

**IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
APPELLATE DIVISION**

MARIO COOPER,
Appellant,

vs.

Appeal No. 07-0022AP-88A
UCN522007AP000022XXXXCV

F.A. MANAGEMENT SOLUTIONS, INC.,
Appellee.

Appeal from Pinellas County Court

Mario Cooper
Appellant, *pro se*

Hugh Shafritz, Esquire
Attorney for Appellee

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KEN BURKE
CLERK OF CIRCUIT COURT

ORDER AND OPINION

THIS CAUSE came before the Court on appeal, filed by the Mario Cooper (Cooper), from the Amended Final Judgment After Final Hearing, entered March 21, 2007, in favor of F.A. Management Solutions, Inc (F.A. Management). Upon review of the briefs, the record and being otherwise fully advised, the Court affirms the trial court's ruling as set forth below.

The record shows that Cooper was the defendant in a breach of contract action filed by F.A. Management to recover damages on an unpaid credit card debt. After filing suit on September 14, 2004, F.A. Management obtained a Default Final Judgment against

Cooper in the amount \$ 1,268.98, plus interest, costs, and attorney's fees. On appeal, this Court reversed the Default Final Judgment finding F.A. Management failed to perfect substitute service on Cooper. The cause was remanded to the trial court.

At the pre-trial hearing, the trial court granted F.A. Management's motion to invoke the Rules of Civil Procedure and to amend its Complaint. The trial court denied Cooper's oral motion to dismiss the Complaint for exceeding the statute of limitations but ruled that it would revisit the issue, "*if Defendant makes a cogent argument and/or files a written motion which states a factual and legal basis for dismissal.*" (emphasis original). The trial court also found: "As Defendant admits incurring the debt upon his credit card and owing the money, the only disputed issue is whether Plaintiff properly has brought suit. Unless Defendant can support his oral demand for dismissal, the Court will enter Final Judgment at the next Pretrial Conference."

In response to F.A. Management's Amended Complaint, Cooper filed an Answer with Affirmative Defenses listing statute of limitations as an Affirmative Defense. Cooper also filed a Motion for Summary Judgment arguing that F.A. Management lacked standing to file its claim, unrelated to the statute of limitations. The trial court denied summary judgment. There is nothing in the record to show that Cooper filed a written motion to dismiss or any other pleading related to his statute of limitations defense. After a final hearing, the trial court entered its "Amended Final Judgment After Final Hearing (Paragraph # 7)." In paragraph 2, the trial court specifically found: "Defendant withdrew his affirmative defense of statute of limitations at the Final Hearing and did not present any evidence or argument on his laches defense." Cooper timely filed his Notice of Appeal.

The only issue raised by Cooper in his Initial Brief is whether the trial court erred in denying his oral motion to dismiss based on the expiration of Delaware's 3-year statute of limitations.¹ Cooper argues additional points in his Reply Brief which were either not preserved for appeal and/or not presented in the Initial Brief. Cooper is procedurally barred from raising such new claims. See Hall v. State, 823 So.2d 757, 763 (Fla. 2002); see also Medrano v. State, 795 So.2d 1009, 1010 (Fla. 4th DCA 2001). The trial court's interpretation of a contract is a matter of law subject to a de novo standard of review. See Jenkins v. Eckerd Corporation, 913 So.2d 43, 49 (Fla. 1st DCA 2005). The statute of limitations is an affirmative defense that can be waived. See Smith v. Rheume, 623 So.2d 625, 626 (Fla. 5th DCA 1993); see also Pritchett v. Kerr, 354 So.2d 972, 973 (Fla. 1st DCA 1978).

In this case, the trial court specifically found that Cooper waived this affirmative defense. There is nothing in the record to refute this. Cooper did not file a motion for rehearing, nor is there any evidence in the record to show that Cooper objected to the wording of the Amended Final Judgment. Further, Cooper failed to file a written motion to dismiss, with supporting facts and case law, as ordered by the trial court at the pre-trial hearing. The Court concludes that Cooper is unable to overcome the presumption of correctness of the trial court's ruling. See Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150, 1152 (Fla. 1979)(stating that the decision of the trial court has the presumption of correctness and the burden is on the appellant to demonstrate error); Bei v. Harper, 475 So.2d 912, 914 (Fla. 2d DCA 1985)(same).

Therefore, it is,

¹ The parties stipulated that Cooper made his last credit card payment on July 3, 2001.

ORDERED AND ADJUDGED that the Amended Final Judgment After Final Hearing is affirmed. It is further

ORDERED AND ADJUDGED that the Appellee's Motion for Award of Attorney's Fees on Appeal is granted. The Appellee is entitled to reasonable appellate attorney's fees which shall be determined by the trial court.

DONE AND ORDERED in Chambers, at Clearwater, Pinellas County, Florida
this 5 of May 2008.

Original opinion entered by Circuit Judges John A. Schaefer, George M. Jirotko, & George W. Greer

Copies furnished to:
Honorable Walt Fullerton
County Court Judge

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