NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY APPELLATE DIVISION

JOSEPH MCMAHON,
Appellant,

v.

MILLPOND ESTATES COMMUNITY HOMEOWNERS ASSOCIATION, INC.,
Appellee.
_____/

UCN: 512015AP0012APAXWS
Appeal No: 2015-AP-0012-WS
L.T. No: 12-CC-3226-WS

On appeal from County Court,
Honorable Anne Wansboro,

Ramy N. Fares, Esq.,
for Appellant,

Keith D. Skorewicz, Esq.,
for Appellee.

ORDER AND OPINION

The trial court properly determined that Appellant had paid the principal amount of the final judgment but had not paid the interest; therefore, he was not entitled to a satisfaction of judgment pursuant to section 701.04, Florida Statutes. The order of the trial court is affirmed.

STATEMENT OF THE CASE AND FACTS

In a small claims action to enforce an arbitration award, the trial court entered a final judgment against Appellant in the amount of $1420.26 on November 3, 2011, and a consent final judgment of attorney's fees in the amount of $3735.00 on January 12, 2012. Both judgments stated that the amount due would bear interest at the rate of 4.75% per year. Approximately two weeks after each judgment, Appellant mailed the principal amount due to Appellee with a cover letter that requested that a satisfaction of judgment be recorded. Although the post-judgment interest was not paid on either judgment, Appellee's counsel drafted and executed a satisfaction of judgment stating

that both judgments were satisfied. It is unclear from the record what happened to the document, but it was never received by Appellant or recorded.

On September 12, 2012, Appellant filed suit seeking to compel compliance with section 701.04, Florida Statutes, to obtain a satisfaction of the judgment liens. A default was entered against Appellee for failing to respond to the action, and the court entered a final judgment in favor of Appellant on November 2, 2012. On February 2, 2013, Appellee filed the Motion to Set Aside the Clerk's Default and Default Final Judgment ("Motion to Set Aside Default") asserting excusable neglect because Appellee's counsel never received any documents in the case even though Appellant knew Appellee was represented by counsel. Appellee also listed various meritorious defenses, including the fact that a satisfaction of judgment was already prepared and executed, together with an affidavit attesting to such. The court set aside the default on the grounds that a party seeking a default, who has actual knowledge that the other party is represented by counsel, must contact the party's counsel before seeking default.

The trial court found that it was "uncontroverted" that Appellant had paid the principal amount of the judgments but not the interest, and pursuant to section 701.04, Florida Statutes, Appellant had the burden of demonstrating that the judgments were paid in full, which includes interest. Accordingly, the trial court awarded judgment in favor of Appellee. Appellant now seeks review in this Court of the trial court's Final Judgment.

STANDARD OF REVIEW

"A trial court's finding of fact which rests on undisputed evidence is in the nature of a legal conclusion and is subject to the 'clearly erroneous' standard of review." *Williams v. Lutrario*, 131 So. 3d 801, 804 (Fla. 4th DCA 2013). An issue that involves a question of statutory interpretation is subject to *de novo* review. *Borden v. East-European Ins. Co.*, 921 So. 2d 587, 591 (Fla. 2006).

LAW AND ANALYSIS

Appellant contends that it was error to award judgment in favor of Appellee because Appellee's assertion that a satisfaction of judgment was executed notwithstanding the interest is a waiver of the interest, which obligates Appellee to record a satisfaction of judgment. Furthermore, Appellant argues that Appellee cannot

maintain contradictory positions by arguing bot that it did not have to issue a satisfaction of judgment and that it already had executed one. *See Montero v. Compugraphic Corp.*, 531 So. 2d 1034, 1036 (Fla. 3d DCA 1988) ("A litigant cannot, in the course of litigation, occupy inconsistent and contradictory positions."). Finally, Appellant alleges that his burden of proof under section 701.04, Florida Statutes, was satisfied by the affidavit of Appellee's counsel stating that the satisfaction of judgment had been executed.

Section 701.04(2), Florida Statutes, provides:

> Whenever the amount of money due on any mortgage, lien, or judgment has been fully paid to the person or party entitled to the payment thereof, the mortgagee, creditor, or assignee, or the attorney of record in the case of a judgment, to whom the payment was made, shall execute in writing an instrument acknowledging satisfaction of the mortgage, lien, or judgment and have the instrument acknowledged, or proven, and duly entered in the official records of the proper county. Within 60 days after the date of receipt of the full payment of the mortgage, lien, or judgment, the person required to acknowledge satisfaction of the mortgage, lien, or judgment shall send or cause to be sent the recorded satisfaction to the person who has made the full payment.

The rule of strict construction has been specifically applied to this statute. *Washington Mut. Bank, F.A. v. Shelton*, 892 So. 2d 547, 550 (Fla. 2d DCA 2005). Only when a judgment has been paid in full is the statute applicable. *Olsen v. O'Connell*, 466 So. 2d 352, 356 (Fla. 2d DCA 1985) (holding that a negotiated release of a judgment lien for less than the full amount of the judgment does not require a satisfaction under the statute); *Norwest Mortg., Inc. v. King*, 789 So. 2d 1139, 1140 (Fla. 4th DCA 2001) ("Section 701.04(1), Florida Statutes, requires a mortgagee to execute and record a satisfaction of the mortgage within sixty days after receipt of *full payment*.") (emphasis in original). "Any judgment for money damages . . . shall bear, on its face, the rate of interest that is payable on the judgment. The rate of interest stated in the judgment . . . accrues on the judgment until it is paid." § 55.03(2), Fla. Stat. As such, the interest becomes part of "the amount of money due" that must be "fully paid" in order for the court to order Appellee to issue a satisfaction of judgment. It is undisputed that the interest was not paid on either final judgment. Accordingly, even if Appellee intended to waive the interest, a court cannot require Appellee to record a satisfaction of judgment under section 701.04, Florida Statutes.

Appellant further contends that the law estops Appellee from maintaining inconsistent positions in litigation; however, the Court finds that Appellee did not present inconsistent positions. Instead, Appellee asserted different defenses as allowed by Florida Rule of Civil Procedure 1.100(g) ("A party may also state as many separate claims or defenses as that party has, *regardless of consistency* . . . .") (emphasis added). In both the Motion to Set Aside Default and the Answer and Defenses, Appellee properly raised both the defense that it was not required to issue a satisfaction because the amount was not fully paid, and the defense that a satisfaction was already executed.

To the extent that Appellant alleges that Appellee's inconsistent positions arose from the affidavit in support of the Motion to Set Aside Default, which averred that a satisfaction had already been executed notwithstanding the lack of interest, and the trial testimony that the missing interest relieved Appellee of its duty to issue a satisfaction, the rule against maintaining inconsistent positions or the principle of judicial estoppel does not apply because "a party simply is not estopped from asserting a later inconsistent position . . . unless the party's initial position was *successfully maintained*." *Leitman v. Boone*, 439 So. 2d 318, 322 (Fla. 3d DCA 1983) (emphasis in original). Additionally, "the party claiming the estoppel must have been misled and have changed his position." *Blumberg v. USAA Cas. Ins. Co.*, 790 So. 2d 1061, 1066 (Fla. 2001). In the present case, the defense of having already executed a satisfaction was not previously successfully maintained in the Motion to Set Aside Default because the trial judge did not set aside the default based on that defense. Instead, the judge set it aside for Appellant's failure to contact Appellee's counsel prior to seeking default when he knew Appellee "was represented by counsel and intended to defend the lawsuit." *See U.S. Bank Nat. Ass'n v. Lloyd*, 981 So. 2d 633, 640 (Fla. 2d DCA 2008). Furthermore, Appellant was not misled and did not change his position based on that defense. To the extent that Appellant alleges Appellee's inconsistent statement was "Appellee's counsel's trial testimony that the interest deficiency was the reason why the association did not record a satisfaction of judgment," the doctrine still does not apply. *See Dunne By & Through Dunne v. Somoano*, 550 So. 2d 5, 7 (Fla. 3d DCA 1989) ("The inconsistent statements of a person testifying once on the witness stand raise an issue of credibility to be resolved by the fact-finder but do not create an estoppel.").

Appellant's final argument alleges that his burden of proof was satisfied by the affidavit of Appellee's counsel stating that the satisfaction of judgment had been executed. The trial court held that Appellant had the burden to prove that the judgments were paid in full under section 701.04, Florida Statutes, and since it was undisputed that the interest was not paid, Appellant failed to meet the burden. The party pleading payment has the burden to establish it. *See Drake Lumber Co. v. Semple*, 130 So. 577, 581 (Fla. 1930). As discussed above, the statute requires the amount of money due to be fully paid, including interest, which Appellant admits was not paid. Accordingly, the trial court correctly concluded that Appellant failed to satisfy his burden of proof.

CONCLUSION

The trial court properly determined that a court cannot compel a party to record a satisfaction of judgment under section 701.04, Florida Statutes, unless the amount due on a judgment has been fully paid, including interest. The order of the trial court is affirmed.

It is **ORDERED AND ADJUDGED** that the Final Judgment of the trial court is hereby **AFFIRMED**.

DONE AND ORDERED in Chambers, at New Port Richey, Pasco County, Florida, on this ____ day of _____ 2016.

Original Order entered on August 30, 2016, by Circuit Judges Daniel D. Diskey, Shawn Crane, and Linda H. Babb.

Copies furnished to:
Ramy N. Fares, Esq.
Keith D. Skorewicz. Esq.