⁰ Therefore, in response to the successive motion, Sheikh was permitted to rely on the materials he had filed in opposition to the motion in federal court. *Justice*, 718 N.E.2d at 1219 n.2. Furthermore, the trial court had discretion to allow him additional time to file that response. *Simon*, 827 N.E.2d at 1240. The trial court erred when it held that it lacked such discretion and failed to consider Sheikh's response. We determine whether that error was harmless as we review the summary judgment order on the merits, taking into consideration the materials Sheikh designated in response to Lender's successive motion; i.e., Sheikh's response to the September 2018 summary judgment motion made in federal court.¹¹

¹⁰ The only factual difference between the two motions is the amount due under the Note; the February 2020 motion asserts a higher amount based on interest and costs incurred with the passage of time. Sheikh's App v. 2 at 141-42; Sheikh's App v. 3 at 15-17.

¹¹ Sheikh also maintains that his summary judgment response was timely because the deadline had been tolled due to the COVID pandemic by order of the Indiana Supreme Court. However, we do not address that argument as we hold that he was permitted to file his response after the thirty-day deadline because he was responding to a successive summary judgment motion.

Merits of Motion for Summary Judgment

[27] We review a ruling on summary judgment de novo; we stand in the shoes of the trial court, applying the same standard in deciding whether to affirm or reverse summary judgment. *Wooten v. Caesars Riverboat Casino, LLC*, 63 N.E.3d 1069, 1072 (Ind. Ct. App. 2016). Thus, we must determine whether there is a genuine issue of material fact and whether the trial court has correctly applied the law. *Id.*; T.R. 56. If a party moving for summary judgment shows that there are no genuine issues of material fact with respect to a given issue or claim, the non-moving party then bears the burden of coming forward with evidence designated to show that a genuine issue of material fact does exist. *Bleeke v. Lemmon*, 6 N.E.3d 907, 917 (Ind. 2014). All designated evidence and reasonable inferences must be construed in favor of the non-moving party, and all doubts must be resolved against the moving party. *Id.* We will reverse on appeal if the law has been incorrectly applied to the facts; otherwise, a grant of summary judgment will be affirmed upon any theory supported by evidence in the record. *Woodruff v. Ind. Fam. and Social Serv. Admin.*, 964 N.E.2d 784, 790 (Ind. 2012).

[28] The Lender¹² moved for summary judgment on the basis of the Unconditional Guarantee signed by Sheikh. An unconditional guarantee is one “whereby the

¹² Sheikh also challenges the grant of summary judgement on the grounds that the Lender’s February 14, 2020, motion was filed by “Countryside Bank,” which Sheikh alleges had been previously “dismissed” as a plaintiff. Sheikh Br. at 30. Although Sheikh’s argument is unclear, it appears he argues that the trial court

guarantor agrees to answer for the debt of the debtor, notwithstanding the occurrence or nonoccurrence of any event either within or not within the contemplation of the parties at the time the guaranty is executed.” *Kruse v. Nat’l Bank of Indianapolis*, 815 N.E.2d 137, 141 n.2 (Ind. Ct. App. 2004).

[T]he interpretation of a guaranty is governed by the same rules applicable to other contracts. *Noble Roman’s, Inc., v. Ward*, 760 N.E.2d 1132, 1137-38 (Ind. Ct. App. 2002). In construing a guaranty, this Court must give effect to the intentions of the parties, which are to be ascertained from the language of the contract in light of the surrounding circumstances. *Id.* at 1138. Generally, the nature and extent of a guarantor’s liability depends upon the terms of his contract, and a guarantor cannot be made liable beyond the terms of the guaranty. *Id.* However, the terms of a guaranty should neither be so narrowly interpreted as to frustrate the obvious intent of the parties, nor so loosely interpreted as to relieve the guarantor of a liability fairly within their terms. *Id.*

Id. at 144-45.

should have “stri[k]en” the motion for summary judgment because Countryside Bank “ha[d] no standing to file any pleadings.” *Id.* Sheikh has waived this contention by failing to provide cogent argument. App. R. 46(A)(8).

Waiver notwithstanding, the trial court did not “dismiss” Countryside Bank; rather, due to merger, it ordered that Hinsdale Bank “shall be and is hereby substituted as Plaintiff in these proceedings.” Sheikh App. v. 2 at 138. Thus, in its order granting summary judgment to plaintiff, the trial court noted the plaintiff was “HINSDALE BANK & TRUST COMPANY, N.A., AS SUCCESSOR IN INTEREST TO COUNTRYSIDE BANK.” Appealed Order at 1. In addition, the CCS reflects that the summary judgment motion was “Filed By: Plaintiff HINSDALE BANK & TRUST COMPANY.” Sheikh App. v. 2 at 9. Sheikh has failed to identify any harm to him from the Lender’s clerical error styling its February 2020 summary judgment motion as one brought by plaintiff “Countryside Bank.” *Id.* at 141. See App. R. 66(A) (“No error or defect in any ruling or order or in anything done or omitted by the trial court or by any of the parties is ground for granting relief or reversal on appeal where its probable impact, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties.”).

[29] Here, the terms of the Unconditional Guarantee could hardly be clearer. The written document, signed by Sheikh, plainly states that he agrees to “pay all amounts due under the Note when Lender makes written demand” upon him, regardless of whether Lender sought “payment from any other source before demanding” such payment from Sheikh. *Sheikh App. v. 2* at 55. The document further provides that the “Guarantor acknowledges that Guarantor has read and understands the significance of all terms of the Note and this Guarantee, including all waivers.” *Id.* at 57. Sheikh admits that he entered into this Unconditional Guarantee, and he does not assert that he did not understand its plain terms.

[30] Nevertheless, Sheikh contends—without citation to supporting legal authority—that he must be excused from his obligation under the Unconditional Guarantee because judgment against one of the borrowers was vacated. However, the terms of the Unconditional Guarantee plainly state that Lender may “may refrain from taking any action on the Note,” and release, compromise, or settle with the Borrowers “at any time, without notice, without Guarantor’s consent, and without making demand upon Guarantor.” *Id.* The document also states that Sheikh “waives defenses based upon any claim that ... [a] Borrower has avoided liability on the Note,” *id.* at 56, or that “Lender did not seek payment from the Borrower, any other guarantors, or any Collateral before demanding payment” from Sheikh, *id.* Thus, Sheikh may not escape liability merely because the trial court vacated the judgment against the Borrower; such a result would contradict the clear terms of the contract into

which Sheikh entered.¹³ See *Kruse*, 815 N.E.2d at 141 n.2 (noting an unconditional or “absolute guaranty, unlike a conditional one, casts no duty upon the creditor or holder of the obligation to attempt collection from the principal debtor before looking to the guarantor” (quotation and citation omitted)). Under the Unconditional Guarantee—the plain terms of which are not in dispute—Lender is entitled to judgment against Sheikh for the amount due under the Note.

[31] However, Shiekh maintains that he is not liable because Lender fraudulently induced him to enter into the Unconditional Guarantee. Fraud is an affirmative defense which must be raised in a responsive pleading. T.R. 8(C). “In order to properly preserve an affirmative defense, the party with the burden of proving the defense must either set forth the defense in a responsive pleading, establish that the defense was litigated by the parties, or have litigated it by consent of the parties.” *Hass v. Shrader’s Inc.*, 534 N.E.2d 1119, 1122 (Ind. Ct. App. 1989), *trans. denied*. Here, Sheikh failed to raise any affirmative defense in his Answer. Moreover, the parties did not litigate the merits of the fraud defense he eventually raised for the first time in his responses to Lender’s summary judgment motions. Rather, Lender objected to Sheikh’s belated summary judgment response in state court and noted that Sheikh had waived any fraud defense for several reasons, including his failure to raise it in his

¹³ The Unconditional Guarantee also plainly makes Shiekh liable for expenses Lender incurs in enforcing the guarantee. Sheikh does not challenge Lender’s claim for such expenses.

responsive pleading.¹⁴ In addition, the trial court never addressed Sheikh's belated fraud defense. Because Sheikh failed to raise his fraud defense in his responsive pleading and the parties never litigated the merits of his fraud defense, that defense is waived and we address it no further. *Id.*; see also *B & B, LLC v. Lake Erie Land Co.*, 943 N.E.2d 917, 923 (Ind. Ct. App. 2011) (“[U]nder Indiana Trial Rule 8(C), a responsive pleading is required to set forth affirmatively all defenses and matters ‘constituting an avoidance.’ The failure to do so results in waiver.”) (citation omitted), *trans. denied*.

[32] Finally, Sheikh also contends Lender, as a matter of law, was required to mitigate its damages—even though no requirement to mitigate damages is contained in the Unconditional Guarantee. However, Sheikh waives this argument by failing to cite any supporting legal authority or cogent reasoning. App. R. 46(A)(8). Although Sheikh points to the federal Small Business Act (“SBA”) regulations, he fails to identify any such regulation that requires a Lender to mitigate damages. In fact, throughout the six pages of Sheikh's brief that he dedicates to SBA regulations, he fails to identify any violation of such regulations. Therefore, Sheikh's contentions regarding mitigation of damages and the requirements of the SBA regulations are waived. *Id.*

¹⁴ When Sheikh raised his fraud defense for the first time in federal court in his summary judgment response, the case was remanded to the state court for lack of jurisdiction and the federal court denied the summary judgment motion as moot. Thus, Sheikh's fraud defense was not litigated in federal court either.

Conclusion

[33] Sheikh waived his claim that the trial court lacked jurisdiction over the case by failing to object to such jurisdiction in the trial court. *See B.J.N.*, 19 N.E.3d at 768. In addition, Lender filed its February 2020 motion for summary judgment in compliance with the time restrictions of Trial Rule 56(A), as the case commenced on December 27, 2017, and Lender's motion was filed well beyond twenty days after such commencement.

[34] Further, although the trial court erred when it refused to consider Sheikh's evidence designated in response to a successive summary judgment motion, *see Justice*, 718 N.E.2d 1219 n.2; *Simon*, 827 N.E.2d at 1240, that error was harmless because (1) Sheikh is liable to Lender under the plain, unambiguous, and undisputed terms of the Unconditional Guarantee; (2) Sheikh waived his fraud defense by failing to raise it in his responsive pleading and the parties did not litigate the merits of that defense, *see* T.R. 8(C); *Haas*, 534 N.E.2d at 1122; and (3) Sheikh waived his contentions regarding mitigation of damages and violation of SBA regulations by failing to provide citation to supporting legal authority and cogent argument, App. R. 46(A)(8).

[35] Affirmed.

Robb, J., and Tavitas, J., concur.