

Affirmed and Majority and Dissenting Opinions filed October 31, 2017.



**In The
Fourteenth Court of Appeals**

NO. 14-16-00599-CV

GERALD GODOY, Appellant

V.

WELLS FARGO BANK, N.A., Appellee

**On Appeal from the 157th District Court
Harris County, Texas
Trial Court Cause No. 2015-36417**

MAJORITY OPINION

Appellee Wells Fargo Bank, N.A. sued appellant Gerald Godoy to collect a deficiency on a debt that Godoy guaranteed. Godoy moved for summary judgment on grounds that Wells Fargo's claims were barred by a two-year statute of limitations applying to deficiency claims; Wells Fargo moved for partial summary judgment on grounds that Godoy contractually waived any limitations defense. The trial court denied Godoy's motion for summary judgment, granted Wells Fargo's motion as

well as a subsequent motion for summary judgment on the deficiency claim, and signed a final judgment in favor of Wells Fargo.

At issue in this appeal is whether a general waiver of “any and all rights or defenses” that might be available to a guarantor is sufficient to waive application of a shortened statute of limitations applicable to deficiency actions. Because the Texas Supreme Court has determined that such a waiver applies to all defenses under the applicable statute, we affirm.

BACKGROUND

Wachovia Bank loaned \$250,000 to GDG Mortgage, Inc. in 2005. The loan was evidenced by a promissory note and secured by a construction deed of trust on certain real property. Godoy guaranteed the promissory note.

GDG defaulted on the note, and Wells Fargo — Wachovia’s successor by merger and holder of the note — foreclosed on the real property securing the note on November 1, 2011. Wells Fargo purchased the real property at the foreclosure sale with a bid that was insufficient to satisfy the outstanding balance on the promissory note, leaving a deficiency.

Wells Fargo sued Godoy to collect the deficiency on June 24, 2015 — more than three years after the foreclosure sale. Godoy moved for summary judgment on the sole ground that Wells Fargo’s claim was barred by a shortened two-year statute of limitations applicable to suits to collect deficiencies from guarantors. *See* Tex. Prop. Code Ann. § 51.003(a) (Vernon 2014). Wells Fargo moved for partial summary judgment on Godoy’s limitations defense, asserting that Godoy specifically waived his limitations defense in the guaranty agreement. The trial court denied Godoy’s motion for summary judgment and granted Wells Fargo’s motion for partial summary judgment.

Wells Fargo then moved for final summary judgment on its deficiency claim seeking judgment for the outstanding balance as well as attorney's fees and costs. The trial court granted Wells Fargo's motion for summary judgment on its deficiency claim against Godoy and signed a final judgment.

STANDARD OF REVIEW

A party moving for summary judgment must conclusively prove all elements of its cause of action or defense as a matter of law. Tex. R. Civ. P. 166a(c); *Browning v. Prostok*, 165 S.W.3d 336, 344 (Tex. 2005). When both parties move for summary judgment and the trial court grants one motion but denies the other, we review the evidence produced by each party, determine *de novo* all questions presented, and render the judgment the trial court should have rendered. *Colo. Cty. v. Staff*, 510 S.W.3d 435, 444 (Tex. 2017); *Moayedi v. Interstate 35/Chisam Rd., L.P.*, 438 S.W.3d 1, 3-4 (Tex. 2014). A defendant moving for summary judgment on the affirmative defense of limitations has the burden to conclusively establish that defense. *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 846 (Tex. 2005).

ANALYSIS

Godoy contends the trial court erred in denying his motion for summary judgment and in granting Wells Fargo's motions for summary judgment because a statute of limitations defense cannot be waived unless the waiver is specific and for a pre-determined length of time. Godoy contends the general waiver in the guaranty agreement is void as against public policy because it is indefinite and would allow Wells Fargo to bring suit at any time, in perpetuity.

Wells Fargo points to *Moayedi*, 438 S.W.3d at 6-8, in which the Texas Supreme Court held that all defenses under Property Code section 51.003 may be

waived. Wells Fargo contends this holding necessarily includes the two-year statute of limitations found in that section and asserted by Godoy as a bar to suit.

I. Scope of Waiver

Property Code section 51.003 — entitled “Deficiency Judgment” — provides that, if a deficiency remains after a nonjudicial foreclosure sale, any action to recover the deficiency must be brought within two years of the foreclosure sale. *See* Tex. Prop. Code Ann. § 51.003(a). A defendant in such an action may be entitled to an offset against the deficiency if the trial court determines that the fair market value of the property sold at foreclosure was greater than the foreclosure sales price. *See id.* § 51.003(c) (Vernon 2014).

Moayedi addressed whether a party waived the statutory right of offset under section 51.003(c) by agreeing to a general waiver of defenses in a guaranty agreement. *See Moayedi*, 438 S.W.3d at 2. The guaranty agreement in that case included the following general waiver of defenses:

Guarantor further agrees that this Guaranty shall not be discharged, impaired or affected by . . . any defense (other than the full payment of the indebtedness hereby guaranteed in accordance with the terms hereof) that the Guarantor may or might have as to Guarantor’s respective undertakings, liabilities and obligations hereunder, each and every such defense being hereby waived by the undersigned Guarantor.

Id. at 3.

The supreme court first examined section 51.003 and determined that “the statute provides an offset that otherwise would not be available. In other words, it provides a defense.” *Id.* at 6. The court then determined that “Moayedi could waive section 51.003” so long as the waiver was clear and specific. *See id.*

Rejecting Moayedi’s argument that the general waiver in the guaranty agreement was not clear and specific, the court determined that a party’s waiver of

“any,” “each,” and “every” defense in a guaranty agreement “results in a broad waiver of all possible defenses.” *See id.* at 8. The court stated:

Just because the waiver is all encompassing does not mean that it is unclear or vague. To waive all possible defenses seems to very clearly indicate what defenses are included: all of them.

Id. *Moayedi* concluded that the guaranty’s broad defense waiver “indicate[d] an intent that the guaranty would not be subject to any defense other than full payment.”

Id.

At issue here is whether, in light of *Moayedi*, Godoy waived the shortened two-year statute of limitations for deficiency actions contained within section 51.003(a).

The guaranty agreement at issue here provided in relevant part:

GUARANTOR’S WAIVERS. . . .

. . . Guarantor also waives any and all rights or defenses arising by reason of (A) any “one action” or “anti-deficiency” law or any other law which may prevent Lender from bringing any action, including a claim for deficiency, against Guarantor, before or after Lender’s commencement or completion of any foreclosure action, either judicially or by exercise of a power of sale; . . . (E) any statute of limitations, if at any time any action or suit brought by Lender against Guarantor is commenced, there is outstanding indebtedness of Borrower to Lender which is not barred by any applicable statute of limitations; or (F) any defenses given to guarantors at law or in equity other than actual payment and performance of the indebtedness. . . .

. . .

GUARANTOR’S UNDERSTANDING WITH RESPECT TO WAIVERS. Guarantor warrants and agrees that each of the waivers set forth above is made with Guarantor’s full knowledge of its significance and consequences and that, under the circumstances, the waivers are reasonable and not contrary to public policy or law. If any such waiver is determined to be contrary to any applicable law or public

policy, such waiver shall be effective only to the extent permitted by law or public policy.

Wells Fargo contends that a party's broad waiver of all defenses in a guaranty agreement necessarily includes a defense based on any statute of limitations. It contends that, at the very least, the waivers at issue here are sufficient under *Moayedi* to waive the two-year statute of limitations contained in section 51.003(a). *See id.* at 6-8.

We need not decide the correctness of Wells Fargo's general assertion that a party may waive any statute of limitations via the language contained in the guaranty agreement. We focus instead on the narrower and dispositive issue presented by this case and agree that the waiver at issue was sufficient to waive the shortened two-year statute of limitations contained in section 51.003(a).

Moayedi explicitly held that guaranty agreement language waiving "any," "each," or "every" defense "results in a broad waiver of *all possible defenses*" under section 51.003. *See Moayedi*, 438 S.W.3d at 8 (emphasis added). Since *Moayedi* was decided, the supreme court has referred to the right of offset under section 51.003 as "an affirmative defense to a deficiency claim." *See PlainsCapital Bank v. Martin*, 459 S.W.3d 550, 557 (Tex. 2015).

A statute of limitations also is an affirmative defense that a party may plead. *See, e.g., Epps v. Fowler*, 351 S.W.3d 862, 869 n.8 (Tex. 2011) ("Limitations is an affirmative defense that must be pleaded and proven."); *KPMG Peat Marwick v. Harrison Cty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999) ("A defendant moving for summary judgment on the affirmative defense of limitations has the burden to conclusively establish that defense."). We see no reason to interpret the supreme court's holding that "all possible defenses" may be waived under section 51.003 to mean that a party may waive the affirmative defense of offset under section

51.003(c), but not the affirmative defense of limitations under section 51.003(a). *See Moayedi*, 438 S.W.3d at 6-8. Accordingly, we conclude that Godoy’s broad waiver of all defenses available to guarantors under the anti-deficiency statute necessarily includes a defense based on 51.003(a)’s two-year statute of limitations. *See Grace Interest, LLC v. Wallis State Bank*, 431 S.W.3d 110, 118, 126-28 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (provision under which guarantor “expressly waives all rights, remedies, claims and defenses based upon or related to Sections 51.003, 51.004 and 51.005 of the Texas Property Code, to the extent the same pertain or may pertain to any enforcement of this Guaranty” was not void as against public policy and was sufficiently specific).

II. Public Policy

Godoy contends on appeal that permitting a waiver of section 51.003(a)’s two-year statute of limitations contravenes public policy because a waiver of a statute of limitations is permissible only when the waiver is specific and limited to a reasonable time period. *See Duncan v. Lisenby*, 912 S.W.2d 857, 858-59 (Tex. App.—Houston [14th Dist.] 1995, no writ) (“Parties may agree to waive the statute of limitations before the statutory bar has fallen. A general agreement in advance to waive or not to plead the statute of limitations on a particular obligation is void as against public policy. The agreement must be specific and for a pre-determined length of time.”) (citations omitted); *Am. Alloy Steel, Inc. v. Armco, Inc.*, 777 S.W.2d 173, 177 (Tex. App.—Houston [14th Dist.] 1989, no writ) (same). According to Godoy’s appellate brief, “A general agreement in advance to waive or not plead the statute of limitations on a particular obligation is void as against public policy.”

We need not address Godoy’s contention that the waiver provision to which he agreed is void. This is so because he did not affirmatively plead this “matter

constituting an avoidance or affirmative defense” in his answer as required under Texas Rule of Civil Procedure 94.

“An allegation that a provision in a contract is void, unenforceable, or unconscionable is a matter in the nature of avoidance and must be affirmatively pleaded.” *950 Corbindale, L.P. v. Kotts Capital Holdings Ltd. P’ship*, 316 S.W.3d 191, 196 (Tex. App. – Houston [14th Dist.] 2010, no pet.) (citing Tex. R. Civ. P. 94 and *Parks v. Developers Sur. and Indem. Co.*, 302 S.W.3d 920, 924 (Tex. App.—Dallas 2010, no pet.)). “If a party fails to plead the affirmative defense, it is waived.” *950 Corbindale, L.P.*, 316 S.W.3d at 196.

This panel is bound by *950 Corbindale, L.P.*’s holding with respect to the necessity of affirmatively pleading under Rule 94 that a contract provision is void, unenforceable, or unconscionable. *See Chase Home Finance, L.L.C. v. Cal W. Reconveyance Corp.*, 309 S.W.3d 619, 630 (Tex. App. – Houston [14th Dist.] 2010, no pet.). In the absence of an affirmative pleading under Rule 94, the dissent’s public policy discussion is unnecessary and unwarranted.

The dissent overreaches when it invokes *Phillips v. Phillips*, 820 S.W.2d 785, 789 (Tex. 1991), for the propositions that no affirmative pleading was necessary because (1) Wells Fargo pleaded an agreement that is illegal on its face and thereby anticipated Godoy’s challenge to the guaranty agreement’s waiver provision; and (2) courts will not enforce a plainly illegal contract even if the parties do not object.

In its first amended petition, Wells Fargo pleaded as follows: “Wells Fargo will further show that Defendant waived any limitations defense he may have had, as set forth in the Commercial Guaranty.”

Under the Commercial Guaranty, Godoy waived “any and all rights or defenses arising by reason of . . . any . . . ‘anti-deficiency’ law . . . which may prevent

Lender from bringing any action, including a claim for deficiency, against Guarantor”

Separately, Godoy waived “any statute of limitations, if at any time any action or suit brought by Lender against Guarantor is commenced, there is outstanding indebtedness of Borrower to Lender which is not barred by any applicable statute of limitations”

Godoy agreed in the Commercial Guaranty that, “under the circumstances, the waivers are reasonable and not contrary to public policy or law.” He further agreed that “[i]f any such waiver is determined to be contrary to any applicable law or public policy, such waiver shall be effective only to the extent permitted by law or public policy.”

It is a significant stretch for the dissent to assume that a guaranty agreement containing a provision waiving all anti-deficiency defenses under section 51.003 is an illegal contract — and a still further stretch for the dissent to assume that such an agreement is “plainly illegal” or “illegal on its face” so as to dispense with Rule 94 pleading requirements. *See Grace Interest, LLC*, 431 S.W.3d at 118, 126-28; *see also id.* at 128. (“Just as a waiver of the Texas Anti-Deficiency Statute does not violate public policy, there is also no requirement that the waiver be conspicuous.”).

The difficulty of indulging the dissent’s assumption is compounded because the contract provides that any limitations waiver “shall be effective only to the extent permitted by law or public policy.” It follows that a narrower waiver of section 51.003(a)’s shortened limitations period does not demonstrate facial illegality of the guaranty agreement even if the agreement’s separate waiver of other potentially applicable statutes of limitations is too open-ended. *See Gupta v. E. Idaho Tumor Inst., Inc.*, 140 S.W.3d 747, 752 (Tex. App.—Houston [14th Dist.] 2004, pet. denied)

(“Where two constructions of a contract are possible, courts give preference to the construction that does not violate the law.”) (citations omitted).

In the absence of section 51.003’s shortened two-year statute of limitations, the general four-year statute of limitations on suits to collect debts would apply. *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.004(a)(3) (Vernon 2002); *see also Sowell v. Int’l Interests, LP*, 416 S.W.3d 593, 597-600 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (determining that both two-year and four-year statutes of limitations can apply to deficiency claims). Godoy did not plead any defense based on the four-year statute of limitations under section 16.004, nor did he present summary judgment evidence conclusively establishing that Wells Fargo’s suit is barred by the four-year statute. *See, e.g., Diversicare Gen. Partner, Inc.*, 185 S.W.3d at 846 (“A defendant moving for summary judgment on the affirmative defense of limitations has the burden to conclusively establish that defense, including the accrual date of the cause of action.”). Accordingly, we need not determine whether summary judgment was proper in light of the four-year statute of limitations, or whether that statute of limitations could be waived through the general waiver in the guaranty agreement.¹

¹ The dissent heads down a rabbit trail by discussing whether an affirmative pleading is required when illegality is claimed only as to one provision of a contract — as opposed to a different circumstance in which the entire contract is claimed to be illegal. Any such distinction is irrelevant here because the guaranty agreement at issue is not illegal on its face — in whole or in part. The guaranty agreement is not illegal on its face because (1) its express waiver of all section 51.003 defenses “does not violate public policy,” *see Grace Interest, LLC*, 431 S.W.3d at 128; and (2) the guaranty agreement expressly says the separate provision addressing waiver of other potentially applicable limitations periods “shall be effective only to the extent permitted by law or public policy.” If the guaranty agreement’s separate, open-ended waiver of any other limitations period outside of section 51.003 is not enforceable as the dissent contends, then the guaranty agreement on its face says this separate waiver is not effective. If the guaranty expressly provides that the open-ended waiver of any other limitations period is not effective, then the guaranty agreement is not illegal on its face — in whole or in part. And if the guaranty agreement is not illegal on its face even in part, then the dissent’s posited distinction makes no difference to

The dissent overreaches again when it invokes trial by consent to argue waiver and excuse Godoy's failure to plead affirmatively that the Commercial Guaranty's waiver provisions are void, unenforceable, or unconscionable.

No waiver occurred here because (1) Wells Fargo raised the pleading defect in its response to Godoy's motion for new trial, in which he again asserted the same public policy arguments with respect to limitations; and (2) the trial court affirmatively recited that it "heard and considered Defendant's Motion for New Trial [and] Wells Fargo's response" in its order denying the motion. *See Harvey v. Kindred Healthcare Operating, Inc.*, 525 S.W.3d 281, 285 n.11 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (rejecting argument that contention omitted from summary judgment response had been waived because contention was raised in motion for new trial and trial court affirmatively indicated that it had been considered in denying the motion for new trial); *cf. Auten v. DJ Clark, Inc.*, 209 S.W.3d 695, 702 (Tex. App.—Houston [14th Dist.] 2006, no pet.) ("[T]he trial court affirmatively indicated that it considered the affidavit attached to the motion for new trial although it denied the motion, effectively reaffirming its earlier ruling. Accordingly, we may consider the affidavit.").

CONCLUSION

Having concluded that Godoy waived a defense based on section 51.003(a)'s two-year statute of limitations, we further conclude that the trial court properly denied Godoy's motion for summary judgment premised solely on that defense. The trial court also acted correctly in granting Wells Fargo's motion for partial summary judgment on Godoy's two-year statute of limitations defense. Godoy has not

the resolution of this appeal.

challenged the trial court's grant of final summary judgment on any other grounds. Accordingly, we overrule Godoy's sole issue.

Having overruled Godoy's sole issue, we affirm the trial court's judgment.

/s/ William J. Boyce
Justice

Panel consists of Chief Justice Frost and Justices Boyce and Brown (Frost, C.J., dissenting).