MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

William J. Stevens
Bridgman, Michigan

ATTORNEYS FOR APPELLEE

Justin E. Endres
Young Lind Endres & Kraft
New Albany, Indiana

Nicholas J. Schuler
Chicago, Illinois

Kevin E. Werner
Crown Point, Indiana

IN THE COURT OF APPEALS OF INDIANA

Central Market of Indiana, Inc.,
Appellant-Defendant,

v.

Hinsdale Bank, N.A. as Successor in Interest to Countryside Bank,
Appellee-Plaintiff.

March 20, 2023

Court of Appeals Case No. 22A-MF-870

Appeal from the Lake Superior Court

The Honorable Calvin D. Hawkins, Judge

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

Memorandum Decision by Judge Riley

Chief Judge Altice and Judge Pyle concur.

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Central Market of Indiana Inc. (CMI) challenges the trial court's grant of summary judgment in favor of Appellee-Plaintiff, Hinsdale Bank & Trust Co. (Hinsdale).

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

ISSUES

[3] CMI presents this court with four issues on appeal, three of which we find dispositive and restate as:

(1) Whether the trial court erred by not dismissing Hinsdale's motion for summary judgement for failing to comply with a discovery order;

(2) Whether the trial court erred by granting Hinsdale's motion for summary judgment; and

(3) Whether the trial court erred by awarding part of the attorney's fees.

FACTS AND PROCEDURAL HISTORY

[4] In 2015, Zafar Sheikh (Sheikh) and Bashir Chaudry (Chaudry), who were members of CMI and 3232 Central Avenue LLC, met with Countryside Bank's (Countryside) director of small business loans Raj Badri (Badri) to negotiate a

small business loan[1] for the purchase of a grocery store at 3232 Central Avenue, Lake Station, Indiana. However, due to a low credit rating, Badri informed Sheikh and Chaudry that someone would have to guarantee the loan. Sheikh's son Sean Sheikh (Sean), who lives in New York, and Chaudry's sister-in-law, Bushra Naseer (Naseer), who resides in Illinois, (collectively, Guarantors), agreed to personally guarantee the loan. Shortly after agreeing to guarantee the loan, Sean expressed his unwillingness, and Sheikh conveyed those concerns to Badri via email. After speaking to Countryside's president John Wheeler (Wheeler), Badri wrote back to Sheikh on April 28, 2015, stating:

> Please tell Sean there is nothing to worry about. I have spoken to [] Wheeler and he assured me that within three months of this closing, the bank will refinance and transfer the loan to Bushra's name or to Bashir's name. This refi will get you some working capital and also absolve Sean of the SBA's guaranty. It's just a matter of three months or at most four months. After the initial closing, the SBA is no more in [the] picture and the bank has more leeway in these matters.
>
> If you want, I can speak to Sean personally. Also please ask Sean to sign the [l]ease and reassignment of rents, and some additional documents that were sent to you to forward him for his signatures. Have you forwarded them to Sean yet. Hopefully he will sign off on those once he knows that we will get him off the loan/SBA guaranty within 3-4 months. You also have to finalize some details in Sean's life insurance. We will need the policy to close.

[1] This appears to be a loan guaranteed by the United States Small Business Administration (SBA).

(Appellant's App. Vol. II, p. 133) (sic throughout).

[5] On May 14, 2015, Countryside offered a loan to CMI and its sister company, 3232 Central Avenue LLC (collectively, Borrowers). The parties subsequently executed the Loan Agreement and Promissory Note (Note) in the principal sum of $1,837,000. In consideration of the funds borrowed and to secure the indebtedness under the Note, Borrowers executed a Mortgage and Assignment of Rents in favor of Countryside. Further, Borrowers executed and delivered a Security Agreement to Countryside for all of their collateral, which consisted of inventory, equipment, accounts, money, fixtures, and proceeds. Countryside perfected its security in the collateral by filing a UCC Financing Statement. Guarantors also executed and delivered Unconditional Guarantees to Countryside whereby Guarantors personally guaranteed the full and prompt payment of the amount to be paid under the terms of the Note.

[6] Under the terms of the Note, Borrowers were required to pay a monthly installment of approximately $11,500. In 2017, Borrowers' grocery store began facing financial difficulties and Borrowers defaulted on the loan. Countryside sent Borrowers a default notice on October 25, 2017. Around that time, 3232 Central Avenue LLC spoke with Hasan Musleh (Musleh), and Musleh agreed to buy the inventory and take over the grocery store's operations. Acting as the lessor of the mortgaged property, 3232 Central Avenue LLC leased the grocery store to Musleh for a two-year period. Upon the expiration of the lease, Musleh also agreed to purchase the grocery store. Musleh paid 3232 Central Avenue LLC one month's rent plus a security deposit of $20,000. It was agreed that

Musleh would pay an additional sum of $5,000 a month to purchase the inventory. Although negotiations and talks were underway for Musleh to take over the grocery store, Countryside did not approve the lease by the time Musleh took possession. In addition, 3232 Central Avenue LLC did not remit to Countryside the $20,000 it received from Musleh, and the transfer of the collateral to Musleh directly interfered with Countryside's perfected interest in the collateral.

[7] On December 1, 2017, Countryside sent Borrowers yet another default notice, but Borrowers failed to cure the default on the Note. On December 27, 2017, by virtue of the default provisions under the Note, Countryside filed a nine-Count Complaint against Borrowers and eleven others[2], arguing in part, that Borrowers had defaulted on the Note and as of December 1, 2017, the sum of $1,831,380.28 plus daily interest of $340.31, was owed. Countryside also alleged that 3232 Central Avenue LLC had fraudulently transferred the collateral to Musleh.

[8] In November 2019, Hinsdale acquired Countryside by merger and succeeded in all its interests, including its interest in these proceedings. As such, Hinsdale moved to be substituted as plaintiff. On November 10, 2020, Hinsdale filed a

[2] Other defendants included, Sheikh, Chaudry, Sean, Naseer, and Musleh.

motion for summary judgment[3] on Count I (liability of Borrowers on the Note's unpaid principal sum of $1,831,380.28 plus the daily interest rate, attorney's fees, and costs), and Count V (right to foreclose its interest in the collateral due to Borrowers' default on the Note).[4]

[9] Around that time, CMI pursued discovery to answer Hinsdale's summary judgment motion. Borrowers served notices of deposition on Hinsdale's employees Wheeler, Badri, Jeff Nitti (Nitti), and CEO and President Richard Eck (Eck). In addition, CMI sought to depose Tiah Murrar (Murrar), the vice president of the managed asset division of Wintrust Financial Corporation, the holding company for Hinsdale. Aside from the deposition notices, CMI requested Hinsdale to provide, documents relating to its SBA loan maintained by Countryside/Hinsdale from 2014 through March 2021, all underwriting files plus correspondence, correspondence between SBA and Countryside/Hinsdale, copies of Countryside Bank's written procedures for loans backed by the SBA, minutes and internal memorandums for meetings held to discuss the issuance of the loan, internal correspondence between Badri and Countryside regarding the loan, correspondence between SBA officials and Countryside about the loan,

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[3]By the time Hinsdale was pursuing summary judgment against CMI, it had already obtained judgments on Counts I, II, III, and V against all other defendants other than CMI. Hinsdale had also voluntarily dismissed Counts IV, VI, VII, and VIII.

[4] In 2020, Hinsdale successfully obtained summary judgement against Sean on Count III of its claim, based on the unconditional guarantee he had offered. On appeal, we determined that Sean is liable for the amount due under the Note to Hinsdale under the plain, unambiguous, and undisputed terms of the Unconditional Guarantee he signed. *See Sheikh v. Hinsdale Bank & Trust Co.*, No. 22A-MF-1244, 2021 WL 1202880, at *7 (Ind. Ct. App. Mar. 31, 2021) *rehg denied*.

SBA standard operating procedures, and correspondence between Hinsdale and Countryside during the merger and acquisition process.

[10] Hinsdale responded to the deposition requests by stating that Badri, Wheeler, and Nitti were not its employees and that it could not produce them for deposition. As for Murrar and Eck, Hinsdale contended that they were high-ranking employees who had no "dealings in the 2015 loan by Countryside" and as Indiana "courts have recognized, attempts to depose high-ranking corporate officers" is a harassment tactic. (Appellant's App. Vol. III, p. 57). Therefore, Hinsdale requested CMI to withdraw those notices directed to Murrar and Eck.

[11] Even though Hinsdale provided numerous documents and answered some of the discovery requests, it opposed the admission or production of specific information because of its burdensome, broad, and irrelevant nature. In light of Hinsdale's responses, on October 31, 2021, CMI filed a motion to compel Hinsdale to provide specific and non-evasive answers, along with other documents that it still deemed relevant. The trial court subsequently issued an order on October 22, 2021, requiring CMI's attorney to email Hinsdale's attorney a list or a description of documents and discovery items that it had not produced or to which responses were incomplete or evasive. Hinsdale had twenty days to respond. Based on Hinsdale's responses, which CMI deemed inadequate, in November 2021, CMI filed a motion to deny Hinsdale's summary judgment motion as a sanction for failing to comply with the discovery order. CMI also responded to Hinsdale's motion for summary judgment.

[12] A hearing was held on December 15, 2021, and even though the trial court did not impose any sanctions at the hearing, it ordered Hinsdale to provide Murrar for deposition. The trial court, however, limited Murrar's scope of questions to the documents that were either produced or withheld by Hinsdale. Murrar was deposed in January 2022. Murrar testified that following the acquisition, Hinsdale retained all files for the loans issued by Countryside. Despite her claim that Hinsdale acquired the rights and interests of the loans from Countryside following the acquisition, she explained that Hinsdale only acquired the loan documents, and not the correspondences or emails. She stated that she was familiar with the loan from Countryside to Borrowers, and that Hinsdale was not withholding any documents.

[13] On February 10, 2022, the trial court conducted a hearing on CMI's motion to deny Hinsdale's summary judgment motion as a sanction for failing to comply with the discovery order. CMI argued that even though Murrar was deposed, her testimony showed that Hinsdale had not produced all documents and email correspondence relating to the loan. Contrary to CMI's claim, Hinsdale argued that Murrar's deposition showed that it was not withholding any relevant loan documents and that CMI's arguments were based on "conjecture" that there were "other documents [] out there somewhere." (Tr. p. 6). Hinsdale argued that Murrar's deposition showed that when Hinsdale acquired Countryside, "[l]oan documents were acquired, not correspondence." (Tr. p. 13). Concluding that Hinsdale was not withholding any relevant documents, the

trial court denied CMI's motion to dismiss Hinsdale's summary judgment motion as a sanction for failing to comply with the discovery order.

[14] On March 24, 2022, the trial court held a hearing on Hinsdale's summary judgment motion. Arguing that summary judgment was inappropriate, CMI contended that Hinsdale's misrepresentation that refinancing would relieve Sean as a guarantor created a genuine issue of material fact. CMI also contended that had Hinsdale not tortiously interfered with Musleh's lease, the grocery store would have continued to operate generating monthly rent of $10,000 and would not have defaulted on the Note. Lastly, CMI argued that although an order for the sale of the property had been issued over two years prior, Hinsdale had yet to appoint a receiver and proceed with the sale. CMI contended that had the property been sold, the proceeds would have reduced CMI's overall debt to Hinsdale. Hinsdale argued that the underlying cause of action is a "routine commercial case. There's no material dispute of fact as the [N]ote is in default, that the [N]ote was signed, and the money requested is due and owing to the [b]ank." (Tr. p. 19). Hinsdale therefore argued that it was entitled to summary judgment as to Counts I and V of the Complaint—liability on the Note and foreclosure on the collateral. At the close of the evidence, the trial court granted Hinsdale's summary judgment motion. On March 25, 2022, the trial court entered a final judgment as a matter of law to Hinsdale, awarding judgment of $2,859,584.72 due under the Note. That amount included attorney fees and collection costs, and it also reflected credited amounts advanced to Hinsdale.

[15] CMI now appeals. Additional information will be provided as necessary.

DISCUSSION AND DECISION

I. *Motion to Impose Sanctions*

[16] As a preliminary matter, we observe that Hinsdale did not file an appellee's brief. A less stringent standard of review is applied for demonstrating reversible error when an appellee fails to file a brief. *McKinney v. McKinney*, 820 N.E.2d 682, 685 (Ind. Ct. App. 2005). In this situation, a judgment may be reversed if the appellant demonstrates a prima facie case of error, meaning an error at first sight, on first appearance, or on the face of it. *Id*. With this in mind, we now turn to CMI's argument.

[17] CMI contends that the trial court abused its discretion by denying its motion to dismiss Hinsdale's summary judgment motion as a sanction for failing to comply with the discovery order.

[18] "Trial courts have the inherent power to punish litigants in order to maintain the dignity of the court, secure obedience to process and rules, rebuke interference with the orderly conduct of business, and to punish unseemly behavior." *Carmichael v. Separators, Inc.*, 148 N.E.3d 1048, 1062-63 (Ind. Ct. App. 2020) (citation omitted), *trans denied*. To protect the discovery process, the trial court may impose sanctions as part of its inherent power. *Noble Cnty. v. Rogers*, 745 N.E.2d 194, 198 (Ind. 2001). We assign the selection of an appropriate sanction for a discovery violation to the trial court's sound discretion. *McCullough v. Archbold Ladder Co.*, 605 N.E.2d 175 (Ind. 1993). We

therefore review a trial court's ruling on a motion for discovery sanctions for an abuse of discretion. *Id.* "Absent clear error and resulting prejudice, the trial court's determination with respect to violations and sanctions should not be overturned." *Doherty v. Purdue Props. I, LLC*, 153 N.E.3d 228, 240 (Ind. Ct. App. 2020) (citation omitted).

[19] CMI asserts that while Hinsdale merged with Countryside, it was obligated to request and insist that Countryside remit all documents associated with its loan. In light of the fact that Hinsdale did not provide the documents it had requested following the discovery order, CMI believes that all the records it had requested were either destroyed or spoliated by Hinsdale.

[20] Spoliation is a particular discovery abuse that involves the intentional or negligent destruction, mutilation, alteration, or concealment of physical evidence. *Glotzbach v. Froman*, 854 N.E.2d 337, 338 (Ind. 2006). A party raising a claim of spoliation bears the burden of proving that (1) there was a duty to preserve the evidence, and (2) the alleged spoliator either negligently or intentionally destroyed, mutilated, altered, or concealed the evidence. *N. Ind. Pub. Serv. Co. v. Aqua Env't Container Corp.*, 102 N.E.3d 290, 301 (Ind. Ct. App. 2018). "The duty to preserve evidence occurs when a first-party claimant knew, or at the very least, should have known, that litigation was possible, if not probable." *Golden Corral Corp. v. Lenart*, 127 N.E.3d 1205, 1217 (Ind. Ct. App. 2019) (quotation omitted). The duty may exist prior to the commencement of a lawsuit. *Id.* at 1218. "The intentional or negligent destruction or spoliation of evidence cannot be condoned and threatens the very integrity of our judicial

system." *Synergy Healthcare Resources, LLC v. Telamon Corporation*, 190 N.E.3d 964, 968 (Ind. Ct. App. 2022) (citation omitted).

[21] At the hearing on the motion to dismiss Hinsdale's summary judgment motion for not complying with the discovery order, Murrar's deposition was submitted. As the evidence shows, Hinsdale merged with Countryside in November 2019, and Murrar testified that when Hinsdale merged with Countryside, not only did it acquire Countryside's assets, but it also acquired its loans. Murrar's testimony revealed that in spite of Hinsdale's acquisition of the rights and interests of the loans from Countryside following the merger, Hinsdale only retained the loan documents and not the internal correspondence or emails. While Murrar admitted that Hinsdale was aware of the pending litigation at the time of the merger, that did not put Hinsdale on notice that it was required to preserve the emails relating to the loan at the time of the merger. *See Glotzbach v. Froman*, 854 N.E.2d 337, 338-41 (Ind. 2006) ("Mere ownership of potential evidence, even with knowledge of its relevance to litigation, does not suffice to establish a duty to maintain such evidence.").

[22] CMI argues that it is regrettable that the trial court was convinced by Hinsdale's "false representation" that it had submitted all documents from its loan file. (Appellant's Br. p. 29). CMI's argument amounts to a request that we reweigh the evidence. As we have already explained, Murrar stated that only the loan documents and not the emails were obtained from Countryside. Indeed, the primary loan documents, which were the Note, Mortgage, Security Agreement, and Unconditional Guarantees were undoubtedly preserved. Other than CMI's

bald assertion which lacks any support from the record that Hinsdale concealed or destroyed other documents pertaining to its loan file, CMI has failed to establish that Hinsdale was required to preserve additional documents or that Hinsdale intentionally destroyed or concealed the evidence it was seeking during discovery. "Trial judges stand much closer than an appellate court to the currents of litigation pending before them, and they have a correspondingly better sense of which sanctions will adequately protect the litigants in any given case, without going overboard, while still discouraging gamesmanship in future litigation." *Whitaker v. Becker*, 960 N.E.2d 111, 115 (Ind. 2012). Here, the trial court was certainly within its discretion to find that sanctions were not appropriate, considering Murrar's responses that Hinsdale had submitted all the documents it had received from Countryside. As such, we conclude that the trial court did not abuse its discretion for not dismissing Hinsdale's motion for summary judgment.

II. *Summary Judgment*

A. *Standard of Review*

[23] When reviewing a grant of summary judgment, we must determine whether there are genuine issues of material fact, and whether the moving party is entitled to judgment as a matter of law. *Rood v. Mobile Lithotripter of Indiana, Ltd.*, 844 N.E.2d 502, 506 (Ind. Ct. App. 2006). Summary judgment should be granted only if the evidence sanctioned by Indiana Trial Rule 56(C) shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Ind. Univ. Med. Ctr., Riley Hosp. for Children v.*

Logan, 728 N.E.2d 855, 858 (Ind. 2000). All evidence must be construed in favor of the opposing party, and all doubts as to the existence of a material issue must be resolved against the moving party. *Id.* However, the review of a summary judgment motion is limited to those materials designated to the trial court. *Id*. The party appealing the grant of summary judgment has the burden of persuading this court that the trial court's ruling was improper. *Carter v. Indianapolis Power & Light Co.*, 837 N.E.2d 509, 514 (Ind. Ct. App. 2005), *trans. denied*. CMI raises a number of claims, but we only address two well-developed issues. Firstly, CMI contends that genuine issues of material fact were presented in Sheikh's and Sean's affidavits. Secondly, Hinsdale's interference with Musleh's lease contributed to its default on the loan, and that was sufficient to preclude summary judgment.

1. *Affidavits*

[24] CMI contends that genuine issues of material fact were presented in Sheikh's and Sean's affidavits. We note that Sheikh's and Sean's affidavits focused on the fact that Hinsdale had reneged on its promise to remove Sean as a guarantor upon refinancing. CMI contends that the representations by Countryside, which it termed as false, clearly set forth the defense of fraudulent inducement because Guarantors were induced into signing the Unconditional Guarantees, which was a valid defense to preclude summary judgment. Hinsdale argued before the trial court that CMI's defense was defeated by the fact that the Note provided that "Borrowers may not use an oral statement of Lender of SBA to contradict or alter the written terms of this Note." (Appellant's App. Vol. III, p.

107). Hinsdale additionally argued that the purported representations by Countryside, which was evidently offered prior to the execution of the Note, in no way served as evidence to modify the terms of the Note, and further, its motion for summary judgment was not based on Sean's liability for his guaranty, but on CMI's liability for the loan.

[25] Indiana Code section 26-2-9-4 precludes enforcement of oral "credit agreements" unless the credit agreement (l) is in writing; (2) sets forth all material terms and conditions of the credit agreement; and (3) is signed by the creditor and the debtor. Even if we were to take Badri's promise as an agreement on behalf of Countryside at the time, it fell short of the above-stated requirements because it did not mention the Note and its terms, and at most, was a discussion about a possible future modification of Sean's guarantee. Contrary to CMI's claim, Sean's and Sheikh's affidavits were insufficient to establish a genuine issue of material fact.

2. *Tortious Interference with Musleh's Lease*

[26] Next, CMI claims that had Hinsdale allowed Musleh to perform under the lease, it would not have defaulted on the Note. CMI contends that it had arranged to lease the Mortgaged Property to Musleh, who would have taken over the operations of the grocery store, paid rent, and eventually purchased the mortgaged property. Under Indiana law, a tortious interference with a contractual relationship claim requires "1) existence of a valid and enforceable contract; 2) defendant's knowledge of the existence of the contract; 3)

defendant's intentional inducement of breach of the contract; 4) the absence of justification; and 5) damages resulting from defendant's wrongful inducement of the breach." *Winkler v. v. G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1235 (Ind. 1994).

[27] Hinsdale opposed CMI's claim by arguing that it failed on the first prong because there was no valid and enforceable lease. Citing to the Mortgage instrument, Hinsdale argued that as the mortgagee, it was bound to approve leases by Borrowers and because it never approved Musleh's lease, there was no valid contract, and that it cannot be said that it tortiously interfered with Musleh's lease. In this regard, we cannot agree with CMI that Hinsdale tortiously interfered with Musleh's lease.

B. *Analysis*

[28] Hinsdale requested summary judgment against CMI because CMI had defaulted on the Note and was liable for the principal amount of $1,837,000 plus daily interest, as well as collection fees and attorney's fees. Furthermore, Hinsdale alleged that under the Note and Security Agreement, it was entitled to foreclose upon the collateral based on CMI's default.

[29] For summary judgment to be appropriate in this case, Hinsdale must have demonstrated that there were no genuine issues of material fact pertaining to any aspect of the claims mentioned above. Hinsdale submitted, among other documents, the Loan Agreement and Note, which demonstrated that the Borrowers had borrowed a principal amount of $1,837,000; the Mortgage and

Assignment of Rents executed by Borrowers agreeing to provide the Mortgage Property as collateral for the Note; the Security Agreement; Affidavits of debt by Hinsdale officials, Murrar and David Veurink; Notices of Default; and Hinsdale's attorney's fees affidavits.

[30] Hinsdale's designated affidavits and materials were not disputed by CMI, and CMI failed to designate any evidence that might excuse their default under the Note. In other words, CMI does not challenge that the Note was in default. Due to the absence of genuine issues of material fact regarding CMI's default on the terms of the Note, we conclude that Hinsdale was entitled to judgment on the principal loan amount plus daily interest, and collection costs. In addition, it was entitled to foreclose on the collateral due to CMI's default under the Note.

III. *Attorney's Fees*

[31] CMI is challenging part of the award of attorney's fees. In this case, the trial court issued a judgment against CMI for the amount of $2,859,584.72, which was due under the Note through February 15, 2022. This amount included attorney's fees and costs, totaling $447,605.91.

[32] Generally, in Indiana a party must pay its own attorney's fees absent an agreement between the parties, a statute, or other rule to the contrary. *R.L. Turner Corp. v. Town of Brownsburg*, 963 N.E.2d 453, 458 (Ind. 2012). A contractual provision agreeing to pay attorney's fees is enforceable if the contract is not contrary to law or public policy. *Dempsey v. Carter*, 797 N.E.2d

268, 275 (Ind. Ct. App. 2004), *trans. denied*. The amount recoverable for an award of attorney's fees is left to the sound discretion of the trial court. *Holliday v. Crooked Creek Villages Homeowners Ass'n, Inc.*, 759 N.E.2d 1088, 1095 (Ind. Ct. App. 2001). The trial court abuses its discretion if its decision is clearly against the logic and effect of the facts and circumstances before it. *Id.* The amount of the trial court's award of attorney's fees must be supported by the evidence. *Id*.

[33] In this particular case, Hinsdale requested that CMI pay attorney's fees as specified in the Note. CMI is not disputing the provision allowing Hinsdale to recover attorney's fees but argues that a portion of the attorney's fees awarded in this case was unreasonable. In determining what is "reasonable," the court may consider such factors as the hourly rate, the result achieved, and the difficulty of the issues. *Dougherty v. Leavell*, 582 N.E.2d 442, 443 (Ind. Ct. App. 1991). "One of these considerations is the results obtained, especially when the plaintiff has made multiple claims but has succeeded on only some of them." *Silverman v. Villegas*, 894 N.E.2d 249, 262 (Ind. Ct. App. 2008), *trans. denied*.

[34] In its Complaint, Hinsdale argued that CMI is responsible for the attorney's fees and costs linked with its efforts collecting amounts due under the Note. To support its motion for summary judgment, Hinsdale submitted an additional affidavit from its attorney, who averred that Hinsdale had been forced to prosecute fraudulent transfer claims against Sean and others related to Sean's Unconditional Guaranty in a case titled "*Hinsdale & Trust Co. N.A v. Sean Z.*

Sheikh, Jr. et al., 2020 CH 05451 (Circuit Court of Cook County, Illinois)"[5] and defend itself in a case titled "*3232 Central [Avenue], LLC and Zafar Sheikh v Countryside Bank*, 2020 CH 03257 (Circuit Court of Cook County, Illinois)."[6] (Appellant's App. Vol. III, p. 117). The affidavit also stated that these collateral proceedings have significantly increased legal expenses, with Hinsdale incurring $227,974 in attorney's fees and $17,171.27 in costs from January 3, 2021, through February 15, 2022.

[35] We notice that the Note and other loan documents were filed with the Complaint but are not part of the record on appeal. CMI did not produce the loan documents for our review, and we remind CMI that as an appellant, it has a duty to present a complete record on appeal that supports its claim so that an intelligent review of the issues may be made. *See Turner v. State*, 508 N.E.2d 541, 543 (Ind. 1987) (citations omitted). This notwithstanding, we retrieved a

[5] During the pendency of this appeal, the case was dismissed pursuant to an agreement between the parties, with each party instructed to pay its own attorney's fees. As a result, and for the purpose of this appeal, CMI filed a motion seeking judicial notice of the dismissal order. However, pursuant to Indiana Evidence Rule 201(b)(5), we are only authorized to take judicial notice of the records of a court of this state. Although Indiana Evidence Rule 201(d) allows courts to take judicial notice at any stage of the proceedings, including on appeal, again, the parameters of such notice are confined to court records from Indiana. *See Banks v. Banks*, 980 N.E.2d 423, 425-26 (Ind. Ct. App. 2012). Consequently, we denied CMI's motion.

[6] It appears that this case was initially filed in federal court, where the plaintiffs alleged racketeering, and fraud claims against Countryside. However, that matter was dismissed, "as the federal court reasoned that the bogus loans that the bank was accused of granting were not that numerous to qualify under Racketeering statutes to establish a pattern of repetitive activity." (Appellant's App. Vol. III, p. 70). Following that dismissal, the plaintiffs filed the matter in the Cook County Chancery Division in Chicago.

copy of the Note from Odyssey[7] and uncovered the pertinent provision relating to attorney's fees. The section provides that Hinsdale/Lender may:

> Incur expenses to collect amounts due under this Note, enforce the terms of this Note, or other Loan document, and preserve or dispose of the Collateral. Among other things, the expenses may include payments for property taxes, prior liens, insurance appraisal, environmental remediation costs, and reasonable attorney fees and costs. . .

(Complaint Exh. B, p. 19).

[36] Although we have not come across an Indiana case that directly addresses the issue of whether a lender can seek reimbursement of attorney's fees from a borrower based on its involvement in collateral actions with third parties other than the named borrowers on the note, especially if initiated in another jurisdiction, it is worth noting this court's decision in *Crum v. AVCO Financial Services of Indianapolis, Inc.,* 552 N.E.2d 823 (Ind. Ct. App. 1990). In *Crum*, we cited the provision of the mortgage document, which provided that "in the event of . . . default, mortgagor agrees to pay mortgagees reasonable attorney's fees and/or foreclosure costs actually incurred . . . " *Crum*, 552 N.E.2d at 832. We determined that the provision permitting the collection of attorney's fees did not "expressly provide for the *payment of all* attorney[']s] fees incurred as a consequence of litigation involving the mortgagor and mortgagee." *Crum*, 552

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[7] *See* Ind. Appellate Rule 27 (providing that the "Record on Appeal . . . consist[s] of the Clerk's Record and all proceedings before the trial court . . . whether or not transcribed or transmitted to the Court on Appeal").

N.E.2d at 832 (emphasis added). We also note our decision in *Smith v. Kendall*, 477 N.E.2d 953 (Ind. Ct. App. 1985), where we observed that provisions in promissory notes for the payment of attorney's fees "should not extend beyond reimbursing the holder of the note for the necessary attorney's fees reasonably and actually incurred in vindicating the holder's collection rights by obtaining judgment on the note." *Smith*, 477 N.E.2d at 954. "An excessive attorney['s] fee award can be avoided when fees are apportioned according to the significance of the issues upon which a party prevails, balanced against those on which the party does not prevail." *Stepp v. Duffy*, 686 N.E.2d 148, 153 (Ind. Ct. App. 1997), *trans. denied.* Finally, we note that even under a contract, an award of attorney's fees must be reasonable. *Walton v. Claybridge Homeowners Ass'n, Inc.*, 825 N.E.2d 818, 826 (Ind. Ct. App. 2005).

[37] Here, we conclude that Hinsdale cannot collect all of its attorney's fees as a result of the attorney's fee provision stipulated in the Note. *See Crum*, 552 N.E.2d at 832. Hinsdale initiated and defended itself against a guarantor and other third parties who were not referred to as Borrowers under the Note. It is undisputed that CMI did not participate in these out-of-state lawsuits. However, Hinsdale asserted that due to CMI's default under the Note terms, it should be permitted to collect its attorney's fees based on its involvement in those cases. At first glance, it does not appear these out-of-state cases were necessary to enforce the Note, but instead, they seem to have had no bearing on Hinsdale's effort in collecting the amount due under the Note, as demonstrated by the successful summary judgment suit filed against CMI in Indiana. *Abbey*

Villas Developmental Corp. v. Site Contractors, Inc., 716 N.E.2d 91, 103 (Ind. Ct. App. 1999) (concluding that "Contractor's defense against [the Developer's counterclaims] was part and parcel of, and necessary to, the enforcement of its mechanic's lien. Therefore, we cannot conclude that the trial court erred by awarding the attorney[']s fees Contractor incurred defending against Developers counterclaims"), *trans. denied*).

[38] Thus, we conclude that Hinsdale is not entitled to additional attorney's fees for the out-of-state cases on the premise they were integral to the enforcement of the Note, which we have established they were not. *See Abbey*, 716 N.E2d at 91. Accordingly, we reverse the trial court's award of attorney fees in this case and remand to the trial court for a hearing on appropriate attorney's fees which excludes the attorney's fees based on Hinsdale's involvement in those out-of-state cases. *See Lutheran Health Network of Ind., LLC v. Bauer*, 139 N.E.3d 269, 284 (Ind. Ct. App. 2019) (remanding with instructions to assess reasonable attorney's fees).

CONCLUSION

[39] Based on the foregoing, we conclude that the trial court did not abuse its discretion by not dismissing Hinsdale's summary judgment motion. Further, the trial court's grant of summary judgment on Hinsdale's Complaint was proper. However, we reverse the trial court's award of attorney's fees and remand to the trial court for a further hearing on the reasonableness of attorney's fees.

[40] Affirmed in part, reversed in part, and remanded for further proceedings.

[41] Altice, C. J. and Pyle, J. concur