VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 26th day of July, 2018.

Present: All the Justices

Gary Pisner, Appellant,

against Record No. 170862
Circuit Court No. CL2015-17584

Mark Conley, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Fairfax County.

Upon consideration of the record, briefs, and argument of appellant, this Court is of opinion that the circuit court erred by dismissing the case based upon the statute of limitations.

On December 28, 2015, Gary Pisner (Pisner) filed a complaint against Mark Conley (Conley) in the Circuit Court of Fairfax County. He alleged breach of a written contract to perform demolition and clean-up work at his property, and sought a judgment against Conley for compensatory damages of $76,000. The complaint was served on Conley on September 7, 2016, and Pisner moved for a default judgment when Conley failed to respond. The court denied the motion for default judgment, and ordered Conley to file a responsive pleading within ten days.

Conley, *pro se*, filed a letter in which he attempted to explain his position. Pisner moved to strike on the grounds that the letter did "not admit or deny any of the elements of the complaint." On December 2, 2016, the circuit court entered an order finding that "the Defendant has not filed a proper answer" and directing Conley to "file an answer that is in the proper form in accordance with the Rules within 21 days." Conley failed to file any response.

On February 2, 2017, Pisner filed another motion for default judgment, on the grounds that Conley failed to file an answer as required by the December 2, 2016 order. The circuit court found Conley in default and granted Pisner's motion for default judgment by order dated

February 24, 2017. The order scheduled an "*ex parte* hearing to determine damages" on March 29, 2017.

At the March 29, 2017 "*ex parte* hearing to determine damages," the circuit court entered a "final order" stating that the "case is dismissed as being time barred by statute of limitations as to written contract." Pisner moved the court to reconsider, arguing that "the statutory bar issue was raised by the court *sua sponte* and Plaintiff did not have the chance to review the facts related to a statutory bar, nor did Pisner have a chance to review the law on this matter." The circuit court denied Pisner's motion to reconsider, and declined to sign his proposed written statement of facts concerning the *ex parte* hearing. Pisner appeals.

This Court reviews *de novo* a circuit court's "decision on a plea in bar of the statute of limitations" and whether an affirmative defense is waived if not pled. *Haynes v. Haggerty*, 291 Va. 301, 304, 784 S.E.2d 293, 294 (2016); *Van Dam v. Gay*, 280 Va. 457, 460, 699 S.E.2d 480, 481 (2010); *see also New Dimensions, Inc. v. Tarquini*, 286 Va. 28, 33, 743 S.E.2d 267, 269 (2013).

"The objection that an action is not commenced within the limitation period prescribed by law can *only* be raised as an affirmative defense specifically set forth in a responsive pleading." Code § 8.01-235 (emphasis added). Code § 8.01-235 reflects the long-recognized role of the statute of limitations as a defense that is personal to the defendant. *See Smith v. Hutchinson*, 78 Va. 683, 686 (1884). In *Smith*, the plaintiff renewed an old judgment, and served his request for a writ of *scire facias* on the debtors, but the debtors did not respond. *Id.* at 684-85. The county court refused to issue the writ "founded, it seems, upon the interposition by the court of its own motion, of the statute of limitations, as a bar to the plaintiff's motion." *Id.* at 685. The circuit court reversed the county court's determination, and this Court affirmed the circuit court, ruling:

> The defence of the *statute of limitation is a personal privilege, and to be made availing must be pleaded by the defendant.* The court sits to determine all questions of law and practice under established rules, and not to interpose or plead, as in effect it did in this case, special defences for defendants who, by their conduct in failing to appear and make defence, in effect say they cannot gainsay the plaintiff's right to revive the judgment in the *scire facias* mentioned.

Smith, 78 Va. at 686 (emphasis added).

In this instance, the statute of limitations was not raised as an affirmative defense in a responsive pleading. Accordingly, the circuit court erred by dismissing this case with prejudice based upon the statute of limitations, because Conley—the only person who could assert a statute of limitations defense—was in default[1] and had never pled such a defense.

Because Conley was the only person capable of asserting a defense based on the statute of limitations and he failed to do so, the circuit court erred by dismissing Pisner's case as barred by the statute of limitations.[2] We therefore reverse the judgment of the circuit court, and remand this case for a hearing to determine damages due to Pisner on the default judgment entered against Conley.

This order shall be certified to the Circuit Court of Fairfax County.

A Copy,

Teste:

Clerk

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[1] The record indicates that Conley did not attend the March 29, 2017 *ex parte* hearing to determine damages. However, even if Conley had appeared at such hearing, any attempt by Conley to present evidence regarding the statute of limitations defense would have been barred by Rule 3:19(c), because a defendant in default "may not offer proof or argument on the issues of liability."

[2] Having decided this appeal on the grounds expressed herein, we need not address Pisner's other assignments of error concerning the calculation of the statute of limitations and the preparation of a written statement of facts regarding the *ex parte* hearing.