IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TMX, INC., A NEVADA CORPORATION; AND CHESTER L. MALLORY, Appellants, vs. IRIS A. VOLK, Respondent.	No. 65807
TMX, INC., A NEVADA CORPORATION; AND CHESTER L. MALLORY, Appellants, vs. IRIS A. VOLK, Respondent.	No. 66222

FILED

AUG 31 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a district court's order granting respondent Iris Volk's motion to dismiss. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

This case arises from appraisals made by Iris Volk from 2005 to 2008 regarding TMX, Inc.'s assets. Volk allegedly failed to deduct scrap metal when calculating TMX's value, eventually leading to an overinflated buy-out price when a partner, Eddie Smyth, left TMX in 2008. TMX agreed to buy out Smyth's stock, and Chester Mallory personally guaranteed $450,000 of the promissory note. TMX later defaulted on its payments, and in 2011 Smyth sued to enforce the note. The jury eventually found for Smyth against Mallory. In 2013, appellants TMX and Mallory (collectively "Mallory") filed suit against Volk for breach of

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contract and fraud, but the district court dismissed the complaint. Mallory appeals the district court's dismissal. Additional facts underlying this case are extensive; however, as the parties are aware of those facts, we need not recite them here.

On appeal, Mallory argues the district court erred in dismissing appellants' complaint. The primary issue we consider is whether the district court erred in concluding the statute of limitations barred Mallory's claims.[1]

We review de novo an order granting a motion to dismiss. *Brown v. Eddie World, Inc.*, 131 Nev. ___, ___, 348 P.3d 1002, 1003 (2015). In asserting a claim for relief, the plaintiff need only state "a short and plain statement of the claim showing that the pleader is entitled to relief." NRCP 8(a). A pleading "is sufficient so long as the pleading gives fair notice of the nature and basis of the claim." *Crucil v. Carson City*, 95 Nev. 583, 585, 600 P.2d 216, 217 (1979). We accept the nonmoving party's factual allegations as true and draw every fair factual inference from them. *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 635, 137 P.3d 1171, 1180 (2006). Dismissal for failure to state a claim is appropriate "only if it appears beyond a doubt that [the nonmoving party] could prove no set of facts, which, if true, would entitle it to relief." *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008) (*Buzz Stew I*). The supreme court clarified in *Buzz Stew I* the standard is not one of

[1]Volk also argues Mallory does not have standing to sue, but as guarantor of the buy-out agreement and an assignee of TMX's claims, Mallory has standing to bring suit. *See* NRCP 17(a); *Szilagyi v. Testa*, 99 Nev. 834, 838, 673 P.2d 495, 498 (1983) (describing real parties in interest and explaining standing focuses on the party seeking adjudication rather than the issues of the case).

"reasonable doubt," but one of *any* doubt. *Id.* at 228 n.6, 181 P.3d at 672 n.6.

An action based upon a written contract must be brought within six years. NRS 11.190(1)(b). Actions based upon an oral contract must be brought within four years. NRS 11.190(2)(c). Actions for fraud and misrepresentation have a three-year statute of limitations.[2] NRS 11.190(3)(d). The date on which a statute of limitations accrues is normally a question of fact, and the district court may determine that date as a matter of law only when the uncontroverted evidence irrefutably demonstrates the accrual date. *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. at ___, ___, 277 P.3d at 458, 462-63 (2012). Non-compliance with a statute of limitations is a non-jurisdictional, affirmative defense, *see, e.g.*, *Dozier v. State*, 124 Nev. 125, 129, 178 P.3d 149, 152 (2008), and the party asserting an affirmative defense bears the burden of proof. *See Nev. Ass'n Servs., Inc. v. Eighth Judicial Dist. Court*, 130 Nev. ___, ___, 338 P.3d 1250, 1254 (2014). As judging the validity of an affirmative defense "often requires consideration of facts outside of the complaint[,]" an affirmative defense generally does not provide grounds for a court to grant a motion to dismiss. *Kelly-Brown v. Winfrey*, 717 F.3d 295, 308 (2d Cir. 2013); *see also In re CityCenter Constr. & Lien Master Litig.*, 129 Nev. ___, ___ n.3, 310 P.3d 574, 579 n.3 (2013) (noting courts generally do not consider matters outside the pleading in determining a motion to dismiss); *Lubin v. Kunin*,

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[2]The Nevada Supreme Court has not clarified whether negligent misrepresentation claims fall under NRS 11.190(3)(d) (misrepresentation, three years) or NRS 11.190(4)(e) (negligence, two years). However, in light of our conclusions, we need not address that issue.

117 Nev. 107, 116, 17 P.3d 422, 428 (2001) (noting defenses generally should not be considered on a motion to dismiss).

"The general rule concerning statutes of limitation is that a cause of action accrues when the wrong occurs and a party sustains injuries for which relief could be sought." *Petersen v. Bruen*, 106 Nev. 271, 274, 792 P.2d 18, 20 (1990). But, the Nevada Supreme Court has provided an exception to the general rule, referred to as the discovery rule, under which "the statutory period of limitations is tolled until the injured party discovers or reasonably should have discovered facts supporting a cause of action." *Id.* The discovery rule generally applies where the statute of limitations does not specify when a cause of action accrues. *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1025 n.1, 967 P.2d 437, 440 n.1 (1998). Because NRS 11.190(1)(b) is silent as to when accrual occurs and NRS 11.190(3)(d) expressly incorporates the discovery rule, the discovery rule applies to both of Mallory's claims. Thus, we first consider when Mallory discovered or reasonably should have discovered the harm.

On appeal, Mallory argues the statute of limitations began to run in 2013 only after Volk testified during the earlier trial involving Smyth's breach of guarantee claim against Mallory, and only after judgment was entered against Mallory in that action. We disagree.

The uncontroverted facts show Mallory suffered harm in 2008 when the inflated valuation led to an inflated buy-out price. Although the 2013 judgment against Mallory enforced the promissory note, the damage itself—Mallory's duty to pay more for the company's stock than they were worth—occurred at the time of the buy-out. And, Mallory was aware in January 2009 the company's worth had been overestimated and that the buy-out amount was likewise inflated. The facts forming the basis of the

present complaint, that Volk purposely or negligently failed to exclude scrap metal from her valuation in breach of her contractual duty to TMX, were actually discovered or could have been discovered with reasonable diligence at that time. Specifically, the parties knew in January of 2009 the company's value had been inflated by the inclusion of scrap metal in the valuations involving Volk's accounting. Further, we note Mallory's argument to this court differs from what he previously asserted to the district court: that the statute of limitations began to run in 2010. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (holding we need not consider a point not urged in the trial court). As such, we agree with the district court that the statute of limitation was triggered in January 2009 when appellants learned of the miscalculation of assets.

Because the applicable statute of limitations began to run in January 2009, Mallory was required to bring his fraud claim by January 2012. Yet, Mallory did not bring suit until December 2013, and, therefore, his fraud claim is barred. Thus, we need not consider whether the complaint was pleaded with sufficient particularity for fraud under *Rocker v. KPMG LLP*, 122 Nev. 1185, 148 P.3d 703 (2006) (overruled on other grounds by *Buzz Stew I*, 124 Nev. at 228, 181 P.3d at 672), or whether the district court should have given leave to amend the complaint to add a claim for negligent misrepresentation,[3] which likewise would have been barred by the statute of limitations.

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[3]We note Mallory did not raise negligent misrepresentation below nor does the record demonstrate Mallory ever moved to amend the complaint to include a claim for negligent misrepresentation. We

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Whether the contract claim was also barred depends upon whether the district court erred in converting Mallory's claim from one founded upon a written contract to one founded upon an oral contract. If the claim was based upon a written contract, the statute of limitations would not have expired before January 2015; if it was based on an oral contract, however, the statute of limitations would have expired in January 2013, nearly a year before Mallory filed suit against Volk. *See* NRS 11.190(1)(b) and (2)(c).

Here, although Mallory's complaint is, perhaps, inartful, it is clear Mallory based the breach of contract claim upon a written contract. Volk moved to dismiss for failure to state a claim under NRCP 12(b)(5). Specifically, Volk argued that because Mallory failed to show the existence of a written contract, the claim could only be based upon an oral agreement and was, therefore, barred by the four-year statute of limitations.

We conclude the district court erred in converting Mallory's breach of contract claim to one based upon an oral contract and finding it was barred by the four-year statute of limitations. First, the complaint was sufficient under NRCP 8(a): it notified Volk of Mallory's belief in the existence of a written contract, and set forth facts detailing the alleged breach of that contract. Second, an issue of fact remains as to whether Mallory's breach of contract claim was filed within the statute of limitations. Taking Mallory's facts as true, and drawing all inferences in the light most favorable to Mallory, it is possible that discovery will yield a

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generally will not consider arguments not raised before the district court. *See Old Aztec Mine*, 97 Nev. at 52, 623 P.2d at 983.

copy of a written contract, should one exist. If evidence of a written contract is produced during discovery and the six-year statute of limitations is found to apply, the breach of contract claim was timely filed. Further, as the party asserting the affirmative defense, Volk, not Mallory, bears the burden of proving the statute of limitations bars Mallory's claim. Accordingly, it was inappropriate for the district court to conclude, on a motion to dismiss, that the breach of contract claim was barred by the four-year statute of limitations, and we reverse the district court on this issue. This conclusion likewise requires us to vacate the award of attorney fees and costs. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Silver

cc: Hon. Janet J. Berry, District Judge
Carolyn Worrell, Settlement Judge
Charles R. Kozak
Woodburn & Wedge
Washoe District Court Clerk