

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JAMES M. HERRELL and JOAN M.)
RUDICK,)
)
Appellants,)
)
v.)
)
UNIVERSAL PROPERTY & CASUALTY)
INSURANCE COMPANY a/s/o SELMA)
SHIRLEY ZETZER,)
)
Appellees.)
_____)

Case No. 2D19-1911

Opinion filed December 23, 2020.

Appeal from the Circuit Court for Lee
County; Alane C. Laboda, Judge.

Scot E. Samis and Christopher Shand
of Traub Lieberman Straus &
Shrewsbury LLP, St. Petersburg, for
Appellants.

Nancy W. Gregoire of Birnbaum,
Lippman & Gregoire, PLLC, Fort
Lauderdale; and Mary E. Cantwell of
Markcity, Rothman, Cantwell & Breitner,
P.A., Plantation, for Appellees.

SMITH, Judge.

In this subrogation action, Universal Property and Casualty Company
sued James Herrell and Joan Rudick for negligence, only to dismiss the action by the

filing of a notice of voluntary dismissal under Florida Rule of Civil Procedure 1.420(a)(1) almost two years later and on the eve of trial but after the statute of limitations period expired and after Herrell and Rudick served Universal Property with separate proposals for settlement under Florida rule of Civil Procedure 1.442 and section 768.79, Florida Statutes (2018). Herrell and Rudick appeal the denial of their motion for attorney's fees, arguing that even though the dismissal was without prejudice, the dismissal has the same preclusive effect as a dismissal with prejudice because the statute of limitations had expired—facts which, according to Herrell and Rudick, distinguish this case from MX Investments, Inc. v. Crawford, 700 So. 2d 640 (Fla. 1997). We disagree.

In MX Investments, the supreme court held that a party is not entitled to an award of attorney's fees and costs pursuant to a proposal for settlement under section 768.79 unless the dismissal is with prejudice. Id. at 642. In so holding the court reasoned:

We construe the terms "voluntary dismissal" and "involuntary dismissal" in section 768.79(6), Florida Statutes (1991), to mean a dismissal with prejudice *so that the dismissal is the basis for a judgment of no liability as contemplated in section 768.79(1), Florida Statutes (1991)*. Thus, only when a plaintiff's voluntarily dismissal is with prejudice or is a second voluntary dismissal is the defendant entitled to attorney fees in accord with section 768.79, Florida Statutes (1991).

Id. (emphasis added); see also Commonwealth Prop. Assocs. v. SunTrust Bank, Sw. Fla., 835 So. 2d 1175, 1177 (Fla. 2d DCA 2002). There is no question that the dismissal here was Universal Property's first voluntary dismissal under rule 1.420(a)(1) and was without prejudice at the time it was filed. The fact that Universal Property

dismissed the lawsuit after the expiration of the statute of limitation period and the time period to accept the offer of judgment does not change the nature of the dismissal.

Herrell and Rudick's argument that the dismissal without prejudice has the same preclusive effect as a dismissal with prejudice because the statute of limitations had expired for purposes of an award of attorney's fees under a proposal for settlement has already been rejected by the Third District. See Gammie v. State Farm Mut. Auto. Ins. Co., 720 So. 2d 1163, 1163-64 (Fla. 3d DCA 1998) (rejecting argument that a voluntary dismissal after the statute of limitations period is the equivalent of an adjudication on the merits). We too decline to accept the argument that a dismissal after the expiration of the statute of limitations equates to a dismissal with prejudice and as such falls outside of the Florida Supreme Court's holding in MX Investments. 700 So. 2d at 642. In essence, Herrell and Rudick advance a fairness and equity argument, which we deem more appropriate for the legislature or the supreme court or the Civil Procedure Rules Committee to address. Because to hold otherwise—choosing equity over the rule—would deny a plaintiff the benefit of exercising its right under rule 1.420(a)(1) to dismiss its lawsuit anytime "after a motion for summary judgment is denied, but before retirement of the jury, or before submission of a nonjury case to the court for decision." See Aero Toy Store, Inc. v. Sherwin Williams Co., 725 So. 2d 1267, 1268 (Fla. 4th DCA 1999) (holding that the trial court is divested of jurisdiction to enter a dismissal with prejudice where a party voluntarily dismisses the case under rule 1.420(a)(1) and thus an award of attorney's fees under section 768.79 is improper). Accordingly, we hold that a dismissal without prejudice after the expiration of the statute of limitations period and the expiration of the period allowed to accept a proposal for

judgment is not an adjudication on the merits. Gammie, 720 So. 2d at 1163-64; see also Tucker v. Ohren, 739 So. 2d 684, 686 (Fla. 4th DCA 1999) (reversing award of attorney's fees under section 768.79 where involuntary dismissal based on the failure to join an indispensable party did not result in an adjudication on the merits).

Affirmed.

KHOUZAM, C.J., and MORRIS, J., Concur.