

2012 IL App (2d) 110369-U
No. 2-11-0369
Order filed February 8, 2012

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

MACKIE CONSULTANTS, LLC,)	Appeal from the Circuit Court
)	of Lake County.
Plaintiff,)	
)	
v.)	No. 09-CH-602
)	
NORTHERN REALTY GROUP, LTD., CB)	
RICHARD ELLIS, INC., KANDYLA, LLC,)	
UNKNOWN OWNERS and NON-RECORD)	
CLAIMANTS,)	
)	
Defendants)	
)	
(Deerfield Milwaukee, LLC, assignees of)	
Village Bank and Trust f/k/a First Northwest)	
Bank, Intervenor and Counterplaintiff-Appellee)	
v. Mackie Consultants, LLC, Unknown)	
owners and Non-Record Claimants, counter-)	
defendants, and KANDYLA LLC, Ross)	Honorable
Economy a/k/a Ross G. Economy,)	Mitchell L. Hoffman,
Counterdefendants Appellants).)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

Held: The trial court properly granted summary judgment, as there were no bases for the trial court to find material issues of fact; Deerfield-Milwaukee was entitled to interest

at the default rate of 13% per *annum*; Economy's guarantee was not discharged; the trial court did not abuse its discretion by awarding Deerfield-Milwaukee the additional attorney fees incurred after the judicial sale; Deerfield-Milwaukee is entitled to fees and costs incurred for the appeal; affirmed and remanded with directions.

¶ 1 The circuit court of Lake County granted summary judgment in favor of Intervenor and counterplaintiff, Deerfield-Milwaukee, LLC (Deerfield-Milwaukee), as assignee of Village Bank & Trust f/k/a First Northwest Bank (Bank)¹ on its counterclaim for mortgage foreclosure of a mortgage recorded against a parcel of unimproved commercial real estate located in Deerfield, Illinois (the property). The circuit court later confirmed the judicial sale of the property and entered deficiency judgments against the borrower, counterdefendant Kandyla, LLC (Kandyla), and the guarantor of the debt, counterdefendant Ross Economy (Economy) (defendants, collectively)² in the amount of \$219,914. Defendants raise four issues on appeal relating to (1) summary judgment; (2) interest rate; (3) the judgment against Economy; and (4) additional attorney fees. We affirm and remand the proceedings to the trial court with directions.

¶ 2

FACTS

¹ During the pendency of the foreclosure, the Bank assigned and transferred the mortgage and related loan documents to Deerfield-Milwaukee. The trial court then substituted Deerfield-Milwaukee as the proper party plaintiff and dismissed the Bank, amending all pleadings and motions to reflect the same. Accordingly, unless the context requires otherwise, all references to Deerfield-Milwaukee includes the Bank.

² Mackie Consultants, LLC, Northern Realty Group, Ltd., CB Richard Ellis, Inc., and Unknown Owners and Non-Record claimants are not parties to this appeal.

¶ 3 Economy operated a restaurant on the property, which was held in a land trust with Economy as beneficiary. In 2004, Economy formed Kandyla for the development, zoning, leasing, and marketing of the property. The property was conveyed from the land trust to Kandyla.

¶ 4 On April 2, 2004, Kandyla executed a mortgage which encumbered the property to secure the repayment of a note executed on the same date to Deerfield-Milwaukee in the principal sum of \$750,000. The original note had a maturity date of October 2, 2005. The note provides a cure provision, which states that a “default, other than a default in payment, is curable.” The mortgage also provides that “any event of default under the construction loan agreement, or any of the related documents referred to therein, shall also be an event of default” under the mortgage.

¶ 5 On October 2, 2005, a first replacement promissory note was executed with a maturity date of January 2, 2006. Around April 2004, Kandyla retained defendant, Northern Realty Group, Ltd., to broker the leasing of a portion of the property to Amcore Bank as a prospective tenant. In 2005, the restaurant was razed for development of the property.

¶ 6 On January 2, 2006, a second replacement note was executed with a maturity date of January 2, 2007. At that time, Kandyla and Deerfield-Milwaukee executed a first modification of mortgage, which increased the principal to \$1,000,000, with a maturity date of January 2, 2027. (Emphasis added). On January 2, 2007, Kandyla and Deerfield-Milwaukee executed a third replacement promissory note, increasing the principal from \$1,000,000 to \$1,750,000. The maturity date on the note was January 2, 2008.

¶ 7 Various replacement promissory notes were subsequently executed. The fourth and final modification, executed on June 2, 2008, increased the principal from \$2,200,000 to \$2,247,000, but the first mortgage maturity date of January 2, 2027, was never modified. During that time,

Economy, as guarantor, executed a commercial guaranty for Kandyla as borrower. The final promissory note is dated March 2, 2009, in the principal amount of \$1,989,568. Two interest payments were to be made on April 2 and May 2, 2009, with one payment of “all outstanding principal plus all accrued unpaid interest on June 2, 2009.”

¶ 8 On February 5, 2009, plaintiff Mackie Consultants, LLC (Mackie), commenced the underlying action to foreclose on a mechanic’s lien in connection with its engineering services relating to the property. Deerfield-Milwaukee was not named as a defendant in Mackie’s claim. Deerfield-Milwaukee filed a petition to intervene, alleging that defendants failed to pay the alleged outstanding balance due and owing under the note and the pending foreclosure were events of default. On December 3, 2009, the trial court granted the motion to intervene.

¶ 9 Thereafter, Deerfield-Milwaukee, as mortgagee, filed a counterclaim and third-party complaint to foreclose its mortgage, adding Economy, individually, as a party defendant. Deerfield-Milwaukee’s complaint alleged two defaults: (1) failure to pay the outstanding balance upon maturity of the note, and (2) allowing a mechanic’s lien to be recorded by Mackie against Deerfield-Milwaukee’s collateral.

¶ 10 Deerfield-Milwaukee filed a motion for summary judgment and motion for judgment of foreclosure and sale against defendants. Deerfield-Milwaukee also filed a statement of uncontested facts, pursuant to the Uniform Rules of Practice for the Circuit Court of Illinois, Rule 2.04 (19th Judicial Cir. Ct. R. 2.04 (May 1, 2010)), which incorporated an affidavit for judgment and an affidavit of attorney fees. The statement of uncontested facts contained the following relevant facts: (1) the maturity date contained in the first modification of mortgage was a scrivener’s error, and the parties intended that the maturity date should have read January 2, 2007; (2) the promissory note

contained a maturity date of June 2, 2009; (3) Economy executed a commercial guarantee of the debt to Deerfield-Milwaukee; (4) the promissory note matured on June 2, 2009, and to date, Kandyla failed to pay the outstanding balance due under the note and mortgage; (5) prior to the maturity date, and multiple times thereafter, Deerfield-Milwaukee sent notice to Kandyla and its counsel of Kandyla's default under the note and mortgage; (6) Kandyla's failure to pay the outstanding balance due on the maturity date of June 2, 2009, constituted a default under the terms of the note and mortgage; and (7) since the maturity date, and after receiving notice of Kandyla's default, Economy has failed to pay the outstanding balance due under the note and mortgage.

¶ 11 Deerfield-Milwaukee attached an affidavit from Earl Goldman, senior vice-president of the Bank, in which he averred that the first modification of mortgage entered into by the Bank and Kandyla contained a scrivener's error referencing a maturity date of the mortgage to January 2, 2027, and that the parties intended the modification to extend the maturity date until January 2, 2007. He further averred that the Bank provided notice to Kandyla and Economy, as well as their counsel, that the promissory note had matured on June 2, 2009, and that payment was past due.

¶ 12 Copies of the notices were attached to the affidavit, including a letter written by Connie Lavin, vice-president of the Bank, dated June 12, 2009, to defendants regarding Kandyla's loan for the property. She wrote:

“This correspondence is in regards to your matured loan for vacant property in Riverwoods. ***

It was my understanding based on our conversation several weeks back, that it was your intention to either sell the property or move it to another lender. Please provide me with details regarding this proposed action since your loan is past due and matured.

If you need to request an additional extension of maturity, Village Bank will need you to pay down the principal balance of the loan to our regulatory loan to value guideline of 80% or pledge additional collateral to make up for the shortfall. Based on the appraised value of \$1,450,000, this amount is approximately \$300,000. In addition, Village Bank will require you to fund an interest reserve for the maturity period you are requesting as well as make the past due interest payments and late fees of \$17,273.37.

Please contact me by June 26 to discuss your plans and make your loan current.”

¶ 13 On May 12, 2010, Deerfield-Milwaukee and Mackie filed a stipulation as to the priority of liens with respect to Mackie’s mechanic’s lien claim, as subordinate to Deerfield-Milwaukee’s mortgage.

¶ 14 On June 15, 2010, the trial court granted Deerfield-Milwaukee leave to file an amended affidavit for judgment of foreclosure and sale *instanter*. The trial court’s order provided that the statement of uncontested facts submitted by Deerfield-Milwaukee was amended on its face to incorporate the amended affidavit for judgment of foreclosure and sale, and the trial court withdrew the previous affidavit for judgment of foreclosure and sale.

¶ 15 Kandyla filed a response to the motion for summary judgment, which included counter-affidavits from Kandyla’s attorneys, but the response failed to deny the allegations of the complaint or to respond to the facts set forth in Deerfield-Milwaukee’s statement of uncontested facts. The only fact contested in the response was that neither in the June 12, 2009, correspondence from the Bank nor at any time thereafter did Deerfield-Milwaukee advise Kandyla that it was in default under the note or mortgage. Deerfield-Milwaukee’s reply in support of its motion for summary judgment

noted that defendants' failure to deny the allegations or to respond to the statement of uncontested facts deemed all material facts admitted, entitling Deerfield-Milwaukee to summary judgment.

¶ 16 The trial court granted Deerfield-Milwaukee's motion for summary judgment against defendants on August 19, 2010. Based thereon, the court entered a judgment of foreclosure and sale (an amended judgment of foreclosure and sale was entered *nunc pro tunc*). On October 18, 2010, the property was sold pursuant to the judgment.

¶ 17 Following the judicial sale of the property, Economy filed a response to Deerfield-Milwaukee's motion for *in personam* deficiency judgments. The response acknowledged the conscionability of the sale and its procedures but argued that Deerfield-Milwaukee was not entitled to a deficiency against Economy because Economy was discharged of his obligation under the guarantee. After consideration, the court rejected Economy's arguments on December 23, 2010. On that date, the court entered a deficiency judgment against defendants in the amount of \$210,577, and confirmed the sale.

¶ 18 Following the confirmation of the sale and entry of judgment of deficiency, defendants filed a posttrial motion requesting that the orders granting summary judgment, confirming the sale and distribution, and granting the deficiency judgments be vacated pursuant to section 2-1203 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1203 (West 2010)). Defendants argued that the judgment must be vacated because there existed genuine issues of material fact regarding the maturity date of the mortgage, whether Deerfield-Milwaukee waived the purported "default" date of June 2, 2009, and whether Deerfield-Milwaukee failed to allow time to cure within a reasonably practical period. The motion was supported by an affidavit from Economy and a second affidavit

from Drake James Leoris, Jr., defendants' counsel. Both affidavits contained facts not previously presented to the trial court.

¶ 19 Deerfield-Milwaukee responded that the loan documents were clear and unambiguous as to the maturity date of the loan, and none had a maturity date in 2027, and thus defendants failed to provide any reason for the court to go beyond the four corners of the documents. Deerfield-Milwaukee further argued that no "course of conduct" modified the loan documents because waivers were not given in writing and signed by the lender, as required by the mortgage; that defendants had many opportunities to cure the June 2, 2009, default; and that calculation of the judgment was correct. The trial court agreed with Deerfield-Milwaukee and denied defendants' posttrial motion.

¶ 20 Deerfield-Milwaukee then filed a motion to amend the deficiency judgment to include additional attorney fees and costs incurred since the submission of its bid to the selling agent, which included fees and costs subsequent to October 17, 2010. On April 28, 2011, the court entered an order approving a portion of the additional fee requested by Deerfield-Milwaukee, thereby increasing the total judgment to \$219, 914. Defendants timely appeal.

¶ 21 ANALYSIS

¶ 22 Summary Judgment

¶ 23 Defendants argue that genuine issues of material fact preclude summary judgment and require reversal of the trial court's orders confirming the judicial sale and granting the deficiency judgments in favor of Deerfield-Milwaukee. Defendants assert that the following issues were ignored by the trial court when it ruled on the motion for summary judgment: (1) whether the plain language of the loan documents extended the maturity date of the debt to January 2, 2027; (2) whether Deerfield-Milwaukee properly calculated the outstanding balance; (3) whether Deerfield-Milwaukee's conduct,

including its history of loan extensions, waived the maturity date of June 2, 2009; and (4) whether Deerfield-Milwaukee's June 12, 2009, correspondence and its pay-off letter waived the monetary default of failing to pay the balloon payment.

¶ 24 Deerfield-Milwaukee asserts that defendants' arguments ignore its own admissions and the clear and unambiguous language of the loan documents. Deerfield-Milwaukee further maintains that defendants' reliance on extrinsic evidence to support its arguments is prohibited because the documents and records are clear and unambiguous and also because defendants failed to timely present this evidence. Even assuming the court disregarded defendants' admissions and the clear and unambiguous language of the loan documents, Deerfield-Milwaukee maintains that the extrinsic evidence submitted by defendants does not create a genuine issue of fact about whether a debt existed, that the debt matured on June 2, 2009, that defendants received notice of the debt's maturity, and that defendant, without justification, failed to pay the debt owed.

¶ 25 On appeal from an award of summary judgment, the reviewing court applies a *de novo* standard of review. *General Casualty Insurance Company v. Lacey*, 199 Ill. 2d 281, 284 (2002). Accordingly, the reviewing court, viewing the evidence in the light most favorable to the nonmovant, must determine whether a genuine issue of material fact exists and whether the moving party is entitled to a judgment as a matter of law. *Majca v. Beekil*, 183 Ill. 2d 407, 416 (1998).

¶ 26 Circuit Court Rule 2.04(B)(3) requires the party responding to a motion for summary judgment to file a concise response to each statement of uncontested fact. When a responding party's statement fails to dispute the facts set forth in the moving party's statement in the manner dictated by the rule, those facts are deemed admitted for purposes of the motion. 19th Judicial Cir.

Ct. R. 2.04(B)(3) (May 1, 2010); see also *Cracco v. Vitran Express, Inc.*, 559 F. 3d 625, 632 (7th Cir. 2009) (applying federal Rule 56.1 (N.D. Ill. R. 56.1), which is virtually identical to Rule 2.04).

¶ 27 Local rules are to be given the same effect as statutes and the failure to comply with a local rule can be fatal to a case. *Premier Electrical Construction Co. v. American National Bank of Chicago*, 276 Ill. App. 3d 816, 834 (1995). Moreover, well-pleaded facts contained in affidavits in support of summary judgment motions that are not refuted are also deemed admitted. *Champaign National Bank v. Babcock*, 273 Ill. App. 3d 292, 299 (1995).

¶ 28 Along with its motion for summary judgment, Deerfield-Milwaukee filed a statement of uncontested facts pursuant to rule 2.04, and included an amended affidavit for judgment. As previously set forth, the uncontested statement of facts and the affidavit for judgment contained the following relevant facts: (1) the 2027 maturity date was a scrivener's error and the parties intended that the maturity date should have read January 2, 2007; (2) defendants did not pay the balance due under the note on or before the June 2, 2009, maturity date; (3) Deerfield-Milwaukee sent notice to defendants of the default; and (4) defendants failed to pay the outstanding balance of \$1,625,908 after receiving the notice of default.

¶ 29 Defendants' response to the motion for summary judgment contains its own statement of uncontested facts, which does not respond to the statements contained in Deerfield-Milwaukee's statement of uncontested facts, as required by local rule. In particular, defendants never contested the "undisputed fact" that the loan maturity date of 2027 was a scrivener's error or that the intent of the parties was for the loan to mature in 2007 to coincide with the promissory note. Given that the note itself contains a 2007 maturity date, we find it reasonable to conclude that the loan maturity date would coincide with the date set forth in the note. Defendants also do not contest any of the factual

allegations concerning the foreclosure, other than to argue that the June 12, 2009, letter from Lavin was not a notice of default.

¶ 30 Accordingly, by failing to respond to the crucial factual allegations set forth in Deerfield-Milwaukee's statement of uncontested facts and the affidavit for judgment, those facts must be deemed admitted. We further find that the trial court properly determined the June 12, 2009, letter served as a notice of default because it clearly states what defendants must do to secure an extension on the loan to make the loan current.

¶ 31 Defendants alleged in their response that the Bank's acceptance of a \$17,000 payment constituted a waiver of the default. However, Deerfield-Milwaukee's reply indicates that the June 12, 2009, letter sets the cure conditions. One of those conditions was the \$17,000 interest or late fee payment, but there were other conditions that defendants never cured.

¶ 32 Kandyla's attorneys, David Drenk and James Leoris, filed counter-affidavits in opposition to the summary judgment motion. However, nothing in those affidavits refutes the critical facts set forth in the statement of uncontested facts or the affidavit for judgment. Their affidavits do not refute that the loan matured and was past due, that Deerfield-Milwaukee required the default to be cured, that the default was not cured, or that Deerfield-Milwaukee's calculations of the outstanding balance were incorrect.

¶ 33 Defendants filed the supplemental affidavits of Leoris and Economy in support of defendants' motion to vacate, pursuant to section 2-1203 of the Code. These were submitted in an attempt to provide a basis to reverse the trial court's previous summary judgment ruling. On appeal, defendants repeatedly cite to the evidence set forth in these later affidavits of Leoris and Economy.

¶ 34 A section 2-1203 motion is intended to bring to the court's attention newly discovered evidence unavailable at the time of the original hearing, changes in existing law, or errors in the court's application of the law. 735 ILCS 5/2-1203 (West 2010); *Continental Casualty Co. v. Security Insurance Co. of Hartford*, 279 Ill. App. 3d 815, 821 (1996). Newly discovered evidence submitted must be of such conclusive or decisive character as to make it probable that a different judgment would be reached for the court to grant a motion to reconsider. *Sanborn v. Sanborn*, 78 Ill. App. 3d 146, 151 (1979).

¶ 35 The supplemental affidavits do not incorporate or reference newly discovered evidence regarding the "course of conduct" between the parties and the development of the property that was unavailable to defendants when the summary judgment motion was brought before the trial court. Instead, it is clear that the information contained in these affidavits was available to defendants when the summary judgment motion was pending. Thus, the trial court properly did not consider these affidavits in deciding the 2-1203 motion, and the evidence contained therein cannot be considered by this court to either supplement the record or refute the admissions made by defendants.

¶ 36 Given defendants' admissions relating to: (1) the execution of the mortgage; (2) the existence of a debt; (3) the maturity of the debt; and (4) the failure to cure, and given the unambiguous language of the June 12, 2009, letter, there were no bases for the trial court to find a material issue of fact, and the trial court's determination of summary judgment was appropriate. Accordingly, we need not address defendants' arguments that the loan documents on their face created an ambiguity as to the maturity date of the loan or the amount of the outstanding balance owed. Furthermore, defendants' argument regarding a waiver arising from a course of dealing is based on information and arguments made for the first time in their motion to reconsider. Because

defendants raised this argument for the first time in their motion to reconsider, they “waived” their right to raise this issue on appeal. See *Krueger v. Lewis*, 359 Ill. App. 3d 515, 520 (2005).

¶ 37 Interest Rate

¶ 38 Assuming *arguendo* that Deerfield-Milwaukee was entitled to a judgment of foreclosure and sale, defendants next contend that a genuine issue of material fact precluded the trial court’s award of interest at the default rate of 13% *per annum* as of June 2, 2009. Defendants argue that Deerfield-Milwaukee was not entitled to interest at that rate because Deerfield-Milwaukee waived the failure to timely pay off the loan by June 2, 2009, as a basis of defaulting defendants.

¶ 39 Defendants ignore the admissions they made, including the failure to refute any portion of the affidavit for judgment of foreclosure, which set forth the factual allegations regarding the true amount owed under the final note. Regardless, the plain language of the loan documents dispels the claim.

¶ 40 The final note provides that, upon default, including failure to pay upon final maturity, the interest rate on the note shall be increased by adding a 6% margin, and shall also apply to each succeeding interest rate charge that would have applied had there been no default. It further states that, in no event will the interest rate exceed the maximum interest rate limitations under applicable law. It is undisputed here that defendants did not make the balloon payment, which became due on June 2, 2009. Under the final note, the failure to make the balloon payment, with no further action by Deerfield-Milwaukee, modifies the interest rate from 7% to 13%. The loan documents did not require a notice and cure period before default interest could be applied. The express language of the final note provides that there is no cure period required when there is a monetary default.

¶ 41 Furthermore, defendants' reliance on the "Right to Cure" clause contained in the original mortgage does not create a genuine issue of fact. The terms of the cure provisions of the final note that are in variance with the mortgage control because the final note specifically addresses the default in question. The mortgage merely refers to generalities about all types of monetary default. When two contract provisions address the same subject matter, the more specific provision controls. *Grevas v. United States Fidelity & Guaranty Co.*, 152 Ill. 2d 407, 411 (1992). Thus, the trial court appropriately determined an event of default occurred on June 2, 2009, which permitted the application of default interest from that date forward.

¶ 42 Judgment Against Economy

¶ 43 It is undisputed that Economy executed a commercial guaranty as guarantor for Kandyla on the mortgage modification with the "2027" maturity date. Defendants argue that Economy's guarantee is discharged because altering the maturity date from 2027 to 2007 materially altered Economy's obligation under the mortgage without any notice to Economy. We disagree.

¶ 44 The common law permits a discharge of a guaranty if the risk of the guarantor is materially altered without the guarantor's knowledge. *Chicago Exhibitors Corp. v. Jeepers! of Illinois, Inc.*, 376 Ill. App. 3d 599, 607 (2007). Economy never contested the fact that the 2027 date was a scrivener's error or that the intent of the parties was to have the mortgage's maturity date coincide with the note's maturity date. Thus, the facts establish that Economy never believed or expected the maturity date to be 2027. We note further that the risk to Economy did not increase since he executed an extension of the note with a maturity date of January 2, 2007. He also executed subsequent extensions with maturity dates well before 2027.

¶ 45 Attorney Fees

¶ 46 Defendants next contend that the trial court abused its discretion by awarding Deerfield-Milwaukee additional attorney fees incurred after the judicial sale. Deerfield-Milwaukee filed a motion to amend the deficiency judgment to include additional fees after briefing was completed regarding both defendants' objection to the confirmation of the sale and its motion to reconsider. Deerfield-Milwaukee sought a total of \$10,062 in attorney fees, plus costs of \$294, which it incurred after the entry of the judgment of foreclosure and sale. Deerfield-Milwaukee did not seek these fees pursuant to the mortgage because the mortgage would have merged with the deed after the judicial sale. Rather, Deerfield-Milwaukee sought the fees under the terms of the promissory note and the guarantee, which provide as follows:

“ATTORNEYS’ FEES: EXPENSES. Lender may hire or pay someone else to help collect this Note if borrower does not pay. Borrower will pay Lender that amount. This includes, subject to any limits under applicable law, Lender’s attorneys’ fees and Lender’s legal expenses, whether or not there is a lawsuit, including attorneys’ fees, expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), and appeals. If not prohibited by applicable law, Borrower also will pay any court costs, in addition to all other sums provided by law.”

“ATTORNEYS’ FEES: EXPENSES. Guarantor agrees to pay upon demand all of Lender’s legal expenses incurred in connection with the enforcement of this Guaranty. Lender may hire or pay someone else to help enforce this Guaranty, and Guarantor shall pay the costs and expenses of such enforcement. Costs and expenses include Lender’s attorneys’ fees and legal expenses whether or not there is a lawsuit, including attorneys’ fees and legal expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic

stay or injunction), appeals, and any anticipated post-judgment collection services. Guarantor also shall pay all court costs and such additional fees as may be directed by the court.”

¶47 Defendants argue, as they did below, that under the above attorney fees provisions, Deerfield-Milwaukee only should be entitled to recover fees to “collect” the promissory note or “enforce” the guaranty and, since Deerfield-Milwaukee sought to foreclose on the mortgage and the mortgage merged with the deed after the judicial sale, and Deerfield-Milwaukee never alleged breach of the note or guaranty, the trial court should not have awarded these fees under the note and guarantee. Defendants further assert that the fees were actually incurred enforcing the mortgage foreclosure judgment, which is enforcement of an entirely new obligation different from the note, mortgage, or guaranty.

¶48 Considering language similar to that contained in the guaranty and note, this court in *McHenry Savings Bank v. Autoworks of Wauconda, Inc.*, 399 Ill. App. 3d 104, 112 (2010), found that the language employed by the note and the guaranty to be unambiguous and to fully entitle the plaintiff to recover its attorney fees incurred in all proceedings relating to post-judgment collecting on the note and enforcing the guaranty. Here, as in *McHenry Savings Bank*, the indebtedness that is guaranteed under the terms and conditions of the note and the guaranty also includes “all collection costs and legal expenses related thereto permitted by law, attorneys’ fees arising from any and all debts, liabilities and allegations of any nature and form.” Accordingly, the terms of the note and the guaranty specifically include all attorney fees incurred in collecting the debt, not just those involving the enforcement of the guaranty or collection on the note. See *Standard Bank and Trust Co. v. Callaghan*, 215 Ill. App. 3d 76, 83 (1991) (holding that provision in note was intended to

encompass all reasonable attorney fees resulting from foreclosure proceedings, including fees incurred in seeking deficiency judgment and for appeals).

¶ 49 Defendants also argue that the time entries were so commingled that the time spent could not be separately determined. The trial court rejected this argument, finding that all of the approved fees were incurred in connection with the enforcement of the guaranty and the note and, because the deficiency judgment had not become final, it had jurisdiction to increase it. We find no abuse of discretion.

¶ 50 Fees and Costs Incurred for Appeal

¶ 51 Because the language of the attorney fees and expenses provision in both the note and the guaranty clearly provide Deerfield-Milwaukee entitlement to its costs and legal expenses, we grant Deerfield-Milwaukee's request that the matter be remanded to the trial court solely for a determination of the reasonable attorney fees and costs incurred with the preparation and presentation of this appeal and an appropriate modification to the deficiency judgments against defendants.

¶ 52 CONCLUSION

¶ 53 For the reasons stated, we affirm the judgment of the circuit court of Lake County.

¶ 54 Affirmed and remanded with directions.