[Cite as *Natl. College Student Loan Trust 2004-1 v. Irizarry*, 2015-Ohio-1798.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

NATIONAL COLLEGIATE STUDENT LOAN TRUST 2004-1, PLAINTIFF-APPELLEE, VS. LOUIS IRIZARRY**,** ET AL**.,** DEFENDANTS-APPELLANTS.	)	CASE NO. 14 MA 50 OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 13CV1389

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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For Defendants-Appellants:

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JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: May 7, 2015

[Cite as *Natl. College Student Loan Trust 2004-1 v. Irizarry*, 2015-Ohio-1798.]
ROBB, J.

{¶1} Defendant-appellant Anis Algahmee ("Appellant") appeals the decision of the Mahoning County Common Pleas Court granting summary judgment in favor of plaintiff-appellee National Collegiate Student Loan Trust 2004-1 ("Appellee"). Appellant is the cosigner on a student loan. He states there is a genuine issue of material fact as to whether he was an accommodation party and argues that his liability could be discharged by the consent judgment entered with the student loan debtor or other statutory defenses. Appellee responds that Appellant failed to file an answer, failed to timely file a memorandum in opposition to summary judgment, failed to specify this issue in his untimely response to the summary judgment motion, failed to raise a genuine issue as to his status as an accommodation party, and failed to show that such status would provide any defenses. For the following reasons, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶2} On April 28, 2004, Appellant co-signed a $10,000 promissory note enabling Louis Irizarry ("the student") to obtain a student loan to attend Ohio State University. Both principal and interest were deferred so that payments would not begin until 2008. With a variable annual percentage rate beginning at 6.336%, the finance charge was disclosed as $12,168.80 over the life of the twenty-year loan for a total cost of $22,168.80.

{¶3} Payments were commenced, but no payments were made after July 2010. *See* Appellee's Summary Judgment Affidavit. On May 23, 2013, Appellee filed a complaint against the student and Appellant stating that they failed to pay the promissory note upon due demand. The note and its accompanying documents were attached to the complaint. The complaint listed the amount of $16,084.42 plus $1,584.68 in accrued interest.[1]

[1] According to the note, where the debtor selects the full deferral repayment option and no payments are required until the loan enters the repayment period, the unpaid accrued interest is added to the principal loan balance quarterly so that interest added to the principal is called "capitalized interest" and is treated as principal. *See* Promissory Note page 2 at D.3.

{¶4} The student filed an answer on July 31, 2013, after obtaining leave to do so. Appellant was served with the complaint on July 29, 2013. Although Appellant filed an August 30, 2013 motion seeking leave to file the answer until September 30, which the court granted on September 24, Appellant failed to file an answer. Appellant thereafter filed a motion to extend the time to respond to discovery requests, which was granted. Notice of compliance with discovery was filed. A status hearing was held in December 2013.

{¶5} On January 10, 2014, a consent judgment entry was approved by the trial court as to the student only. Upon agreement of the parties, judgment was granted in favor of Appellee against the student for $16,084.42, plus $1,584.68 in interest, plus the costs of the action. The entry stated that, except for the filing of a judgment lien, no execution shall be issued if the student pays $100 per month for 12 months at which time the account would be reviewed to ascertain if the amount could be increased. It was also stated that if the student failed to submit a payment on time, Appellee would have the right to commence execution proceedings without further order of the court.

{¶6} That same day, Appellee filed a motion for summary judgment against Appellant stating that there are no material facts to be litigated as Appellant admitted executing the note, the note had plain language as to his liability, and the damages were established by affidavit. An affidavit was attached explaining that a review of the business records and the attached note showed the amount due of $16,084.42, plus $1,584.68 in interest. In order to support Appellant's admission that he cosigned the April 28, 2004 student loan for the student, Appellee attached the answers to interrogatories and requests for admissions provided by Appellant in discovery.[2]

{¶7} The summary judgment motion was set for hearing on February 26, 2014. Appellee was granted permission to appear at the hearing via telephone. On

[2] One of Appellant's answers seemed to suggest that he believed the student received a subsequent loan increasing the amount due and asserted, "I only agreed to pay $10,000 and nothing else." *But see* prior footnote. Although unresponsive to the question, another answer stated there was no proof the maker was uncollectible.

the day of the scheduled hearing, Appellant filed a request for leave to respond to the summary judgment motion. The court granted leave, ruling that Appellant must respond by March 17, 2014. The summary judgment hearing was reset for April 2, 2014.

{¶8} On April 2, 2014, Appellant filed a half-page response, outlining the following statements: he received no student loans or money from the lender; he served only as a cosigner; the lender entered an accord and satisfaction with the student; and the lender has not shown the student is uncollectible. Appellant's affidavit was attached. He reiterated that he cosigned for the loan for the student, he received no money himself, and it has not been shown the student is uncollectible.

{¶9} On April 4, 2014, the trial court granted summary judgment against Appellant and entered judgment in favor of Appellee in the amount of $16,084.42, plus $1,584.68 in interest, post-judgment interest, and costs. Appellant filed a timely notice of appeal.

LANGUAGE OF THE NOTE

{¶10} The main terms of the promissory note were contained on four pages with the footer E0.03-.04.CSX1.20.1203. The note provided, "I promise to pay to your order, upon the terms and conditions of the Application/Promissory Note, all principal, interest and other charges set forth herein." It was explained that words such as "I" and "me" referred to "each and every Borrower and Cosigner, individually and collectively, who signed this Application/Promissory Note." (And, "you" referred to the lender.) As to any required future notices, the note provided that separate notices to the cosigner are not required unless by law.

{¶11} Under clause L.2., the note stated that the loan proceeds will be used only for educational expenses and that the cosigner will not receive any of the loan proceeds. At clause L.3., it was promised:

> *My responsibility for paying* the loan evidenced by this Application/ Promissory Note *is unaffected by the liability of any other person to me* or by your failure to notify me that a required payment has not been made. * * * You may delay, fail to exercise, or waive any of your rights

> on any occasion without losing your entitlement to exercise the right at any future time, or on any future occasion. *You will not be obligated to make any demand upon me, send me any notice, present this Application/Promissory Note to me for payment or make protest of non-payment to me before suing to collect* on this Application/Promissory Note if I am in default, and to the extent permitted by applicable law, *I hereby waive any right I might otherwise have to require such actions.* * * * " (Emphasis added.)

{¶12} Furthermore, clause L.9. expressed, "*It shall not be necessary for you to resort to or exhaust your remedies against any Borrower before calling upon any other Borrower to make repayment.*" (Emphasis added.) The signatories also specifically agreed in clause L.9:

> If this Application/Promissory Note is executed by more than one Borrower, any notice of communication between you and any of the Borrowers will be binding on all of the Borrowers. *Each Borrower intends to be treated as a principal on this Application/Promissory Note and not as a surety. To the extent the Borrower may be treated as a surety, such Borrower waives all notices to which such Borrower might otherwise be entitled by such law, and all suretyship defenses* that might be available to such Borrower (including, without limitation, contribution, subrogation and exoneration). * * * " (Emphasis added.)

{¶13} The signature page was signed at the bottom by the student and by Appellant as the cosigner after the statement: "By my signature, I certify that I read, understand and agree to the terms of and undertake the obligations set forth on all four (4) pages of this Application/Promissory Note E0.03-.04.CSX1.20.1203." This page also stated that the signatories were not required to fax their signatures, but if they chose to do so, then "I intend: * * * that this Application/Promissory Note will not be governed by Article 3 or Article 9 of the Uniform Commercial Code."

{¶14} The signature page additionally stated: "I, the Cosigner, have read the applicable cosigner notice(s)." Appellant signed this notice as the cosigner, which

also explained: "You agree to pay the debt identified below although you may not personally receive the education or money. *You may be sued for payment although the person who receives the education or money is able to pay.*" (Emphasis added.) The notice pointed out that liability may be higher than the loan amount as a result of interest, late charges, court costs, attorney's fees, and other charges in the note.

ASSIGNMENT OF ERROR

{¶15} Appellant's sole assignment of error provides:

"THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS THERE ARE MATERIAL ISSUES OF FACT IN DETERMINING ALGAHMEE'S STATUS AND CAPACITY ON THE PROMISSORY STUDENT LOAN NOTE."

{¶16} Appellant states that there is a genuine issue as to his capacity in signing the note. He notes that an accommodation party may sign the instrument as maker, drawer, acceptor, or indorser and is obligated to pay in the capacity in which he signed, citing R.C. 1303.59. At one point, Appellant suggests that he signed as an accommodation *indorser*, stating that such a signatory only agrees to pay upon dishonor and any necessary notice of dishonor and protest. He then states that at most, he signed as an accommodation *maker* and his liability has been discharged by the consent entry and other statutory defenses. For definitions, he cites two statutes that were amended years ago and no longer contain the content for which they are cited: R.C. 1303.49 and R.C. 1303.50(A).

{¶17} Appellant concludes that the matter should proceed to trial to determine the capacity in which he signed and to determine whether any of the defenses available in R.C. 1303.59 were present. He cites *Huron Cty. Banking Co., N.A. v. Knallay*, 22 Ohio App.3d 110, 489 N.E.2d 1049 (6th Dist.1989) for the proposition that if the capacity of a signatory is disputed, the matter is an issue of material fact precluding summary judgment.

{¶18} Appellee sets forth four main arguments in response. First, Appellant failed to file an answer and thereby admitted the pertinent facts while failing to set forth any of the affirmative defenses to which he now alludes. Second, Appellee states that Appellant's response to summary judgment did not specifically raise the

various issues presented on appeal; the response did not discuss accommodation parties or indorsers versus makers or cite the statutes now cited. Third, Appellee urges that Appellant's summary judgment response was untimely, and thus, it did not have to be (and may not have been) considered by the trial court.

{¶19} Lastly, Appellee points out that the plain language of the note attached to the complaint indicates the capacity and liability of the cosigner. For instance, the note makes clear that each signatory is liable as a principal debtor, rather than as a surety, and expresses that suretyship defenses are not available. The note explained that the lender need not exhaust its remedies against the student before proceeding against the cosigner.

{¶20} Appellee distinguishes the *Knallay* case cited by Appellant on multiple grounds. For example, the cosigner in *Knallay* raised the statutory defense of impaired collateral, which is a defense available to an accommodation party. Additionally, the note in that case did not provide the contractual language existing here. Appellee states that Appellant's arguments under Chapter 1303, which corresponds to Article 3 of the Uniform Commercial Code ("U.C.C."), would fail. Appellee urges that the statutory defenses referenced to by Appellant for an accommodation party do not factually apply here. Appellee also asserts that the parties agreed not to be bound by the U.C.C. and that common law states that both a co-maker and a surety are primarily liable. *See, e.g., Smith v. Leis*, 106 Ohio St.3d 309, 2005-Ohio-5125, 835 N.E.2d 5, ¶ 62.

LAW & ANALYSIS

{¶21} A complaint shall contain a short and plain statement of the claim of entitlement to relief and a demand for judgment for the relief to which the party claims entitlement. Civ.R. 8(A). Damages shall not be specified unless the claim is based upon an instrument required by Civ.R. 10 to be attached. *Id.* *See also* Civ.R. 10(D)(1) (when any claim or defense is founded on an account or other written instrument, a copy of the account or written instrument must be attached to the pleading). A defendant is required to respond to the complaint in short and plain terms setting forth a defense to each claim asserted in the complaint. Civ.R. 8(B).

This answer must be filed within twenty-eight days of service of the complaint unless certain defenses are raised by way of a pre-response Civ.R. 12(B) motion. Civ.R. 12(A).

{¶22} "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." Civ.R. 8(D). Moreover, the answer must affirmatively set forth: "*accord and satisfaction*, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, want of consideration for a negotiable instrument, fraud, illegality, injury by fellow servant, laches, license, *payment, release*, res judicata, statute of frauds, statute of limitations, *waiver, and any other matter constituting an avoidance or affirmative defense*." (Emphasis added.) Civ.R. 8(C). "In addition to the express inclusion of "release" in Civ.R. 8(C) as an affirmative defense, traditionally in Ohio acts of the creditor which result in the discharge of the surety have been required to be affirmatively pled as a defense." *Highland Savs. Assn. v. Milligan*, 4th Dist. No. 432 (Apr. 14, 1982), citing *Bank of Steubenville v. Leavitt*, 5 Ohio 207 (1831).

{¶23} Affirmative defenses are waived if not raised in the answer or in a Civ.R. 15 amendment to the answer (or in a pre-answer Civ.R. 12(B) motion where appropriate). *See Supportive Solutions, L.L.C. v. Electronic Classroom of Tomorrow*, 137 Ohio St.3d 23, 2013-Ohio-2410, 997 N.E.2d 490, ¶ 19.[3] Pursuant to Civ.R. 15(A), after the time for answering expires, the defendant may amend his answer only with consent of the opponent or with leave of court, which shall be freely given when justice so requires. Additionally, the court may grant a motion to serve a supplemental answer setting forth post-answer events, even if the original answer is defective in its statement of a defense. Civ.R. 15(E)

{¶24} Where a debtor argued that an affidavit attached to a summary judgment motion was not made on personal knowledge and damages were not

[3] Citing *State ex rel. Plain Dealer Pub. Co. v. Cleveland*, 75 Ohio St.3d 31, 33, 661 N.E.2d 187 (1996). *Compare Jim's Steak House, Inc. v. Cleveland*, 81 Ohio St.3d 18, 20, 688 N.E.2d 506 (1998) (three justices stating Civ.R. 12(B) cannot be used for affirmative defenses not listed therein, with others concurring in judgment only). Such Civ.R. 12(B) matters are not at issue here.

properly proven, the Twelfth District refused to address these matters as the debtor never filed an answer. It was stated that the allegations were admitted and summary judgment was proper for the lender in the amount set forth in complaint as due on the note. *See Wells Fargo Bank, N.A. v. Reaves*, 12th Dist. No. CA2014-01-015, 2014-Ohio-3556. It was explained that the copy of the instrument attached to the complaint was part of the complaint that was admitted. *Id.* at ¶ 13, citing Civ.R. 10(C) ("A copy of any written instrument attached to a pleading is part of the pleading for all purposes.").

{¶25} The court stated that although Civ.R. 8(D) excludes damages from the averments considered admitted by the lack of a denial in an answer, "damages for the purpose of Civ.R. 8(D) do not include an amount alleged in a complaint to be due and unpaid on a promissory note." *Id.* at ¶ 15, citing *e.g. Farmers & Merchants State & Savs. Bank v. Raymond G. Barr Ent., Inc.,* 6 Ohio App.3d 43, 452 N.E.2d 521 (4th Dist.1982), citing *Dallas v. Ferneau*, 25 Ohio St. 635, 638 (1874) (amount due on account is not a matter of value or damage). The Twelfth District concluded in *Reaves* that the amount due on the note included in the complaint was admitted as true when the defendants failed to file an answer. *Id.* at ¶ 16.

{¶26} Here, Appellant failed to file an answer. He was served on July 29, 2013. He sought leave to file an answer on August 30, 2013. Leave was granted, but Appellant filed no answer. Appellee proceeded under the summary judgment rule. After Appellant learned of a consent judgment with the student debtor, he did not seek leave to answer based upon new occurrences. Instead, he sought an extension of time to respond to summary judgment.

{¶27} In that response, he raised the affirmative defense of accord and satisfaction. However, the consent judgment entry was not an accord and satisfaction of the student loan. *See Barmar Ents., L.L.C. v. Benco Industries, Inc.*, 8th Dist. No. 91662, 2009-Ohio-366, ¶ 22 (accord and satisfaction is by its definition the acceptance of a decreased amount in order to avoid the risk of nonpayment and avoid a lawsuit); R.C. 1303.40(A) (instrument with conspicuous statement is tendered as full satisfaction of claim that was subject to bona fide dispute); Black's Law

Dictionary (9th Ed.2009) ("An agreement to substitute for an existing debt some alternative form of discharging that debt, coupled with the actual discharge of the debt by the substituted performance.").

{¶28} In the case at bar, the existing debt was not discharged. Rather, a judgment was entered against the student for the specific amount sought, plus costs. Judgment was entered due to the student's agreement to consent to judgment rather than proceed through motion practice. The entry contained an agreement to stay execution after the filing of the judgment lien based upon the student's monthly payments toward the judgment. The judgment remained unpaid at the time. Additionally, as will be discussed further infra, even a discharge of the student would not discharge Appellant.

{¶29} Appellant's response mentioned that he received no loan proceeds, he only served as cosigner, and the borrower was not shown to be uncollectible. As will also be discussed below, these facts are not material to the specific contractual language existing in this case or to the statutory sections cited by Appellant on appeal (even when we follow the cited sections to the amended, renumbered statutes).

{¶30} But first, we review Appellee's observation that Appellant's response to summary judgment was untimely filed. Upon granting leave to file a response to summary judgment, the court expressly gave Appellant until March 17, 2014 to file a response and set the matter for an April 2, 2014 hearing. Where the court provides a specific deadline for a response, further leave must be sought to surpass that deadline. *See Hooten v. Safe Auto Ins. Co.*, 100 Ohio St.3d 8, 2003-Ohio-4829, 795 N.E.2d 648, ¶ 35 (in fact, the better practice is for the trial court to explicitly set cut-off dates for submission of materials on the motion for summary judgment and to set a date for any hearing). Moreover, even in a case where no specific cut-off dates were ordered and only a hearing date for the summary judgment motion is provided, Civ.R. 56(C) states: "The adverse party, prior to the day of hearing, may serve and file opposing affidavits." Either way, Appellant's half-page response with affidavit filed on the day of the scheduled hearing was untimely.

{¶31} Appellee alternatively asserts that Appellant's summary judgment response did not express various arguments he now makes on appeal: he was an accommodation indorser or "at most" an accommodation maker; the U.C.C. supports his claims; notice of dishonor and protest were required; or his liability was discharged by other statutory defenses. It is urged that these matters were waived and cannot be raised for the first time on appeal. "Even though this is a de novo review of a summary judgment decision, there is no 'second chance to raise arguments' that should have been raised before the trial court." *American Express Centurian Bank v. Banaie*, 7th Dist. No. 10MA9, 2010-Ohio-6503, ¶ 24 (and failure to raise an affirmative defense in an answer waives it as well as the failure to mention the matter in summary judgment practice), citing *Hamper v. Suburban Umpires Assn., Inc*., 8th Dist. No. 92505, 2009-Ohio-5376, ¶ 2, citing *Perlmutter v. People's Jewelry Co.*, 6th Dist. No L-04-1271, 2005-Ohio-5031 ¶ 29.

{¶32} Appellant believes that his response (stating that he did not receive loan proceeds, he was merely a co-signer, there was an accord and satisfaction, and there was no showing the borrower was uncollectible) essentially encompassed the arguments he makes on appeal. Appellant refers to statutory defenses and suggests that the post-judgment pre-execution payment schedule would act to release and discharge an accommodation party. Yet, he never raised the affirmative defense of release in an answer. He did not file an answer at all.

{¶33} In any case, Appellant's arguments are without effect. A party signs an instrument as an accommodation party where he signs for the purpose of incurring liability without being a direct beneficiary of the value, which is given to benefit another when the instrument is issued. R.C. 1303.59(A). An accommodation party may sign as maker or indorser (or drawer or acceptor) and is obliged to pay in the capacity in which he signs, subject to division (D). R.C. 1303.59(B). *See also* R.C. 1303.14(A) (parties with the same liability as makers or anomalous indorsers are jointly and severally liable in the capacity in which they sign except as otherwise provided in the instrument); R.C. 1303.14(C) (the discharge of one party with joint and several liability by a person entitled to enforce does not affect the right of one

party to receive contribution from the party discharged); R.C. 1304.25(D) (anomalous indorsement does not affect the manner in which the instrument may be negotiated {as opposed to special or blank indorsement} and is normally made by an accommodation party).

{¶34} The referred to division (D) provides that if the signature is accompanied by words unambiguously indicating that the signer is guaranteeing collection rather than payment, then the signer is obligated to pay only if one of the following applies: (1) *execution of judgment against the other party has been returned unsatisfied*; (2) the other is insolvent or in an insolvency proceeding; (3) the other cannot be served; or (4) it is otherwise apparent that payment cannot be obtained from the other. R.C. 1303.59(D). This section does not assist Appellant because the note does not unambiguously state that he was only guaranteeing collection. In fact, it clearly provides that he is primarily liable without regard to the student's ability to pay or the exhaustion of remedies against the student.

{¶35} Appellant makes a one-sentence suggestion that he is an accommodation indorser rather than an accommodation maker (or a co-maker). A signature, other than that of a signer as maker (or drawer or acceptor) that is made on an instrument for the purpose of incurring indorser's liability, is an indorsement. R.C. 1303.24(A)(1). A signature is an indorsement unless the words indicate unambiguously that the signature was made for another purpose. R.C 1303.24(A)(2). The benefits to being an indorser discussed by Appellant deal with notice of dishonor or protest.

{¶36} However, even assuming arguendo Appellant's signature was that of an indorser and the Chapter cited by Appellant applies here, notice of dishonor is not required under this Chapter *if the terms of the instrument provide that such is not required or if such was waived*. R.C. 1303.64(B) (and waiver of presentment is waiver of notice of dishonor). *See also* R.C. 1303.64(A) (presentment for payment is excused if the terms of the instrument provide that presentment is not necessary to enforce the obligation of indorser). Moreover, as to the obligation of an indorser, it is

only if notice of dishonor is required by R.C. 1303.63 (which can be excused by R.C. 1303.64) that the liability of the indorser can be discharged. R.C. 1303.55(C).

{¶37} As aforementioned, the note plainly states that Appellant's responsibility for paying the loan is unaffected by the failure to notify him when a required payment is missed, that a separate notice to the cosigner is not required, and that notice to one is notice to all borrowers. It further specifies: "You will not be obligated to make any demand upon me, send me any notice, present this Application/Promissory Note to me for payment or make protest of non-payment to me before suing to collect on this Application/Promissory Note if I am in default, and to the extent permitted by applicable law, I hereby waive any right I might otherwise have to require such actions." Thus, the benefits to being an indorser that Appellant mentions are inapplicable.

{¶38} In any event, the language of the note eliminated any factual dispute as to Appellant's argument that the cosigner is not principally liable because he received no loan proceeds. Appellant acknowledged that as the co-signer he received no proceeds while promising to pay the debt *on the terms in the note*. The note reiterated that the promise was made by "each and every Borrower and Cosigner, individually and collectively." It was also explicitly agreed that Appellant's responsibility for paying the loan was unaffected by the liability of any person to him.

{¶39} Appellant additionally agreed that Appellee was not required to resort to remedies against the student before calling upon Appellant to make repayment. Exhaustion of remedies against the student was expressly not required. Appellant contracted "to be treated as a principal on this Application/Promissory Note and not as a surety." Relevant to Appellant's argument, exoneration has been defined as "[t]he equitable right of a surety — confirmed by statute in many states — to proceed to compel the principal debtor to satisfy the obligation, as when, even though the surety would have a right of reimbursement, it would be inequitable for the surety to be compelled to perform if the principal debtor can satisfy the obligation." *Black's Law Dictionary* (9th Ed.2009). Appellant waived all notices and all suretyship defenses, *including exoneration*.

{¶40} Furthermore, Appellant signed a notice to the cosigner which provided: "You may be sued for payment although the person who receives the education or money is able to pay." There is no allegation that these clauses are unclear. Rather, these clauses are merely ignored in Appellant's construction of his response below and brief on appeal.

{¶41} Lastly and in addition, we turn to R.C. 1303.70, entitled, "Discharge of indorsers and accommodation parties," which would include an accommodation maker and an accommodation indorser. Initially, the statute provides that *the discharge of an obligation of one party to pay an instrument* under R.C. 1303.69 *does not discharge the obligation of the indorser or accommodation party having the right of recourse against the discharged party*. R.C. 1303.70(B), citing R.C. 1303.69(A)(2) (a person entitled to enforce an instrument may discharge the obligation of a party to pay the instrument by agreeing not to sue or otherwise renouncing rights against the party by a signed writing). Thus, the holder can discharge the student without discharging the cosigner.

{¶42} The statute then provides some defenses. For instance, an extension of the due date of the obligation can discharge the indorser or accommodation party with a right of recourse against the party whose obligation is extended *but only to the extent that the indorser or accommodation party proves that the extension caused him loss with respect to the right of recourse*. R.C. 1303.70(C). If there is some other material modification, the indorser or accommodation party can be discharged to the extent the modification causes him loss with respect to the right of recourse. R.C 1303.70(D). The final defenses deal with impairment of the value of collateral. R.C. 1303.70(E)-(G).

{¶43} Notably, this section does not allow discharge if the instrument or a separate agreement provides for waiver of discharge, which can be done with "general language indicating that the parties waive defenses based on suretyship * * *." R.C. 1303.70(I). As aforestated, this note has such language. Regardless, none of these defenses are alleged to apply here: there is no extension or material

modification of the note that is alleged to have caused loss with respect to the right of recourse, and there was no collateral involved.

{¶44} Without such circumstances, the status of the maker as an accommodation party, and even the status as an indorser versus a maker, becomes irrelevant to those defenses. *See Star Bank N.A. v. Jackson*, 1st Dist. No. C-000242 (Dec. 1, 2000) ("even if Jackson is an accommodation party, as an accommodation maker, he is still obligated to pay the note according to its terms. He has only a few defenses against the holder, such as impairment of collateral, none of which he raised to the trial court."). *Compare Huron Cty. Banking Co. N.A. v. Knallay*, 22 Ohio App.3d 110, 489 N.E.2d 1049 (6th Dist.1984) (*where note lacked plain language on status*, there was question of fact as to whether cosigner was principal maker or accommodation maker, *because* cosigner set forth defense of impairment of collateral). As such, the defenses in R.C. 1303.70 have not been factually alleged to exist here, and the remainder of the statute does not support Appellant's position.

CONCLUSION

{¶45} In conclusion, Appellant failed to file an answer and thus failed to properly set forth his affirmative defenses. He also failed to file a timely response to summary judgment, and the response he did file was an outline without specifics. Even if Appellant were an indorser, the benefits of said status mentioned by Appellant (such as notice of dishonor) were waived. Appellant did not allege the applicability of the defenses available to both indorsers and accommodation makers, i.e. impairment of collateral and extension or other material modification affecting the right of recourse were not demonstrated to be pertinent.

{¶46} Appellant is primarily liable under the plain language of the note. The note explicitly states that the holder need not resort to or exhaust its remedies against one borrower before calling upon the other to pay. The note contains a waiver of all suretyship defenses and provides that each borrower is liable as "a principal * * * and not as a surety." Finally, the signed notice to the cosigner provides, "You may be sued for payment although the person who receives the education or money is able to pay." Appellant was not guaranteeing mere collection.

Consequently, Appellee was not required to produce an unsatisfied execution of judgment under R.C. 1303.59(D)(1) before recovering against Appellant.

{¶47} For all of the foregoing reasons, Appellant's assignment of error is overruled. The trial court's judgment is hereby affirmed.

Donofrio, P.J., concurs.

DeGenaro, J., concurs.