FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-4117

MARIA FALDUTO,

Appellant,

v.

R. WAYNE LEWIS,

Appellee.

On appeal from the Circuit Court for Okaloosa County.
John Jay Gontarek, Judge.

November 30, 2020

JAY, J.

Appellant, Maria Falduto, appeals from the Final Summary Judgment entered in favor of Appellee, R. Wayne Lewis, as well as from the trial court's antecedent order granting Appellee's motion to strike Appellant's notice that she intended to voluntarily dismiss her counterclaim. Because we hold that the trial court erred in granting Appellee's motion to strike, we reverse both orders.

I.

This case began with property: $96,000 worth of property accumulated over the course of the parties' twenty-four-year romantic relationship. The parties' relationship ended, but not amicably. In November 2018, Appellee filed a Complaint for

Replevin demanding the return of the aforementioned belongings, which, at the time, were in Appellant's possession. The trial court entered a Replevin Order to Show Cause. Appellee followed with an Amendment to Complaint & Supplemental Affidavit of Property for Replevy. Appellant answered and filed affirmative defenses, as well as a four-count counterclaim. The four counts averred: (Count I) breach of an oral contract whereby Appellee had allegedly promised to financially support Appellant for the rest of her life and to bequeath her all of the parties' belongings; (Count II) unjust enrichment based on the benefit allegedly conferred by Appellant on Appellee of personal services and labor over the course of the relationship; (Count III) promissory estoppel based on Appellant's alleged detrimental reliance on Appellee's promise to support her for the rest of her life; and (Count IV) breach of an alleged implied-in-law contract, again based on the services allegedly performed by Appellant that contributed to Appellee's financial success and counted toward the value of their possessions.

Following a show cause hearing, the trial court entered a Replevin Order & To Issue Writ of Replevin in December 2018, finding that Appellee's underlying claim against Appellant was "probably valid" and, therefore, Appellee was entitled to possession of the effects in question pending final adjudication of the parties' claims. The order further directed that should Appellant be unable to execute a surety bond approved by the court in the amount equal to the value of the property, she was to surrender the effects to Appellee. The court also enjoined Appellant from damaging, concealing, secreting, selling, or otherwise disposing of the property. In turn, Appellee was ordered to hold the effects securely and without damaging them until the final adjudication of the parties' claims.

The case languished until August 2019 when Appellee filed a motion for summary judgment directed to all outstanding issues, including all counts of Appellant's counterclaim. A week before the summary judgment hearing, Appellant filed a Notice of Voluntary Dismissal Without Prejudice directed to all counts of her counterclaim and predicated on Florida Rule of Civil Procedure 1.420(a)(1) and (c).

Two days later, Appellee moved to strike Appellant's notice. In his motion, Appellee claimed that the unilateral dismissal of Appellant's counterclaim was not permitted "inasmuch as [Florida Rule of Civil Procedure] 1.420(a)(2) require[d] an order of the Court to dismiss actions in which property ha[d] been seized or [was] in the custody of the Court, or a counterclaim ha[d] been served." In Appellee's view, the current action "indisputably . . . included property in the custody or control" of the court by virtue of the Replevin Order, which "specifically assert[ed] the Court's control" over the property, and also, by way of the Writ of Replevin. Appellee additionally urged that rule 1.420(c) expressly applied the provisions of rule 1.420 to the dismissal of any counterclaim, but the "Author's Comments" limited rule 1.420(a)(1) to plaintiffs.

At the hearing on his motion, Appellee chiefly argued that because the case had begun as a replevin action and he was given temporary possession of the property by way of the initial writ of replevin—but was prohibited from transferring the property before trial—the property was effectively within the "custody" of the court and, arguably, squarely within the exception set out in rule 1.420(a)(1). In other words, Appellee reasoned that but for Appellant's competing claim to the ownership of the property, the trial court would have just given it to him. Consequently, Appellant had no right to voluntarily dismiss her counterclaim.

Appellant countered by arguing that she was "trying to extricate" herself from the matter completely, noting that she had consented to the replevin judgment. She stressed that Appellee was "not losing anything." More to the point, Appellee alleged that under rule 1.420, a counterclaimant possesses the same right to voluntarily dismiss an action as does a plaintiff up until the matter is submitted to the court on a motion for summary judgment. She disputed Appellee's argument that the property was in the custody of the court, relying on the Second District's decision in *Baden v. Baden*, 260 So. 3d 1108 (Fla. 2d DCA 2018).

Following the parties' arguments, and after expressing doubt as to the wisdom of its decision, the trial court granted Appellee's motion to strike Appellant's notice of voluntary dismissal. The court did not elaborate on its reasons for doing so, either at the hearing or in its written order. This appeal followed.

II.

Answering the question presented by this appeal requires us to construe and interpret the text of the Florida Rules of Civil Procedure. This presents a pure question of law and is subject to de novo review. *Pino v. Bank of N.Y.*, 121 So. 3d 23, 30–31 (Fla. 2013) (citations omitted). To appreciate the unique construct of rule 1.420 we are guided by the general rules of construction neatly integrated by Judge Badalamenti in *Baden*:

> We construe the language of a . . . rule in accord with its plain and ordinary meaning. *See Brown v. State*, 715 So. 2d 241, 243 (Fla. 1998) ("Our courts have long recognized that the rules of construction applicable to statutes also apply to the construction of rules. Thus, when the language to be construed is unambiguous, it must be accorded its plain and ordinary meaning." (citations omitted)). "Legal text 'should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts.'" *Boatright v. Philip Morris USA Inc.*, 218 So. 3d 962, 967 (Fla. 2d DCA 2017) (quoting *Jones v. ETS of New Orleans, Inc.*, 793 So. 2d 912, 914-15 (Fla. 2001)). If a "statutory provision appears to have a clear meaning in isolation, 'but when given that meaning is inconsistent with other parts of the same statute or others in pari materia, the [c]ourt will examine the entire act and those in pari materia in order to ascertain the overall legislative intent.'" *Id.* (alteration in original) (quoting *Fla. State Racing Comm'n v. McLaughlin*, 102 So. 2d 574, 575-76 (Fla. 1958)). Indeed, "[w]henever possible, we must avoid construing legal text as 'mere surplusage.'" *Id.* (quoting *Hechtman v. Nations Title Ins. of N.Y.*, 840 So. 2d 993, 996 (Fla. 2003)).

120 So. 3d at 1112. Applying these principles of construction to Appellee's argument leads us to conclude that his logic is based on a faulty premise and his analysis is inconsistent with the convergent structure of the rule's relevant parts, taking some out of context and rendering others superfluous.

To resolve the instant dispute, we need to examine only three provisions of rule 1.420—subdivision (a)(1) and (2), and subdivision (c). Those provisions are set forth below:

> **(a) Voluntary Dismissal.**
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> (1) *By Parties.* Except in actions in which property has been seized or is in the custody of the court, an action, a claim, or any part of an action or claim may be dismissed by plaintiff without order of court (A) before trial by serving, or during trial by stating on the record, a notice of dismissal at any time before a hearing on motion for summary judgment . . . . Unless otherwise stated in the notice or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication on the merits when served by a plaintiff who has once dismissed in any court an action based on or including the same claim.
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> (2) *By Order of Court; If Counterclaim.* Except as provided in subdivision (a)(1) of this rule, an action shall not be dismissed at a party's instance except on order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been served by a defendant prior to the service upon the defendant of the plaintiff's notice of dismissal, the action shall not be dismissed against defendant's objections unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.
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> . . . .
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> **(c) Dismissal of Counterclaim, Crossclaim, or Third-Party Claim.** The provisions of this rule apply to the dismissal of any counterclaim, crossclaim, or third-party claim.

In synopsizing the rule, one commentator has observed: "[R]ule 1.420(a)(1) outlines the procedure for the voluntary dismissal of a claim without court approval. This rule may be used

by the plaintiff to dismiss the complaint, *or by a defendant to dismiss a counterclaim*, a crossclaim, or a third party complaint." Philip J. Padovano, *West's Fla. Prac. Series, Civil Practice* § 12:1 (Mar. 2020 update) (emphasis added). That subdivision (a)(1) applies equally to counterclaimants is established by the clear language of rule 1.420(c). Thus, rule 1.420(a)(1) freely permits a counterclaimant to voluntarily dismiss her counterclaim "without order of court . . . at any time before a hearing on motion for summary judgment." *Id.*; *accord McIntire v. McIntire*, 352 So. 2d 142, 143 (Fla. 1st DCA 1977) (holding that "a counterclaimant can dismiss his counterclaim without leave of court provided the conditions of Fla. R. Civ. P. 1.420(a)(1) are otherwise met. (*See* Fla. R. Civ. P. 1.420(c).)"). As the Florida Supreme Court held in *Pino*, the right to voluntarily dismiss within the time limitations of rule 1.420(a)(1) is "absolute." 121 So. 3d at 31 (citation omitted). In fact, assuming compliance with the rule, "[t]he trial court has no authority or discretion to deny the voluntary dismissal." *Id.*

We begin our analysis with the Appellee's faulty premise. Appellee claims that the opening clause of subdivision (a)(1)—which imposes an exception where property has been seized or is in the custody of the court—applied to defeat Appellant's right to voluntarily dismiss her counterclaim. We disagree. By virtue of rule 1.420(c), the Appellant's counterclaim must be treated as the "action" or "claim" contemplated in subdivision (a)(1). However, it cannot be said that the counts of the counterclaim involve property that was "seized or is in the custody of the court." Fla. R. Civ. P. 1.420(a)(1). Furthermore, if by "action"—as used in the exception clause—the rule means the main cause of action, we are not willing to accept the argument that Appellee's principal "action" involves property that was "seized or is in the custody of the court." *Id.* It was, rather, placed in Appellee's possession.

Appellee's reliance on the supreme court's pre-rule decision in *Crump v. Branning*, 77 So. 228 (Fla. 1917), is unavailing. Even though *Crump* involved a writ of replevin, it did not, as here, involve a counterclaim that had no bearing on the property that was the subject of the replevin action. Instead, *Baden*, cited by Appellant, informs our decision.

In *Baden*, it was argued that the exception identified in the opening clause of rule 1.420(a)(1) prevented Mr. Baden from voluntarily dismissing his own lawsuit. 260 So. 3d at 1113. In its sua sponte order striking Mr. Baden's notice of voluntary dismissal, the trial court ruled that "'[t]he successor trustee of the [trust] is under this [c]ourt's direction, supervision and control and therefore the funds being held by the successor trustee are in the custody of this [c]ourt' such that the court 'continues to retain jurisdiction to supervise the [trust] and the successor trustee.'" *Id.* at 1114 (alterations in original). The Second District rejected that ruling, holding that "the daughters identify no authority to support their contention that this expansive view of 'custody of the court' applies in the context of rule 1.420(a)(1)." *Id.* It concluded:

> [T]he most natural reading of the term "property . . . in the custody of the court" in rule 1.420(a)(1) is money or other property in the *actual* custody of the court, such as funds deposited in the court registry. Those are funds that are in the actual custody of the court, not trust property on the transactions of which the court has issued orders.

Id. (emphasis added) (citation omitted). *See also Our Gang, Inc. v. Commvest Sec., Inc.*, 608 So. 2d 542, 544–45 (Fla. 4th DCA 1992) (holding that, in a case in which the trial court ordered the funds placed into escrow or in the registry of the court, "[b]ecause no property had been seized by the court or was in the custody of the court at the time Commvest filed its voluntary dismissal . . . Florida Rule of Civil Procedure 1.420(a)(1) is inapplicable."); *Cigna v. United Storage Sys., Inc.*, 537 So. 2d 129, 130 (Fla. 5th DCA 1988) (holding that pretrial transfer of insurance fines to plaintiff's attorney to be held in escrow for the plaintiff was not a seizure by the court or in the custody of the court within the meaning of rule 1.420(a), so as to prevent the plaintiff from voluntarily dismissing the suit).

Similarly, in this case, the trial court ordered the property to be held by Appellee with the proviso that he must safeguard it pending final judgment. In keeping with the above-cited decisions, we do not consider that order to equate with a situation where a court has actually seized a party's property or taken a party's

property into the custody of the court. Nor does the property exception apply to Appellant's counterclaim. Accordingly, we reject Appellee's assertion that the exclusion in rule 1.420(a)(1) applied to defeat Appellant's right to voluntarily dismiss her counterclaim.

Appellee's next argument, that rule 1.420(a)(2) required Appellant to obtain a court order to dismiss her counterclaim, misconstrues the rule's plain text. The very fact that the title of the subdivision contains two separate subjects separated by a semicolon—"By Order of Court; If Counterclaim"—should have alerted Appellee that the subdivision addresses two distinct circumstances. Moreover, by including the words "[e]xcept as provided in subdivision (a)(1) of this rule," the first sentence of (a)(2) reaffirms the dismissal component of subdivision (a)(1). As to the second sentence of (a)(2), we again turn to Mr. Padovano's treatise on Florida civil procedure:

> A complaint cannot be voluntarily dismissed without court approval if the defendant had served a counterclaim before the plaintiff served the notice of voluntary dismissal. Rule 1.420(a)(2) states that "[i]f a counterclaim has been served by a defendant prior to the service upon the defendant of the plaintiff's notice of dismissal, the action shall not be dismissed against defendant's objections unless the counterclaim can remain pending for independent adjudication by the court." Thus, the rule affords the defendant a right to be heard before dismissal of the complaint in this situation. The court can decide to dismiss the complaint even if the defendant objects, however, if the counterclaim can remain pending independently of the complaint.

West's Fla. Prac. Series, Civil Practice § 12:1 (footnote omitted). The evident intent, then, of subdivision (a)(2) is to prevent "a plaintiff from unilaterally terminating litigation when the defendant countersues." *Murphy v. WISU Props., Ltd.*, 895 So. 2d 1088, 1096 (Fla. 3d DCA 2004) (footnote omitted) (citation omitted) ("When a counterclaim has been served by a defendant prior to the service of plaintiff's notice of voluntary dismissal, the action cannot be dismissed against the defendant's objections."); *accord Fed. Ins. Co. v. Fatolitis*, 478 So. 2d 106, 109 (Fla. 2d DCA 1985)

(same). The foregoing supports Appellant's argument that there are only two exceptions to the dismissal right of rule 1.420: "the seizure/custody limitation," and the "pending-counterclaim limitation."

Appellee's reliance on *Siler v. Lumbermen's Mutual Casualty Co.*, 420 So. 2d 357 (Fla. 5th DCA 1982), is not persuasive. *Siler* involved the *plaintiffs'* filing of a "paper" voluntarily dismissing certain *parties* from its action—which involved not only counterclaimants but a convoluted web of cross-claimants. Fearing that they had eliminated not only their main claim, but also their cross-claim, the plaintiffs moved for relief from their voluntary dismissal with prejudice under Florida Rule of Civil Procedure 1.540(b). The trial court denied the motion, ruling it had lost jurisdiction once the plaintiffs effected a dismissal without an order of the court.

In reversing the trial court's order, the Fifth District observed that "[f]irst, and most elementarily, Florida Rule of Civil Procedure 1.420 relates only to dismissal of actions and not to dismissal of parties from an action" and "[n]otwithstanding what appellants may or may not have intended to accomplish by their paper styled 'Voluntary Dismissal with Prejudice,' a careful reading of it shows that it only attempted to dismiss" parties. *Id.* at 358 (footnote omitted). The Fifth District continued: "Secondly, even if the paper were considered to be a notice of dismissal under Rule 1.420(a), . . . in this case there was a counterclaim filed and, therefore, a voluntary dismissal under Rule 1.420(a)(1) was not authorized; any dismissal of the action must be under Rule 1.420(a)(2), which requires an order from the trial court." *Id.* (footnote omitted) (citations omitted).

Siler, therefore, essentially supports our interpretation of rule 1.420(a)(2). It would have required Appellee, as the plaintiff, to obtain a court order prior to dismissing his action in light of Appellee's counterclaim, but not the other way around. Rule 1.420(a)(2) serves to protect the counterclaimant.

III.

In short, Appellee has failed to persuade us that Appellant's notice of voluntary dismissal of her counterclaim ran afoul of either

the "seizure/custody" exception of rule 1.420(a)(1), or the order requirement of rule 1.420(a)(2). To the extent that the trial court's order granting Appellee's motion to strike relied on either or both of those arguments, it was incorrect. Accordingly, we reverse the Order Granting Plaintiff's Motion to Strike Notice of Voluntary Dismissal without Prejudice. On remand, Appellant may serve her notice of voluntary dismissal of her counterclaim. With the counterclaim effectively dismissed, we must also reverse that portion of the Final Summary Judgment addressing the merits of the counterclaim, since the voluntary dismissal of the counterclaim will serve to divest the trial court of jurisdiction over its contents. *Pino*, 121 So. 3d at 32.

REVERSED and REMANDED for further proceedings consistent with this opinion.

RAY, C.J., and BILBREY, J., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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