MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Falon Vela,
Appellant/Cross-Appellee-Defendant,

v.

Beverly K. Oswald,
Appellee/Cross-Appellant-Plaintiff.

April 29, 2022

Court of Appeals Case No. 21A-PL-1486

Appeal from the Hamilton Superior Court

The Honorable Michael A. Casati, Judge

Trial Court Cause No. 29D01-1701-PL-211

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant/Cross-Appellee-Defendant, Falon Vela (Vela), appeals the trial court's summary judgment entered in favor of Appellee/Cross-Appellant-Plaintiff's, Beverly K. Oswald (Oswald), breach of contract claim and the trial court's denial of her cross-motion for summary judgment.

[2] We affirm in part, reverse in part, and remand.

ISSUES

[3] On appeal, Vela presents this court with four issues, which we consolidate and restate as follows:

(1) Whether Oswald designated sufficient evidence as a matter of law to establish her damages arising out of Vela's breach of a valid purchase agreement, governed by Arkansas law; and

(2) Whether Vela is entitled to recover attorney's fees pursuant to Arkansas statute or the terms of the purchase agreement.

[4] On Cross-Appeal, Oswald presents this court with one issue, which we restate as: Whether this cause should be remanded to the trial court to recalculate attorney's fees owed to Oswald, including reasonable appellate attorney's fees.

FACTS AND PROCEDURAL HISTORY

[5] This is an appeal from a summary judgment in a breach of contract action involving a purchase agreement—governed by Arkansas law—between Oswald

and Vela. The parties stipulated that the cross-motions for summary judgment involve only questions of law and agreed that the facts are undisputed.

[6] Oswald is the owner of several Bar Louie franchised restaurants, which included in 2015, two locations in Little Rock, Arkansas, operated as Little Rock Louie LLC and North Rock Louie, LLC (collectively, Restaurants). North Rock Louie LLC had entered into an equipment lease (Equipment Lease) with United Leasing, Inc (United Leasing) for which Oswald had executed a personal guaranty (Guaranty). In September 2015, Oswald entered into a Sale of LLC Interest Agreement (Purchase Agreement) with Vela and Tarek Shehadeh (Shehadeh) pursuant to which Vela and Shehadeh purchased Oswald's interest in the Restaurants. The Purchase Agreement is governed by Arkansas Law and under its terms, Vela and Shehadeh agreed to make a down payment upon the execution of the Purchase Agreement, followed by additional annual payments. Vela and Shehadeh also agreed to assume certain financial obligations of the Restaurants, including rent payments on two commercial leases, payments on the Equipment Lease, and payments on twelve promissory notes payable to individual lenders.

[7] After Vela and Shehadeh took operational control of the Restaurants in October 2015, the Restaurants began to suffer financially. In October 2016, concerned about her standing with Bar Louie's corporate office, Oswald, together with Michael Frierdich (Husband), Oswald's husband and representative, assisted in negotiating and facilitating the sale of the Restaurants to Broadway, Inc., operated by Nadeem Siddique (Nick). On October 31, 2016, Husband sent an

email to Shehadeh, which stated, in part, "If I can get you out of your contract obligations under the agreement to [Oswald] for payment of leases, taxes, and [individual] lender[s], then I will NOT expect you or [Vela] to pay the last $100,000 [down payment] due to [Oswald]." (Appellant's App. Vol. IV, p. 184). Negotiations for the Restaurants' sale were ultimately successful and Broadway, Inc. acquired the Restaurants' assets and assumed the real estate leases but not the payments on the Equipment Lease or the individual lender notes.

[8] On January 6, 2017, Oswald filed a Complaint against Vela and Shehadeh,[1] alleging that they breached the Purchase Agreement by failing to make installment payments with interest, as required by the express terms of the Purchase Agreement, and requesting judgment interest and attorney's fees. In September 2020, Vela answered the Complaint, admitting that she executed the Purchase Agreement and requesting reasonable attorney's fees pursuant to the Agreement.

[9] On or around June 13, 2018, between the filing of the Complaint and Vela's Answer, the Equipment Lease defaulted. As a result, United Leasing accelerated the indebtedness due, demanding payment from Oswald, as the guarantor under the Guaranty, of $54,924.40. United Leasing agreed to forebear from enforcing its rights and remedies under the Equipment Lease

[1] Although the Complaint initially listed Shehadeh as a party, Oswald and Shehadeh settled out of court and the cause was dismissed as to Shehadeh.

conditioned on Oswald entering into a Forbearance Agreement and executing a Promissory Note (2018 Note) for the total indebtedness due. The Forbearance Agreement stated that Oswald will "reaffirm, ratify and confirm the Lease Document and the Obligations" and that the Forbearance Agreement "together with the Lease Documents, constitutes the entire agreement and understanding among the parties relating to the subject matter." (Appellant's App. Vol. V, pp. 84, 89). Additionally, pursuant to the Forbearance Agreement, Oswald, as guarantor, agreed to pay $2,000 in attorney's fees for drafting the document and "all costs of a proceeding to recover any equipment of [United Leasing] in Arkansas." (Appellant's App. Vol. V, p. 86). Oswald was specifically listed as a party to the Forbearance Agreement and her signature appeared as "manager" of "Eville Louie, LLC" at the end of the document. (Appellant's App. Vol. V, pp. 84, 91). Oswald signed the 2018 Note in similar capacity, agreeing to "remain bound hereby until the principal and interest of this Note are paid in full." (Appellant's App. Vol. V, p. 97). Both the Forbearance Agreement and 2018 Note are governed by Indiana law. Between September 1, 2018, and April 11, 2019, Oswald made a total of seven payments in the amount of $13,258 to United Leasing.

[10] To offset the remaining balances due under the Equipment Lease, United Leasing initiated a replevin action against Nick and Nick's Bar Louie in Arkansas, seeking recovery of the equipment. The costs and attorney's fees associated with this action totaled $26,083.73. On May 29, 2019, United Leasing, Nick, and Nick's Bar Louie, Inc. entered into a Settlement and

Release Agreement (Release Agreement) pursuant to which Nick and Nick's Bar Louie agreed to pay United Leasing $60,000 for dismissal of the replevin action and United Leasing's release of all rights to the equipment. The Release Agreement specifically stated that, "aside from the Releasees listed," there was no "release as to other parties not listed." (Appellant's App. Vol. IV, p. 135).

[11] After United Leasing applied the proceeds from the Release Agreements and Oswald's prior payments to the indebtedness of the Equipment Lease, it determined that a deficiency of $15,000 still remained. Accordingly, as United Leasing claimed that under the Release Agreement Oswald was not released from her obligations under the Guaranty, United Leasing required Oswald to execute a new Promissory Note on December 26, 2019 (2019 Note), which replaced the 2018 Note. Oswald paid $6,400 to United Leasing on the 2019 Note.

[12] In September 2020, Vela filed her Answer to Oswald's Complaint. During discovery, Oswald asserted that Vela was liable to her for the $100,000 annual payment, the amounts due on the Equipment Lease, and the amounts due on the promissory notes to individual lenders. Vela requested Oswald to produce "[a]ll documents evidencing amounts alleged to be owed by [Vela] as to any lender[s] as claimed as damages in the Complaint" and "[a]ll documents evidencing amounts alleged to be owed by [Vela] as to United Leasing as claimed as damages in the Complaint." (Appellant's App. Vol. IV, p. 159).

[13] On April 16, 2021, Vela filed a motion for summary judgment, a memorandum, and designation of evidence. That same day, Oswald filed her motion for summary judgment, memorandum, and designation of evidence. On May 17, 2021, both parties, separately, filed responses to the other party's motion for summary judgment. On May 26, 2021, after several additional filings relating to the parties' respective motions for summary judgment, the trial court held a hearing on the cross-motions for summary judgment. On June 29, 2021, the trial court entered its summary judgment, concluding, in pertinent part, in favor of Oswald that (1) Oswald was owed damages proximately caused by Vela's failure to legally assume the Equipment Lease as required in the Purchase Agreement in the amount of $29,474.03; (2) Oswald was entitled to attorney's fees incurred for responding to and dealing with lenders due to Vela's failure to assume and pay the individual lender notes; (3) Oswald was entitled to attorney's fees and costs resulting from Vela's breach of the Purchase Agreement; and (4) Vela was not entitled to attorney's fees under the Purchase Agreement. With respect to Vela, the trial court entered summary judgment, concluding that (1) she was not liable for the $100,000 annual payment, given Oswald's email offer to forgive that payment; and (2) Vela was not liable to Oswald for the outstanding amounts on the lender notes because Oswald was not personally liable for them and never made a payment on them. The summary judgment granted the parties thirty days to reach an agreement on the amount of attorney's fees due to Oswald. On August 30, 2021, the trial court entered an Agreed Order, determining that Oswald was entitled to $25,513.33 "in prosecuting this action." (Appellant's App. Vol. II, p. 32).

[14] Vela now appeals and Oswald cross-appeals. Additional facts will be provided if necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

[15] Pursuant to its terms, the Purchase Agreement is governed by Arkansas law. Procedural matters, on the other hand, are governed by Indiana law. *See Homer v. Guzulaitis*, 567 N.E.2d 153, 156 (Ind. Ct. App. 1991) ("When the parties to a contract agree on the law which should control the contract, we will give effect to their agreement. At the same time, Indiana procedural law applies."), *trans. denied*.

[16] When reviewing a summary judgment, this court uses "the same standard as the trial court: summary judgment is appropriate only where the designated evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Glob. Caravan Techs., Inc. v. Cincinnati Ins. Co.*, 135 N.E.3d 584, 588 (Ind. Ct. App. 2019), *trans. denied*. "All facts and reasonable inferences are construed in favor of the non-moving party." *Id*. "Where the challenge to summary judgment raises questions of law, [this court] reviews them *de novo*." *Id*.

[17] This court does "not modify [its] standard of review when the parties make cross motions for summary judgment." *Id*. Instead, this court considers "each motion separately to determine whether the moving party is entitled to

judgment as a matter of law." *Id*. "When the trial court makes findings and conclusions in support of its order regarding summary judgment, [this court] is not bound by such findings and conclusions, but they aid in [its] review by providing reasons for the decision." *Id*.

APPEAL

II. *Damages Due to Breach of Contract*

[18] To prevail on a breach of contract claim, Oswald had to establish "the existence of an agreement, breach of the agreement, and resulting damages." *Barnes v. Wagoner*, 573 S.W.3d 594, 595 (Ark. Ct. App. 2019). Damages recoverable for breach of contract are "those damages that would place the injured party in the same position as if the contract had not been breached." *Greenway Equip., Inc. v. Johnson,* 602 S.W.3d 142, 150 (Ark. Ct. App. 2020). "When a contract is unambiguous, the [] court applies the plain language of the parties' terms and determines as a matter of law how to apply the contract." *Chambers v. McDougald*, 520 S.W.3d 740, 744 (Ark. Ct. App. 2017). Vela does not dispute the existence of the Purchase Agreement, or her obligations to make certain payments pursuant to this Agreement and her subsequent failure to do so. Rather, on appeal, she only challenges the damages resulting from her breach of the Agreement.

[19] In accordance with the terms of the Purchase Agreement, Vela was required to assume the payments under the Equipment Lease. Given Vela's failure to assume the Equipment Lease and make payments accordingly, United Leasing

accelerated the debt and demanded payment from Oswald as guarantor, who in turn sought payment from Vela under a breach of contract theory. In its summary judgment, the trial court awarded Oswald seven payments totaling $13,258 which Oswald paid to United Leasing during the period of September 1, 2018 to April 11, 2019; payments totaling $6,400, which Oswald paid under the 2019 Note; and the balance of $9,815.95 on the 2019 Note. Vela now challenges this award.

1. *Notice Pleading*

[20] First, Vela contends that Oswald could not have pled a claim for Equipment Lease damages because there was no default of the Lease when Oswald filed the Complaint. Because the Equipment Lease was only defaulted in June 2018 whereas the Complaint was filed on January 6, 2017, Vela maintains that Oswald never asserted a specific claim for damages relating to the Equipment Lease.

[21] While we agree with Vela that Oswald's Complaint was filed before Vela breached the Equipment Lease, for which she was required to make the payments in accordance with the terms of the Purchase Agreement, the Complaint alleged that Vela breached the Purchase Agreement by failing to make payments under the Agreement's express terms, with Oswald seeking judgment "in the amount of unpaid Contract obligations." (Appellant's App. Vol. V, p. 8). Indiana Trial Rule 15(B) states that "issues not set out in the pleadings may be tried by express or implied consent of the parties." This

principle has been applied to summary judgment proceedings. *See Schmidt v. Ind. Ins. Co.*, 45 N.E.3d 781, 785-86 (Ind. 2015). Here, the uncontroverted evidence reflects that Vela consented to litigate the damages resulting from the Equipment Lease. During discovery, Vela requested "[a]ll documents evidencing amounts alleged to be owed by [Vela] as to any lender[s] as claimed as damages in the Complaint" and "[a]ll documents evidencing amounts alleged to be owed by [Vela] as to United [Leasing] as claims as damages in the Complaint." (Appellant's App. Vol. IV, p. 159). Subsequently, in her summary judgment brief Vela discussed the damages resulting from the Equipment Lease. Not until she issued her response to Oswald's summary judgment motion did Vela argue that Oswald's Complaint was insufficiently pled. Accordingly, we conclude that Vela was put on notice and consented to the Equipment Lease damages being tried during the summary judgment proceedings.

2. *The Guaranty*

[22] On or around June 13, 2018, between the filing of the Complaint and Vela's Answer, the Equipment Lease defaulted. As a result, United Leasing accelerated the indebtedness due, demanding payment from Oswald, as the guarantor under the Guaranty. After entering into a Forbearance Agreement and the 2018 Note, Oswald made several payments to United Leasing. Despite these payments, United Leasing initiated a replevin action against Nick and Nick's Bar Louie, Inc. in Arkansas, seeking recovery of the equipment and executing a Release Agreement. Relying on Paragraph 6 of the Release

Agreement, Vela contends that Oswald was discharged of all liability under the Guaranty and therefore her claim against Vela for the Equipment Lease payments fails as a matter of law.

[23] Paragraph 6 of the Release Agreement between United Leasing and Nick and Nick's Bar Louie states:

> [T]he Parties . . . hereby unconditionally, irrevocably, forever and fully release, acquit, and forever discharge each other and its/their predecessors . . . of and from any and all claims, demands, actions, causes of action, suits, liens, debts, obligations, promises, agreements, costs, damages, liabilities, and judgments of any kind, nature, or amount whether in law or equity, whether known or unknown, anticipated or unanticipated, liquidated or unliquidated, including any and all claimed or unclaimed compensatory damages, consequential damages, interest, costs, expenses and fees (including reasonable or actual attorneys' fees) which were or could have been raised in, arise out of, relate to, or in any way, directly or indirectly, involve the Action or the Property.

(Appellant's App. Vol. IV, pp. 134-35). While citing various dictionary definitions of the term 'predecessor,' Vela argues that Paragraph 6 discharges Oswald from her obligations under the Equipment Lease because she was a predecessor of Nick and Nick's Bar Louie in her capacity as a lease guarantor. Painting an "express contractual succession" from Vela's sale of North Rock Louie LLC to Nick, she points out that Nick and Nick's Bar Louie acquired North Rock Louie LLC's interest in the Equipment Lease. (Appellant's Br. p. 25). Consequently, pursuant to Paragraph 6 of the Release Agreement, Vela maintains that as North Rock Louie LLC, as a predecessor of Nick and Nick's

Bar Louie, was released from liability related to the Equipment Lease, Oswald, as the guarantor pursuant to the Guaranty of North Rock Louie LLC for the Equipment Lease, was necessarily released as well.

[24] In support of her argument, Vela references the general principle that "discharge of the principal from its obligation on a contract will ordinarily discharge the guarantor." *N. Ind. Steel Supply v. Chrisman*, 204 N.E.2d 668, 671 (Ind. Ct. App. 1965)[2]. Despite this general principle, the Guaranty specifically includes Oswald's agreement "to pay or perform for [United Leasing] any and all obligations of Lessee [North Rock Louie LLC]," which included "obligations of Lessee [North Rock Louie LLC] . . . [that] hereafter become otherwise unenforceable." (Appellant's App. Vol V, p. 71). Furthermore, the Guaranty also specifically states that "[t]he obligations of each of the undersigned hereunder are primary and independent of the obligations of each other and of the Lessee [North Rock Louie LLC]." (Appellant's App. Vol. V, p. 72). Accordingly, as the Guaranty stands independently of any obligations assumed or discharged by North Rock Louie LLC, Oswald, as guarantor, remains liable for her obligations under the Equipment Lease and is not released thereof.

3. *Personal Payments to United Leasing*

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[2] Although the Guaranty did not include a choice of law provision, it was executed by an Indiana company and an Indiana resident and is therefore governed by Indiana law. *See Nat'l Union Fire Ins. Co. v. Std. Fusee Corp.*, 940 N.E.2d 810. 815 (Ind. 2010).

[25] As another challenge to the Equipment Lease payments, Vela asserts that Oswald cannot recover the $13,528 and $6,400 payments made to United Leasing because the checks for those payments bore the names Louie Management LLC, Eville Louie LLC, or 7700 LLC. Accordingly, because the payments were made by a non-party, Vela maintains that Oswald cannot recover the payments as her personal damages.

[26] In support of her argument that the two payments were made from her own personal funds and not from corporate accounts, Oswald submitted an affidavit, attesting,

> All payments to United, since the lease went into default in 2018, have been made with my personal funds. **The payments were paid from bank accounts registered in the name of companies owned and controlled by me and my husband, Michael Frierdich**, including 7700 LLC and Louie Management LLC. Specifically, the lease payments made from September 1, 2018 through April 11, 2018 totaling $13,258 were paid with my funds from Commerce Bank, Acct. XXXXX02653, registered in the named 0f 7700 LLC, which company is owned by me and my husband. The payments made to United from January 1, 2020 through present were paid with my funds from German American Bank Acct. XXXX74501, registered in the name of Louie Management, LLC, which company I am the sole owner of.

(Appellant's App. Vol. V, p. 160) (emphasis added). The designated evidence reflects that the account statement for Louie Management identifies the owner of the account as Louie Management LLC, with Oswald and Husband identified as "signer." (Appellant's App. VI, p. 9).

[27] Without any support or citation to legal authorities, Oswald solely relies on her affidavit to claim that her personal funds were used in the payment of the Equipment Lease to United Leasing because she had an ownership interest in the LLC's which made the payments. As a general rule, Indiana courts are reluctant to disregard corporate identity and it is well settled that a company and its owners are separate and distinct legal entities. *Cmty Care Ctrs, Inc. v. Hamilton*, 774 N.E.2d 559, 564 (Ind. Ct. App. 2002); *Winkler v. V.G. Reed & Sons*, 638 N.E.2d 1228, 1231-32 (Ind. 1994) ("a corporation is a legal entity separate and distinct from its shareholders and officers"). Corporate formalities preclude a shareholder's use of corporate funds to pay personal obligations. *Fairfield Dev., Inc. v. Georgetown Woods Senior Apartments Ltd. P'ship*, 768 N.E.2d 463, 468 (Ind. Ct. App, 2002) ("piercing the corporate veil" holds individuals liable for corporate actions where corporate funds are used for personal obligations). Funds contributed to a legal entity as an owner's capital contribution or loan do not retain their legal status as an owner's personal funds once transferred to the legal entity. *See Ind. Dep't State Revenue v. Belterra Resort Ind., LLC*, 935 N.E.2d 174, 177 (Ind. 2010) (recognizing that a capital contribution is a transaction between the shareholder and corporation where the shareholder transfers money or property to the corporation). As such, even if Oswald had funded the LLCs with her own personal funds, as soon as the funds were placed in the LLCs accounts, the funds were owned by the LLC and not Oswald.

[28] While Oswald concedes that the payments were made from accounts registered in the name of the LLCs, she does not offer evidence that the payments were charged to her, as owner of the LLC, or that she reimbursed the LLC after payment was made to United Leasing. *See Cmty Care Ctrs, Inc.,* 774 N.E.2d at 564 (company paid individual obligations of stockholder, but obligations were charged to the individual and reimbursed to the corporation). Accordingly, as the two payments were made with funds from the LLCs and not Oswald's personal funds, she, as a matter of law, cannot recover $13,258 and $6,400 as damages under the Purchase Agreement. We reverse the summary judgment in favor of Oswald in this respect and enter summary judgment for Vela.

4. *The 2019 Note*

[29] Upon United Leasing's replevin action against Nick and Nick's Bar Louie and subsequent Settlement and Release agreement, United Leasing determined that an indebtedness still remained under the Equipment Lease. Accordingly, as United Leasing claimed that pursuant to the terms of the Release Agreement Oswald was not released from her obligations under the Guaranty, United Leasing required Oswald to execute the 2019 Note. Currently, a balance of $9,815.95 remains. Claiming that Oswald was discharged "of all [Equipment] Lease related liability under the Guaranty based on the Release Agreement in May 2019," Vela maintains that Oswald was under no legal obligation to execute the 2019 Note. (Appellant's Br. p. 30). As such, she maintains that Oswald's "decision to gratuitously execute and incur personal liability under

the 2019 Note does not give rise to [Vela's] liability for breach of the" Purchase Agreement. (Appellant's Br. p. 31).

[30] We already determined that because the Guaranty stands independently of any obligations assumed or discharged by North Rock Louie LLC, Oswald remained liable for her obligations under the Equipment Lease and is not released thereof. Therefore, as Vela assumed the obligations of the Equipment Lease through the Purchase Agreement, which she breached, Vela remains liable for the balance of the 2019 Note.

III. *Lender Notes*

[31] In its summary judgment, the trial court concluded that Vela had breached the Purchase Agreement by failing to assume and pay the individual lender notes. However, the trial court did not place any liability on Vela for the outstanding amounts on the lender notes because Oswald was not personally liable for them; rather, the Restaurants themselves would be entitled to any damages suffered by Vela's breach. Nevertheless, the trial court did award Oswald attorney's fees for responding to and dealing with demands from the individual lenders resulting from Vela's non-payment of the lender notes. Although the trial court's summary judgment did not include the amount of attorney's fees, the trial court ordered the parties "to reach an agreement on an amount of attorney fees to be awarded to Oswald." (Appellant's App. Vol. II, p. 31). Vela now challenges the trial court's award of these attorney's fees by raising three different arguments, which we will address in turn.

1. *Unsigned Affidavit*

[32] First, Vela challenges her liability for the attorney's fees because the trial court abused its discretion in admitting Oswald's unsigned affidavit in which Oswald affirmed to have incurred attorney's fees while dealing with individual lenders' demands. The admission and exclusion of evidence falls within the sound discretion of the trial court, and we review the admission of evidence only for an abuse of discretion. *Estate of Carter v. Szymczak*, 951 N.E.2d 1, 5 (Ind. Ct. App. 2011), *trans. denied*. An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Id.* This court will not reverse the trial court's admission of evidence absent a showing of prejudice. *Id*.

[33] In order to preserve an appellate argument challenging the admission of evidence, a party must have made a contemporaneous objection at trial, and the failure to object will result in waiver of any alleged error. *Raess v. Doescher*, 883 N.E.2d 790, 796 (Ind. 2008), *reh'g denied*. In addition to a timely objection, the objection must also state the "'specific ground'" for the objection "'if the specific ground was not apparent from the context.'" *Id*. at 797 (quoting Ind. Evidence Rule 103(a)(1)). In other words, "[t]o preserve a claimed error in the admission of evidence, a party must make a contemporaneous objection 'that is sufficiently specific to alert the trial judge fully of the legal issue'" *Id*. (quoting *Moore v. State*, 669 N.E.2d 733, 742 (Ind. 1996), *reh'g denied*). Moreover, "[i]t is well established that '[a] party may not object on one ground at trial and seek reversal on appeal using a different ground.'" *Musgrave v. Aluminum Co. of Am.*,

Inc., 995 N.E.2d 621, 638–39 (Ind. Ct. App. 2013) (quoting *Malone v. State*, 700 N.E.2d 780, 784 (Ind. 1998) and citing *Showalter v. Town of Thorntown*, 902 N.E.2d 338, 342 (Ind. Ct. App. 2009) (stating that the trial court "cannot be found to have erred as to an issue or argument that it never had an opportunity to consider"), *trans. denied*). Thus, "[a] mere general objection, or an objection on grounds other than those raised on appeal, is ineffective to preserve an issue for appellate review." *Raess*, 883 N.E.2d at 797.

[34] Upon Oswald's affirmation that she had "incurred attorney fees dealing with demands from individual lenders from Vela's non-payment of the notes," Vela objected, and explained that the "statement is not based on admissible evidence, and further relies on inadmissible hearsay. Even if it were based on admissible evidence, such was not disclosed in discovery, and Oswald designates no evidence of any such demands or fees." (Appellant's App. Vol. IV, p. 51). While Vela lodged a general objection claiming that the affidavit was inadmissible hearsay, the trial court was not apprised of the specific ground for the objection. It is not until the appellate proceedings that Vela raised the specific ground of inadmissibility based on Indiana Trial Rule 56(E), *i.e.*, an unsigned affidavit. Accordingly, Vela's objection was ineffective to preserve the issue on appeal. *See id.*

2. *Lack of Notice*

[35] As with the Purchase Agreement, Vela again contends that she was not on notice that Oswald was requesting attorney's fees in dealing with demands from the unpaid lenders and that she did not consent to litigate the issue.

[36] As we noted before, the Complaint alleged that Vela breached the Purchase Agreement by failing to make payments under the Agreement's express terms and Oswald sought judgment "in the amount of unpaid Contract obligations." (Appellant's App. Vol. V, p. 8). Indiana Trial Rule 15(B) states that "issues not set out in the pleadings may be tried by express or implied consent of the parties." Vela's discovery demand requested "[a]ll documents evidencing amounts alleged to be owed by [Oswald] as to any lender(s) as claimed as damages in the Complaint"; Oswald's interrogatory answer, which after explaining that Vela did not pay individual lenders, set forth attorney's fees as a liability; Oswald's designated evidence included an affidavit from Oswald explaining that individual lenders were "informing her that installment[] payments were not being made, and demanding that she made payment thereon"; and Oswald's supplemental designation of evidence informed Vela that she incurred attorney's fees in dealing with unpaid lenders. (Appellant's App. Vol. IV, pp. 159, 147; Vol. V, p. 38). Accordingly, Vela had been put on notice that the Purchase Agreement allowed for attorney's fees upon a breach of contract and the trial court was sufficiently apprised that the parties were litigating the issue of unpaid lenders.

3. *Attorney's Fees as Litigation Costs*

[37] As a final claim, Vela contends that Oswald cannot claim attorney's fees for her dealings with unpaid lender notes because she designated no admissible evidence to establish these fees throughout the course of litigation.

[38] Paragraph 4.4. of the Purchase Agreement entitled Oswald to reasonable attorney's fees upon "any breach of this agreement or any action of [Vela] relative to non-payment of any obligations." (Appellant's App. Vol. II, p. 12). The trial court, in its summary judgment, concluded that Vela had breached the Purchase Agreement by failing to assume and pay the lender notes as agreed in the Agreement, and, although the trial court found that Oswald could not recover for the lender demands as she was never personally liable for the notes, the trial court did award attorney's fees because Oswald affirmed that she incurred attorney's fees in responding to and dealing with demands from the individual lenders resulting from Vela's non-payment of the lender notes. "A request for attorneys' fees almost by definition is not ripe for consideration until after the main event reaches an end. Entertaining such petitions post-judgment is virtually the norm." *Boyer Constr. Grp v. Walker Contr. Co., Inc.*, 44 N.E.3d 119, 124 (Ind. Ct. App. 2015). Accordingly, the trial court properly determined the amount of attorney's fees to be a post-judgment issue, after establishing Vela's liability thereof, and ordered the parties to reach an agreement on the amount of attorney fees within thirty days of its summary judgment.

IV. *Oswald's Attorney's Fees for Breach of Contract*

[39] Separate from her argument that Oswald was not entitled to attorney's fees arising out of her dealings with the individual lenders due to Vela's nonpayment of the lender notes, Vela contends that Oswald cannot seek attorney's fees under Paragraph 4.4 of the Purchase Agreement because (1) Oswald never incurred any damages and (2) Paragraph 4.4 is an indemnification provision applicable to third party claims.

[40] As has been conclusively established throughout these proceedings, Oswald incurred damages due to Vela's breach of the Purchase Agreement. For the first time on appeal, Vela argues that Paragraph 4.4 is an indemnification provision that only applies to third party claims and is not applicable to Oswald's first party breach of contract claims against Vela. Paragraph 4.4 of the Purchase Agreement states:

> Buyers will indemnify, defend, and hold Seller harmless from any and all costs, damages, claims, obligations, liabilities, including reasonable attorneys' fees and costs, whether known or unknown, contingent or vested, resulting from, relating to, or arising out of or attributable to any breach of this agreement or any action of Buyers relative to non-payment of any obligations, or any of their actions, of any nature to Buyers operation of the Companies subsequent to their assumption of operations control of the businesses.

(Appellant's App. Vol. V, p. 12). Relying on the Paragraph's language of 'indemnify, defend and hold … harmless,' Vela maintains in a single sentence in her appellate brief, which she slightly expanded upon in her reply brief, that "the plain language of Section 4.4 utilizes each of the three obligations to define

the scope of the indemnity obligation, and makes clear that it is limited to third-party claims where Oswald is a defending party." (Appellant's Reply Br. p. 29).

[41] However, it is well-established that parties "may not raise a new argument for the first time on appeal, even in an appeal from a summary judgment." *Clark Cnty. Drainage Bd. v. Isgrigg*, 963 N.E.2d 9, 19 n. 4 (Ind. Ct. App. 2012), *aff'd on reh'g*, 966 N.E.2d 678. As Vela's indemnification provision claim was never raised before the trial court and is now presented for the first time on appeal, we find the issue waived for our review.

V. *Vela's Attorney's fees*

[42] Citing to Arkansas Code and Paragraph 4.5 of the Purchase Agreement, Vela contends that she is entitled to attorney's fees in these proceedings. The Arkansas statute relied upon by Vela, provides:

> In any civil action to recover on an open account, statement of account, account stated, promissory note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services, or breach of contract, unless otherwise provided by law or the contract which is the subject matter of the action, the prevailing party may be allowed a reasonable attorney's fees to be assessed by the court and collected as costs.

Ark. Code Ann. § 16-22-308. We find the statute inapplicable as the Purchase Agreement, "the contract which is the subject matter of the action" does provide for attorney fees in the event of a party's breach and sets forth the circumstances allowing for such an award.

[43] Turning to the Purchase Agreement, Paragraph 4.5., relied upon by Vela, states

> Seller shall indemnify, defend, and hold Buyers harmless relative to any losses, costs, damages, claims, obligations, including reasonable attorneys' fees and costs whether known or unknown, contingent or vested, resulting from, relating to, or arising out of or attributable to any breach of this agreement or any action of Sellers relative to non-payment of obligations in excess of 30 days as defined hereinabove or for any violation of this agreement.

(Appellant's App. Vol. V, pp. 12-13). Contending that Oswald breached the Purchase Agreement by "asserting theories and alleged damages precluded under the Contract" and by "advanc[ing] a baseless action," Vela now claims to be entitled to attorney's fees. (Appellant's Br. p. 42). We disagree. We affirmed the trial court's summary judgment on several of Oswald's claims for damages and in the absence of any designated evidence supporting damages resulting from or attributable to any breach of the Purchase Agreement by Oswald, we conclude, as a matter of law, that no award of attorney's fees can be made to Vela.

CROSS-APPEAL

I. *Replevin Action Fees and Costs*

[44] To offset the remaining balances due under the Equipment Lease, United Leasing initiated a replevin action against Nick and Nick's Bar Louie in Arkansas, seeking recovery of the equipment. The costs and attorney's fees associated with this action totaled $26,083.73. Maintaining that the replevin

action is due to Vela failing to assume the Equipment Lease, Oswald now seeks a remand to the trial court to correct the amount of damages she is owed and to award her an additional $26,083.73 to cover the replevin costs and fees.

[45] The designated evidence reflects that given Vela's failure to assume the Equipment Lease and make payments accordingly, United Leasing accelerated the debt and demanded payment from Oswald, as the guarantor of the Equipment Lease. Under the Guaranty, Oswald had assumed liability for United Leasing's damages in its enforcement of the Equipment Lease. However, United Leasing agreed to forebear from enforcing its rights and remedies under the Equipment Lease conditioned on Oswald entering into a Forbearance Agreement and executing the 2018 Note for the total indebtedness due. The Forbearance Agreement stated that Oswald "reaffirm, ratify and confirm the Lease Document and the Obligations" and that the Agreement "together with the Lease Documents, constitutes the entire agreement and understanding among the parties relating to the subject matter." (Appellant's App. Vol. V, pp. 84, 89). Additionally, pursuant to the Forbearance Agreement, Oswald, as guarantor, agreed to pay $2,000 in attorney's fees for drafting the document and "all costs of a proceeding to recover any equipment of [United Leasing] in Arkansas." (Appellant's App. Vol. 5, p. 86). The subsequent replevin action constituted United Leasing's proceeding to recover its equipment from Nick and Nick's Bar Louie. Accordingly, based on the contractual documents, once United Leasing sought to recover its costs from

Oswald, as the guarantor, Oswald, in turn could seek that amount from Vela for failure to assume the payment under the Equipment Lease.

[46] Vela now contends that Oswald is not liable under the Forbearance Agreement or the 2018 Note because Oswald's signature does not appear on the last page of the Forbearance Agreement. Our review of the Forbearance Agreement reveals that the Agreement's preamble states:

> THIS FORBEARANCE AGREEMENT (this "Agreement") is made. entered into, and effective this 1 day of September, 2018 (the "Effective Date"). by and between LITTLE ROCK LOUIE, LLC, EVILLE LOUIE, LLC, MEMPHIS LOUIE, LLC and BEVERLY K. OSWALD (each "Guarantor" and collectively referred to as "Guarantors") and UNITED LEASING, INC., an Indiana corporation, with an address of 3700 E. Morgan Avenue, Evansville. Indiana. 47715, Attention: Debra M. Lewis ("United").

(Appellant's App. Vol. V, p. 84). Additionally, on the Forbearance Agreement's final page, Oswald signed as "manager" of "Eville Louie, LLC." (Appellant's App. Vol. V, p. 91). Although Oswald is listed in her personal capacity as guarantor in the preamble, Oswald did not sign the Forbearance Agreement in her personal capacity of guarantor, nor did she submit designated evidence indicating that she personally paid the costs incurred in the replevin action. Accordingly, as there is a genuine issue of material fact as to whether Oswald paid the replevin costs in her personal capacity as guarantor or in her capacity as manager of the Eville Louie, LLC., we remand to the trial court for further proceedings on this issue.

II. *Lender Notes*

[47] In its summary judgment, the trial court entered judgment in favor of Oswald "for attorney's fees incurred by Oswald in responding to and dealing with lenders because of [Vela's] failure to assume and pay lender notes." (Appellant's App. Vol. II, p. 31). Although the judgment did not include the amount of attorney's fees Oswald to which entitled, the trial court ordered the parties "to reach and agreement on an amount of attorney's fees to be awarded to Oswald." (Appellant's App. Vol. II, p. 31). On August 20, 2021, the parties entered into an Agreed Order, accepted by the trial court, which stated:

> 1. [Oswald] submitted an affidavit of counsel [] with her summary judgment materials which attested that:
>
>> As of April 15, 2021, [Oswald] has incurred twenty-thousand and four 80/100 dollars (20,004.80) in attorney fees and five hundred dollars ($500) in costs and expenses in prosecuting this action.
>
> 2. [Oswald] thereafter submitted attorney fee invoices to [Vela] which evidenced said attorneys' fees.
>
> 3. Subsequent to the Order, [Oswald] submitted additional invoices to [Vela] evidencing an additional 5,508.53 in attorneys' fees and expenses incurred in prosecuting this action, for a total of $25,513.33 that [Oswald] seeks.
>
> 4. []

> 5. Subject to and reserving all appeal rights and without waiver of any right to challenge any issue as to the Order, including the Court's conclusion that [Oswald] is entitled to an award of attorneys' fees, and including [Oswald's] right to seek additional attorney fees upon the disposition of the appeal, [Oswald] and [Vela] agree to the entry of this Agreed Order to finalize matters relating to attorneys' fees to be awarded to [Oswald] under the Order, and specifically, an agreement as to the aforementioned $25,513.33 in attorneys' fees and expenses, which amount the parties agree is reasonable.

(Appellant's App. Vol. II, pp. 31-32). Oswald now contends that the amount of attorney's fees agreed upon in the Agreed Order omitted the attorney's fees resulting from Oswald's dealing with the individual lenders and she requests us to remand this cause to submit evidence relating to these attorney's fees.

[48] Our plain reading of the trial court's summary judgment reflects that the issue of attorney's fees related to the lender notes was decided in Oswald's favor, with the parties awarded thirty days to reach an agreement on "an amount of attorney's fees to be awarded to Oswald." (Appellant's App. Vol. II, p. 32). The parties reached that agreement, as evidenced by the Agreed Entry, and settled on a "reasonable" amount of $25,513.33 for "costs and expenses in prosecuting this action." (Appellant's App. Vol. II, p. 31). Again, in Paragraph 5 of the Agreed Order, the parties reaffirmed that the Agreed Order "finalize[d] matters relating to the attorneys' fees to be awarded to [Oswald] under the Order." (Appellant's App. Vol. II, p. 32). As attorney's fees related to lender notes were awarded to Oswald in the trial court's summary judgment Order, we

must conclude that these attorney's fees were necessarily finalized in the Agreed Order and included in the amount agreed upon.

[49] Although Oswald now refers to the Agreed Order's specific language that the parties were "reserving all appeal rights and without waiver of any right to challenge any issue as to the Order" to bolster her claim for additional attorney's fees relating to having to deal with the individual lenders, we find Oswald's claim to be without merit. The issue decided in the trial court's Order was Oswald's award of attorney's fees resulting from the lender notes, not the specific amount of attorney's fees, which was later settled by the parties in the Agreed Order. Because the specific award of $25,513.33 encompassed the "costs and expenses in prosecuting this action," we conclude that Oswald is not entitled to an additional amount of attorney's fees resulting from her dealings with the individual lenders.

III. *Appellate Attorney's Fees*

[50] Lastly, relying on Paragraph 4.4 of the Purchase Agreement, Oswald requests this court to award her appellate attorney's fees. "When the parties enter into a written contract that specifically provides for the payment of attorney's fees incurred in the enforcement of the contract, the agreement is enforceable according to its terms[.]" *Worley v. City of Jonesboro*, 385 S.W.3d 908, 919 (Ark. Ct. App. 2011). Pursuant to the Purchase Agreement's terms, Vela "will indemnify, defend, and hold [Oswald] harmless from [] reasonable attorneys' fees and costs, [] arising out of or attributable to any breach of this agreement or

any action of [Vela] relative to non-payment of any obligations." (Appellant's App. Vol. V, p. 12). In addition, the parties consented in the Agreed Order that Oswald "reserve[ed] all appeal rights [] including [Oswald's] right to seek additional attorney fees upon the disposition of the appeal." (Appellant's App. Vol. II, p. 32). The current suit, which includes a defense against Vela's appeal and asserts cross-appeal contentions, arises out of or is attributable to Vela's various breached of the Purchase Agreement. Therefore, we remand to the trial court to determine Oswald's reasonable appellate attorney's fees.

CONCLUSION

[51] Based on the foregoing, we affirm the trial court's entry of summary judgment with respect to Vela's breach of contract, her failure to assume the Equipment Lease payments, and award of attorney's fees. However, we reverse the summary judgment with respect to the trial court's conclusion of Vela's liability for $13,528 and $6,400 as these payments were not made with Oswald's personal funds.

[52] With respect to the Cross-Appeal, we remand to the trial court to determine whether the replevin costs were paid out of Oswald's personal funds; we affirm the trial court's summary judgment awarding Oswald attorney's fees for her dealings with the individual lenders but do not remand to the trial court for recalculation as these attorney's fees were included in the Agreed Order; and we remand to the trial court to determine Oswald's reasonable appellate attorney's fees.

[53] Affirmed in part, reversed in part, and remanded.

[54] Robb, J. and Molter, J. concur