SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2106-19

FRANK FALOTICO,

Plaintiff-Appellant,

v.

SYED KHUSRO PARVEZ,
TARIQ S. PARVEZ,
FAIRUZ SYED PARVEZ, and
SYED REFRIGERATION
COMPANY, INC.,

Defendants-Respondents.

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Argued October 25, 2021 – Decided February 10, 2022

Before Judges Sabatino and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Docket No. L-0744-18.

Daniel W. Weininger argued the cause for appellant (Lento Law Group, PC, attorneys; Daniel W. Weininger, on the briefs).

Thomas M. Keeley-Cain argued the cause for respondents.

PER CURIAM

In this appeal, plaintiff Frank Falotico challenges a January 13, 2020 Law Division order dismissing his breach of contract claims as barred by the statute of limitations. On appeal, he argues that the court improperly dismissed those claims because defendants' prior discovery defaults resulted in an order dismissing their answer and all affirmative defenses with prejudice. Plaintiff also contends defendants otherwise waived their statute of limitations defense by not pleading it specifically and not asserting it until the matter proceeded to a proof hearing. We disagree with plaintiff and affirm the court's decision to dismiss these indisputably stale claims.

I.

Plaintiff rented a building in Philadelphia in 2000 to operate his woodworking business. He soon became acquainted with defendants who owned a storage facility for their refrigeration business next door. Between 2007 and 2008, plaintiff extended a series of loans to defendant Syed Parvez totaling $111,250, which he failed to repay.

On July 2, 2018, plaintiff filed a seven-count complaint against defendants for failing to repay the loans, in which he alleged defendants breached numerous oral contracts, engaged in a series of bad faith commitments, committed fraud

in the inducement, and were unjustly enriched. On November 19, 2018, plaintiff filed an amended complaint which provided additional information and a timeline identifying when he loaned defendants the $111,250.

In that amended pleading, plaintiff specifically alleged that in August 2016, he met with Syed's[1] son, defendant Tariq Parvez, to discuss the unpaid loans. He contended that the two subsequently agreed and compromised to settle the outstanding debts, with plaintiff agreeing to accept $100,000 in repayment "as long as the funds were received in a short time." Plaintiff maintained that Tariq agreed to remit the funds within thirty to sixty days, and plaintiff therefore compiled a "detailed list" of the debts.

Plaintiff also alleged he opened an account at TD Bank in order for the Parvez family to deposit the settlement funds. "A few weeks" later, plaintiff stated he followed up regarding the unpaid $100,000 settlement, but was met with requests from the Parvez family to stop contacting them.

On January 15, 2019, defendants filed an answer which asserted twenty-three affirmative defenses, including the statute of limitations. On January 28, 2019, plaintiff filed a motion seeking an order "dismissing [d]efendants[']

[1] Because defendants Syed and Tariq Parvez share a surname, we refer to them by their first names for purposes of clarity, intending no disrespect.

[a]nswer with [s]eparate [d]efenses" for their failure to respond to his discovery requests. At the hearing on plaintiff's motion, the parties agreed to extend the date for defendants to respond to the outstanding discovery and in light of that agreement, on February 15, 2019, the court entered an order denying plaintiff's motion without prejudice.

On February 25, 2019, the court entered a separate order that extended discovery and ordered defendants to "respond to plaintiff's notice to produce and interrogatories no later than March 3, 2019," and "serve discovery no later than March 4, 2019." Defendants again failed to respond to plaintiff's discovery requests in accordance with the court's order.

Plaintiff accordingly filed a motion seeking an order dismissing defendants' answer under Rule 4:23-5(a)(1), which the court granted on April 12, 2019. Two months later, on June 12, 2019, and having still not received any discovery responses from defendants, plaintiff moved to dismiss their answer with prejudice pursuant to Rules 1:13-7 or 4:43-2, which the court granted on August 2, 2019. The court based its decision to grant plaintiff's application on Rule 4:23-5(a)(2), however, despite plaintiff's reliance on the aforementioned Rules.

In support of its decision, the court found that defendants remained "delinquent in providing discovery," and that they were "properly served in compliance with the [Rules]." Plaintiff moved for an entry of default against defendants that same day.

On August 28, 2019, defendants filed a motion for reconsideration of the court's August 2, 2019 order and attached Syed Parvez's, Syed Refrigeration's, and Tariq Parvez's answers to plaintiff's document demands. In those answers, Syed largely denied having any documents responsive to the plaintiff's discovery demands, except for certain bank records related to his son, Tariq, from 2013. Syed further noted he would supply records dating back to 2007 once he received them. Tariq specifically denied ever "execut[ing] any contracts with the [p]laintiff" and denied he was in possession of documents or correspondence responsive to plaintiff's discovery requests.

On October 23, 2019, the court denied defendants' motion because it was untimely. In doing so, the court primarily, and incorrectly, relied upon Rule 4:49-2, which applies to final judgments, despite the interlocutory nature of the August 2, 2019 order.[2] Specifically, the court stated that:

> Defendants did not file their [m]otion for [r]econsideration until [August 28, 2019]. That is

[2] Defendants did not file a cross-appeal challenging any of the court's orders.

> [twenty-six] days after the order was served. The [c]ourt finds that this filing was outside the time period allowed by the court rules and no time extension can be granted.

The court also rejected defendants' reliance on Rule 4:50-1 and denied plaintiff's request for additional sanctions.

On December 13, 2019, the court held a proof hearing to establish defendants' liability. Because defendants were in default, the court precluded them from presenting any affirmative proofs, allowing them only to cross-examine plaintiff and his friend, Nick Yiambalis. Defendants did not appear.

Plaintiff testified largely consistent with his amended pleadings and detailed the amount and dates of the twelve loans he made to Syed, confirming that the last loan occurred in June 2008. He stated the payments were "roughly about a month apart from each other," and defendant agreed to repay the loans "within a week, two weeks, or thereabout[s]." He also stated that Syed signed a promissory note only with respect to the initial $10,000 loan.

Plaintiff further testified that defendant paid him back $250 in January 2008, but defendant promised to "sell something from his company and then turn the money back over to [plaintiff]" to pay off the remaining balance. Other than this $250, however, plaintiff stated he never received any other payment from defendants.

Plaintiff testified that he calculated the total amount loaned to be "in excess of $120,000 plus . . . interest" and that "the agreements were on a monthly basis." Plaintiff calculated approximately $20,000 due in interest but stopped calculating interest after "so many months had transpired."

Significantly, plaintiff also testified regarding the 2016 meeting with Tariq, where Tariq agreed on Syed's behalf to settle the outstanding debts for $100,000. At no point in the hearing did plaintiff testify that he and Tariq, or Syed, executed a written agreement to memorialize the 2016 compromise or the various 2007 and 2008 loans, other than the promissory note on the first loan. Rather, plaintiff testified he was confident he would be repaid because the oral agreements were made "man to man," and based on what he understood to be Syed's religious beliefs, that "shaking a person's hand" and "verbally speak[ing] to them" was enough to ensure defendant's promise to repay him would be honored. Yiambalis testified he loaned over $35,000 to plaintiff so that plaintiff could then loan the money to Syed.

At the close of all testimony, defendants argued that the statute of limitations barred plaintiff's action. In response, the court noted the "statute of limitations [issue was] a serious concern," and instructed the parties to provide the court with supplemental briefs on the issue, which both parties submitted.

In his supplemental brief, plaintiff argued that defendants waived their statute of limitations defense because their affirmative defenses were stricken with prejudice and they were precluded from asserting the defense at the conclusion of the proof hearing. Plaintiff also requested the court award sanctions against defendants' counsel.

In response, defendants argued that the testimony presented at the proof hearing established that plaintiff's claims for breach of contract were filed well outside the six-year time limit under N.J.S.A. 2A:14-1. Defendants further contended that the proof hearing "failed to establish any additional terms, agreed to by any defendant, for the repayment of the[] alleged loans or investments" and plaintiff did not establish any evidence that the agreements were reduced to writing in 2008 or 2016.

On January 13, 2020, after considering the testimony at the proof hearing and the parties' supplemental submissions, the court dismissed plaintiff's complaint with prejudice after concluding his breach of contract claims were barred by the statute of limitations. In the court's accompanying written statement of reasons, it made factual findings regarding the terms of the loans and the breach of those contracts based on the credible testimony of plaintiff and Yiambalis. The court found twelve instances in which plaintiff loaned or

invested money to defendant from September 2007 to June 2008, and the only repayment that occurred was the $250 paid in January 2008. The court further found that plaintiff and defendant executed a written agreement only on the first loan, but that agreement was not produced at trial. Otherwise, the agreements were made orally.

In addition, the court further concluded that "[p]laintiff [had] shown that he loaned/invested [monies] to Syed Parvez" and that the total amount of those loans or investments was $111,250. The court determined, however, that plaintiff had not established a claim against any other defendant because "there was no evidence presented at the proof hearing that would indicate [that those] [d]efendants . . . ever entered into any agreements with [p]laintiff."

With respect to the statute of limitations, the court found that N.J.S.A. 2A:14-1 requires a contractual claim or liability, express or implied, to be filed within six years from the date the cause of action accrues. The court then determined that "the latest date of accrual [of the cause of action was] June 14, 2008, meaning the statute of limitations is, at the latest, June 14, 2014" and plaintiff filed his complaint four years after this date.

The court also rejected plaintiff's argument that Tariq's "acknowledgement and promise to repay the debt . . . remove[d] the statute of

limitations bar." Although the court found that plaintiff did meet with Tariq in August 2016, and that he "orally told [p]laintiff that he would be paid back," the court nevertheless rejected plaintiff's argument under N.J.S.A. 2A:14-24. The court noted that the statute expressly provides that "'no acknowledgement or promise by words only' . . . shall suffice to take any case out of the statute of limitations" absent a writing. Because plaintiff failed to provide any written agreement, the court concluded that the "statute of limitations bar [was] not lifted."

The court also rejected plaintiff's argument that defendants waived their statute of limitations defense because their "answer was stricken with prejudice." The court found that there was nothing in the "record that explained [p]laintiff's significant delay in filing this matter" nor anything "to suggest that [d]efendants caused, in any way, the delay in filing [the complaint.]" The court further reasoned that no "equitable principles appl[ied] . . . to estop defendants from raising the statute of limitations as an affirmative defense."

The court also found that the statute of limitations was not "automatically waived" because defendants failed to raise the defense prior to the proof hearing. The court noted that the statute of limitations was raised in defendants' answer

and "during closing arguments at the proof hearing," and concluded plaintiff provided no persuasive authority to support a contrary result.

The court specifically rejected plaintiff's reliance on Kolczycki v. City of East Orange, 317 N.J. Super. 505 (App. Div. 1999), in support of his position that "the dismissal with prejudice bars the [c]ourt's consideration of the statute of limitations." In this regard, the court referenced a statement in Kolczycki, quoting from Johnson v. Johnson, 92 N.J. Super. 457, 465 (App. Div. 1966), that "even though a defendant's answer is stricken for failure to make discovery, the plaintiff may be, as here, precluded from recovery where the proof which he offers in support of his own case reveals a legal defense to his claim." The court further likened the circumstances to those in Prickett v. Allard, 126 N.J. Super. 438 (App. Div. 1974), aff'd o.b., 66 N.J. 6 (1974). In that case, a twenty-year time-bar in a tax foreclosure action appeared on the face of the complaint and we concluded defendants' statute of limitations defense was not waived by their failure to assert it.

This appeal followed, in which plaintiff raises two primary arguments, as detailed below, and to which we accordingly limit our discussion.

II.

Plaintiff first argues that the court erred in dismissing his complaint based on the statute of limitations because defendants' answer and affirmative defenses were stricken with prejudice for failing to respond to his discovery requests. We are unpersuaded by this argument.

We first address the standards of review that guide our analysis. The court's determination of the legal consequences of established facts is not due any special deference from us. See Manalapan Realty, L.P. v. Twp. Committee of Manalapan, 140 N.J. 366, 378 (1995). "[Q]uestions of fact as to when a cause of action is deemed to accrue for purposes of applying a statute of limitations are ordinarily resolved by a judge and not a jury." Berlen v. Consol. Rail Corp., 291 N.J. Super. 542, 555 (App. Div. 1996); see also Lopez v. Swyer, 62 N.J. 267, 272 (1973). As such, "[w]hether a cause of action is barred by a statute of limitations is a question of law, also reviewed de novo." Catena v. Raytheon Co., 447 N.J. Super. 43, 52, (App. Div. 2016); see also Save Camden Pub. Sch. v. Camden City Bd. of Educ., 454 N.J. Super. 478, 487 (App. Div. 2018).

Here, plaintiff does not challenge the court's factual findings that his breach of contract claims are time-barred. We have nevertheless reviewed the record from the proof hearing, and we are satisfied, for the reasons explained

infra, that plaintiff's breach of contract claims were filed outside the six-year period prescribed by N.J.S.A. 2A:14-1. We also note that plaintiff has neither briefed, nor challenged, on procedural or substantive grounds, the court's dismissal of its remaining claims and we accordingly do not address any issue related to the dismissal of those causes of actions.

"It is axiomatic that where, following the entry of a default, a plaintiff seeks unliquidated damages, judgment should not ordinarily be entered without a proof hearing . . . ." Chakravarti v. Pegasus Consulting Group, Inc., 393 N.J. Super. 203, 210 (App. Div. 2007) (citations omitted). At such a hearing, it is "strictly a discretionary matter for [the] court to determine and delineate the extent of defendant's participation." Scott v. Scott, 190 N.J. Super. 189, 196 (Ch. Div. 1983) (citations omitted).

The court is also vested with discretion to require a plaintiff seeking default judgment to prove liability. R. 4:43–2(b); Douglas v. Harris, 35 N.J. 270 (1961); Heimbach v. Mueller, 229 N.J. Super. 17, 20-21 (1988). The court, however, generally should require only that the plaintiff establish a prima facie case. Kolczycki, 317 N.J .Super. at 514; Heimbach, 229 N.J. Super. at 20; see also Pressler & Verniero, Current N.J. Court Rules, cmt. 2.2.2 on R. 4:43–2 (2022) (stating that "unless there is intervening consideration of public policy

or other requirement of fundamental justice, the judge should ordinarily apply to plaintiff's proofs the prima facie case standard of [Rule] 4:37–2(b) and [Rule] 4:40–1, thus not weighing evidence or finding facts but only determining bare sufficiency").

A court, however, can refuse to enter judgment against a defaulting defendant if "some necessary element of plaintiff's prima facie case was missing or . . . plaintiff's claim was barred by some rule of law whose applicability was evident either from the pleadings or from the proofs presented." Heimbach, 229 N.J. Super. at 23–24. We view the court's decision in which it effectively vacated its earlier order suppressing defendants' answer so that it could evaluate the issue on the merits as a discretionary determination and apply an abuse of discretion standard. Flagg v. Essex County Prosecutor, 171 N.J. 561, 571 (2002).

We are satisfied, upon a balancing of the equities, that the court did not abuse its considerable discretion when considering defendants' statute of limitations defense, despite its earlier order that suppressed defendants' answer. Here, plaintiff filed his complaint on July 2, 2018, approximately ten years after the breach of the final June 2008 oral agreement, and four years after the six-year statute of limitations expired in June 2014. See N.J.S.A. 2A:14-1 ("Every

action at law . . . for recovery upon a contractual claim or liability, express or implied . . . shall be commenced within [six] years next after the cause of any such action shall have accrued.").

In his amended complaint, plaintiff acknowledged that the last loan was extended to defendants in June 2008. As confirmed at the proof hearing, plaintiff did not receive payment as expected within a month. As such, we are satisfied that plaintiff's own proofs "reveal[] a legal defense to his claim" and the trial court was within its rights to dismiss the complaint on the basis that it was brought four years too late and contrary to N.J.S.A. 2A:14-1. Heimbach, 229 N.J. at 23-24.

Further, plaintiff provided no competent proofs to establish his untimely claims warranted resuscitation under N.J.S.A. 2A:14-24. In fact, the proofs established the precise opposite.

N.J.S.A. 2A:14–24 provides

> In actions at law grounded on any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, so as to take any case out of the operation of [the applicable statute of limitations], or to deprive any person of the benefit thereof, unless such acknowledgment or promise shall be made or continued by or in some writing to be signed by the party chargeable thereby.

"In addition to the requirement of a writing[,] it is also necessary that the acknowledgment relied upon be such as in its entirety fairly supports an implication of a promise to pay the debt immediately or on demand." Denville Amusement Co. v. Fogelson, 84 N.J. Super. 164, 170 (App. Div. 1964). Thus, in order "[t]o constitute a promise to pay sufficient to remove the bar of the statute of limitations the promise [also] must be unconditional and unqualified." Evers v. Jacobsen, 129 N.J.L. 89, 91 (E. & A. 1942).

Notably, plaintiff limits his argument regarding the effect of his 2016 conversation with Tariq as evidential only to establish he satisfied the requirements of N.J.S.A. 2A:14-24, thereby placing the 2007-2008 agreements within the six-year statutory period for breach of contract claims. However, in his complaint, plaintiff alleged the existence of only oral agreements between the parties, except for the signed promissory note as to the first loan in 2007. Plaintiff alleged that when he requested Syed "sign and record a note recognizing all his outstanding debt," Syed "refused, saying that as per his Muslim religion . . . his word of religion was more binding [than] a legal contract." Further, plaintiff testified that the agreements he made with Syed were "man to man" because as he understood Syed's religious beliefs, "shaking a person's hand" and "verbally speak[ing] to them" was enough to ensure the

promise was kept. At no point did plaintiff allege an "unconditional and unqualified" writing to support the "implication of a promise to pay the debt immediately or on demand." Evers, 129 N.J.L. at 91; Denville Amusement Co., 84 N.J. Super. at 170.

We reach our decision with full recognition that defendants have not challenged on appeal, on either a procedural or substantive basis, the propriety of the court's August 2, 2019 order. Accordingly, there is no dispute that the order dismissing defendants' answer and affirmative defenses was appropriately entered "with prejudice" which, as plaintiff correctly argues, "'constitutes an adjudication on the merits as fully and completely as if the order had been entered after trial.'" A.T. v Cohen, 231 N.J. 337, 351 (2017) (quoting Velasquez v. Franz, 123 N.J. 498, 507 (1991)).

But that legal principle must be considered in the context of an equally important rule applicable to all interlocutory orders. That is, subject to due process considerations, a "trial court has the inherent power, to be exercised in its sound discretion, to review, revise, reconsider and modify its interlocutory orders at any time prior to the entry of final judgment." Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, 257 (App. Div. 1987). In Lombardi v. Masso, 207 N.J. 517, 536-37 (2011), our Supreme Court acknowledged that

> where a litigation has not terminated, an interlocutory order is always subject to revision where the judge believes it would be just to do so. The rules governing final judgments, for example, that evidence must be newly discovered to be considered, R. 4:50-1(b), do not apply in the interlocutory setting. Nor is the judge constrained, as would a reviewing court be, by the original record.
>
> [Id. at 536-37.]

In electing to consider the statute of limitations issue, the court effectively exercised its discretion to reconsider the August 2, 2019 interlocutory order. Before doing so, it clearly stated that based on the plaintiff's testimony the "statute of limitations is a serious concern." Despite its reservations, the court did not sua sponte vacate the August 12, 2019 order, but instead invited the parties to submit supplemental briefing, without limitation, to address the statute of limitations defense. Both parties thereafter briefed the issue on the merits, with plaintiff strenuously arguing that defendants waived the right to assert the defense on much of the same grounds he argues before us. Under the circumstances we find no error in the procedure employed, or the result the court reached.

Further, the court's decision honored the goals underlying the six-year statute of limitations which "is to stimulate prompt action and to penalize negligence, while promoting repose by establishing stability in human affairs.

Stated differently, the purpose of statutes of limitations is to protect defendants from unexpected enforcement of stale claims by plaintiffs who fail to use reasonable diligence in prosecuting their claims." LaFage v. Jani, 166 N.J. 412, 423 (2001) (internal citation omitted).

We also consider, and reject, plaintiff's criticism of the court's finding that he failed to establish the existence of a written contract confirming the 2016 discussion and compromise with Tariq. Plaintiff essentially contends that defendants' actions effectively crippled his ability to establish those proofs because it failed to answer discovery that would have enabled him to establish the existence of such an agreement.

Plaintiff's argument is not without support in our case law. Indeed, as we have noted, although it is within the court's discretion "to take such proceedings as it deems appropriate" under Rule 4:43-2(b) "to determine the truth of the allegations, it must also 'consider whether the refusal of a party to make the discovery was flagrant and contumacious and whether the undisclosed information demanded might go to the proof of plaintiff's case.'" Scott, 190 N.J. Super. at 195 (quoting Douglas, 35 N.J. at 277-78).

We are nevertheless unpersuaded by this argument as, again, it is belied by the facts as alleged in the complaint and, more critically, at the proof hearing

and the supplementary proceedings. First, as a participant to the alleged 2016 agreement, plaintiff himself would be expected to have a copy of any such writing and he clearly failed to establish the existence of an agreement that would fall within the terms of N.J.S.A. 2A:14-24, as was his burden. See Finocchiaro v. D'Amico, 8 N.J. Super. 29, 31 (App. Div. 1950) (A party arguing that an original contract has been substituted by a new contract has the burden of proving such a defense.). Second, plaintiff did not maintain that such documents or communications were lost or unavailable to him. In fact, plaintiff failed to allege the existence of any such document in his amended complaint or his testimony at the proof hearing, with the exception of the unproduced initial written note. Third, when the court permitted briefing on the issue, plaintiff did not assert the existence of such an agreement, or that he was unable to produce any conforming document as it was in defendants' exclusive control.

Finally, we find plaintiff's arguments distinguishing Prickett and Kolczycki unpersuasive and contrary to Heimbach. In Prickett v. Allard, 126 N.J. Super. at 439, as noted, plaintiff purchased a tax sale certificate in 1949 and filed a foreclosure action twenty-three years later, in 1972. Although defendants failed to answer the complaint, or otherwise assert the statute of limitations defense, the trial court dismissed plaintiff's action because it was filed outside

the twenty-year period provided by N.J.S.A. 54:5-79 (the "title of a purchaser at a sale shall cease and . . . be void at the expiration of [twenty] years from the date of the sale," unless the purchaser brings a foreclosure action). Id. at 440. We affirmed because "the bar of the statute of limitations appear[ed] on the face of the complaint." Prickett, 126 N.J. Super. at 440-441.

Plaintiff argues that "satisfying the requisite limitations period is not a prima facie element of [his] breach of contract claim," unlike in Prickett. He also maintains that the language in Kolczycki, 317 N.J. Super. at 520, stating that "even if defendants' answer and separate defenses had been stricken with prejudice in this case, plaintiffs could still be denied recovery if their own proofs revealed that their claim is time-barred," is dicta and should not be considered by this court. We disagree that these distinctions warrant reversal as the circumstances presented here fully justify the court's actions.

As noted, the facts supporting the time-bar of plaintiff's breach of contract claim are evident from plaintiff's own testimony. As such, plaintiff's own "proofs revealed that [his] claim [was] time-barred." Kolczycki, 317 N.J. Super. at 520; Heimbach, 229 N.J. Super. at 23-24. We find plaintiff's claim that the court was restrained from considering defendants' argument on the merits because the statute of limitations was an affirmative defense, as opposed to a

direct element of plaintiff's claims, to be a distinction without a material difference when evaluated in the context of the court's discretionary decision-making authority, and when the relative equities are properly considered.

III.

Plaintiff also contends that defendants waived their statute of limitations defense because they did not specifically set forth a statement of facts for the defense in their answer as required by Rule 4:5-4 and by their failure "to reference it in the eleven months between filing the answer . . . and their closing statement at the proof hearing." Again, we disagree.

A statute of limitations is not "self-executing," and generally must be raised as an affirmative defense. Zaccardi v. Becker, 88 N.J. 245, 256 (1982); see also Fed. R. Civ. P. 8(c). "[O]rdinarily an affirmative defense that is not pleaded or otherwise timely raised is deemed to have been waived." Pressler & Verniero, Current N.J. Court Rules, cmt. 1.2.1 on R. 4:5-4 (2022). If the defense is not properly raised and adjudicated, "a stale claim filed after the expiration of the applicable statute of limitations is nonetheless valid." Notte v. Merchants Mut. Ins., 185 N.J. 490, 500 (2006).

Rule 4:5-4 requires that "[a] responsive pleading shall set forth specifically and separately a statement of facts constituting an avoidance or

affirmative defense including . . . statute of limitations." Henebema v. Raddi, 452 N.J. Super. 438, 453 (App. Div. 2017) ("[T]he pleading of affirmative defenses must be, not merely by legal conclusion, but by a statement of facts."). We acknowledge that defendants' answer failed to provide any facts related to their statute of limitations defense nor did it provide any citation to an applicable statute. Defendants' answer simply stated that "[d]efendants plead the [s]tatute of [l]imitations."

We note, however, that while Rule 4:5–4 requires a specific statement supporting the factual or legal basis for an asserted defense, "the failure to do so does not in and of itself constitute a waiver of an asserted affirmative defense." Ahammed v. Logandro, 394 N.J. Super. 179, 191 (App. Div. 2007); see also Rivera v. Gerner, 89 N.J. 526, 535 (1982) (finding "no waiver of the defense of immunity or limitation of liability . . . merely because defendant did not plead the specific statutory section relied upon."); Pressler & Verniero, Current N.J. Court Rules, cmt. 1.2.2 on R. 4:5-4 (2022) ("nor need an affirmative defense be specially pleaded where the defense appears on the face of the complaint and clearly goes to the maintainability of the action").

Defendants asserted the statute of limitations defense, and although they did not identify those facts upon which it was based, plaintiff certainly cannot

claim surprise as certain supporting facts were alleged on the face of the amended complaint and others based on plaintiff's testimony at the proof hearing. See Jackson v. Hankinson, 94 N.J. Super. 505, 514 (App. Div. 1967) (noting that the "spirit of the rule" is to "avoid surprise"); Faul v. Dennis, 118 N.J. Super. 338, 342 (Law. Div. 1972) (stating that an "affirmative defense generally involves the introduction of new matter which is not shown by the plaintiff's own proof or pleading" and "the omission to plead them specifically might occasion surprise"). If plaintiff was in any way uncertain regarding the basis for that defense, he certainly could have moved for a more definite statement. We assume he did not do so for the simple reason that the factual foundation for the defense was apparent to him.

Further, we are satisfied that the circumstances presented do not approach those in which our courts have stripped defendants of the right to rely on the statute of limitations by their litigation conduct and conclude the cases relied upon by plaintiff, see e.g., Zaccardi, 88 N.J. at 256-60; Williams v. Bell Tel. Lab., Inc., 132 N.J. 109, 118-20 (1993); White v. Karlsson, 354 N.J. Super. 284, 290 (App. Div. 2002) are distinguishable and do not warrant a contrary result.

For example, in White, the defendant asserted a statute of limitations defense in her answer, among seventeen others, but did not actually rely upon

that defense until a week before trial when she successfully moved for summary judgment on that basis, after participating in mandatory arbitration. White, 354 N.J. Super. at 287. In addition, when asked in discovery whether the defendant intended to rely on any specific statute, she responded citing only to the definitions section of the motor vehicle statute. Ibid. We reversed, holding that the defendant could not rely on the affirmative defense in light of her participation in the arbitration hearing and extensive discovery without raising the defense. Id. at 292.

Likewise, in Zaccardi, plaintiffs filed a first complaint against defendant doctors for medical malpractice, but the trial court dismissed that complaint after plaintiffs failed to answer defendants' interrogatories. Id. at 249-250. The case remained active on the court's docket for seventeen months, during which the plaintiff sought at least ten adjournments to discovery, and defendants did not object. Id. at 250. Plaintiffs moved to vacate the dismissal and requested an extension for discovery, and the trial court granted both motions. Defendants appealed and we reversed, reinstating the dismissal, without specifying whether it was with or without prejudice. Ibid. The Supreme Court denied certification and plaintiffs filed a new complaint, identical to the original. Ibid.

The trial court dismissed the second complaint, holding that the dismissal precluded plaintiffs from bringing the action as the statute of limitations had expired, and we affirmed. Zaccardi, 88 N.J. at 250. The Supreme Court reversed and held that defendants were not entitled to assert the statute of limitations as an affirmative defense to bar plaintiff's second complaint. Id. at 257-58. The Court explained that "defendant[s'] conduct is relevant to the availability of a statute of limitations defense," and defendants did not inform the court of the time-bar, nor did they object to plaintiff's various adjournments. Id. at 257. Instead, defendants "added to the delay while plaintiffs acted under the reasonable misapprehension that the defendants had agreed to the continuation of the case." Ibid.

In Williams, plaintiff brought an action against her former employer after her termination, and the jury returned a verdict in her favor. Williams, 132 N.J. at 112. After three-and-one-half years of litigation, defendant filed a post-verdict motion seeking judgment in its favor on the basis of the statute of limitations, which the trial court denied because defendant "had made no reference to that statute at any point in the proceedings, which included numerous pretrial and trial motions," and therefore concluded defendants had waived the defense. Ibid.

After we reversed and entered judgment for defendant, the Supreme Court remanded for a new trial and held that the employer had waived the statute of limitations defense. Id. at 118. The Court emphasized that "[n]o unforeseen or insurmountable developments intruded in this litigation to inhibit in any way [defendant]'s pursuit of its limitations defense. The mere one-time mention of the statute in [defendant]'s [a]nswer . . . should not serve to preserve that otherwise-unasserted defense through the entire three-and-one-half-year span of the litigation." Id. at 119.

While not excusing defendants' conduct in failing to respond to discovery, here, unlike Zaccardi and Williams, it was only eleven months between the time of defendants' answer and the proof hearing. During that period, defendants did attempt to vacate the August 2, 2019 order and provided responses to plaintiff's document demands, but the court incorrectly determined its application was untimely under Rule 4:42-9. Defendants did not limit reliance upon the statute of limitations by way of its proposed discovery responses, as the defendant did in White. Nor did this case involve multiple lawsuits, during which defendants conceded to numerous discovery adjournments, as in Zaccardi. Indeed, other than its inaction in failing to respond to plaintiff's initial discovery, defendants'

conduct did not warrant preclusion of its statute of limitations defense, as the court correctly concluded.

IV.

We offer a few final but necessary comments. Our decision should not be interpreted as an implicit or explicit expression of approval of defendants' conduct during the discovery process, as it was illaudable. The result we have reached required us, as we have noted, to consider the unique and competing equities presented when evaluating the propriety of the court's discretionary decision to consider defendants' suppressed statute of limitations defense.

In doing so, we acknowledge that defendants failed to satisfy the most basic discovery obligations imposed on litigants by our Rules. Their dilatory conduct wasted valuable judicial resources, caused plaintiff to incur costs unnecessarily, and would have fully warranted an order requiring defendants to reimburse plaintiff for those incurred litigation fees and costs.

On the other hand, we are confronted with a plaintiff who filed a lawsuit seeking recovery on a series of oral contracts years outside the applicable statute of limitations, and which did not otherwise fall within the protections of N.J.S.A. 2A:14-24, as he confirmed under oath at the proof hearing. This was not a situation requiring application of the discovery rule to determine an

uncertain accrual date for a cause of action as in Lopez and its progeny. Nor does it involve any similar equitable principle that would support tolling the statute of limitations based on a defendant's conduct that seduced an unwitting plaintiff into inaction. Rather, this was a simple breach of contract claim with the breach of the last agreement occurring upon defendant's failure to repay the June 2008 loan.

In the face of such undisputed evidence, the court chose to address the statute of limitations issue substantively, after permitting all parties to be heard on the merits. We find no error in the court's refusal to permit a defective claim to be memorialized into a final judgment under such circumstances.

As Judge Dreier explained nearly thirty years ago in Jugan v. Pollen, 253 N.J. Super. 123 (App. Div. 1992), where the "adversarial nature of the proceedings has been thwarted by a party's default," it may be appropriate to "strip away that party's rights to participate one by one so as not to prejudice the plaintiff and punish the contumacious party" but in the end, a "trial, and even a proof hearing is a search for truth." Id. at 134; see also R. 1:1-2 ("[A]ny [Rule] may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in an injustice."). Judges are not expected to operate as ministerial functionaries but rather are required to conduct all proceedings in

a fair and impartial manner and with the paramount goal that justice be done. We are satisfied the result reached by the court in dismissing plaintiff's breach of contract claims satisfied these principles.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION