

**SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF SAN DIEGO  
CENTRAL**

**MINUTE ORDER**

DATE: 12/04/2019

TIME: 11:51:00 AM

DEPT: C-69

JUDICIAL OFFICER PRESIDING: Katherine Bacal

CLERK: Calvin Beutler

REPORTER/ERM:

BAILIFF/COURT ATTENDANT:

CASE NO: **37-2019-00002457-CU-BT-CTL** CASE INIT.DATE: 01/14/2019

CASE TITLE: **Anthony J Johnson vs David Huffman [IMAGED]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Business Tort

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**APPEARANCES**

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The Court, having taken the above-entitled matter under submission on 10/25/19 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

The motion for attorneys' fees, filed by defendants David Huffman, Richard Turner, Manuel Altamirano, and David Kinney, is granted in part. Defendants are awarded \$12,237.50 in fees.

*Preliminary Matters*

This motion was heard on October 25. The Court tentatively denied the request for fees because the briefs exceeded the page limits when the moving and opposition papers for the anti-SLAPP motion were taken into account. ROA # 115. After considering argument, the Court took the motion under submission to consider the merits of the anti-SLAPP motion. ROA # 117.

Plaintiff's and defendants' unopposed requests for judicial notice are granted.

**Background**

This is one of several lawsuits between the shareholders of a software company, Storix, Inc. According to the complaint, plaintiff was initially the sole shareholder of Storix but subsequently reduced his interest to 40%. As a result, defendants have the majority of outstanding shares, the board seats and all officer positions. Roughly summarizing the allegations, the complaint alleges defendants caused Storix to bring a meritless case against plaintiff (the "Direct Action"), refused to indemnify plaintiff for defending the Direct Action, used plaintiff's share of company profits to pay Storix's counsel in the Direct Action and a Derivative Suit which plaintiff filed on behalf of the company, and converted profits that plaintiff earned before defendants became shareholders.

On April 12, 2019, defendants filed a special motion to strike under the anti-SLAPP statute, Code of Civil

Procedure section 425.16. ROA # 45. On May 30, before the anti-SLAPP motion could be heard, plaintiff dismissed the entire action without prejudice. ROAs 71-77. Consequently, the anti-SLAPP hearing was vacated. Defendants filed a motion for attorneys' fees. ROA # 87.

## Discussion

### 1. Anti-SLAPP Motion

A defendant who prevails on its special motion to strike is entitled to recover its reasonable attorneys' fees and costs for the motion. Code Civ. Proc., § 425.16, subd. (c). A court has jurisdiction to award fees where the challenged pleading is voluntarily dismissed while the anti-SLAPP motion is pending. *Pfeiffer Venice Properties v. Bernard* (2002) 101 Cal.App.4th 211, 215. However, defendants may not recover fees unless the Court finds they would have prevailed on the anti-SLAPP motion. *Tourgeman v. Nelson & Kennard* (2014) 222 Cal.App.4th 1447, 1457. If defendants establish that the challenged claim arises from activity protected by section 425.16, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success. *Baral v. Schnitt* (2016) 1 Cal.5th 376, 384 (explaining two-step process). Under the first step, a defendant must make a prima facie showing that the plaintiff's claim arises from the defendant's exercise of his free speech or petition rights.

#### *Protected Activity*

The anti-SLAPP motion sought to strike the 1<sup>st</sup> cause of action for wrongful use of civil proceedings, 2<sup>nd</sup> cause of action for breach of fiduciary duty, 3<sup>rd</sup> cause of action for conversion, and 5<sup>th</sup> cause of action for fraud.

Plaintiff conceded that the 1<sup>st</sup> cause of action for wrongful use of civil proceedings arose out of protected activity, but argued that the other causes of action do not.

The 2<sup>nd</sup> cause of action alleged that defendants, as majority shareholders, breached their fiduciary duty of loyalty and good faith to plaintiff as a minority shareholder. Compl., ¶ 40. Defendants allegedly denied plaintiff the benefits defendants afforded themselves, including depriving plaintiff indemnification. *Id.* at ¶ 41. Defendants also allegedly diverted plaintiff's share of company profits to direct Storix's counsel to exclusively assist defendants in protecting their control and to unlawfully interfere and defend against the Derivative Suit. *Id.* Plaintiff alleged defendants used company funds to pay their personal attorneys to defend against the Derivative Suit. *Id.* at ¶ 23.

Defendants argue that "communicative conduct such as the filing, funding, and prosecution of a civil action" are acts that arise from protected activity (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056) and that they have a "protected right to direct their attorneys in their representation in litigation and defend litigation filed by [plaintiff]." However, in the anti-SLAPP context, the critical consideration is whether the cause of action is based on the defendant's protected free speech or petitioning activity. *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89; see also *Sheley v. Harrop* (2017) 9 Cal.App.5th 1147, 1167 ("critical point to establishing the 'arising from' requirement is whether a plaintiff's claim itself was based on an act in furtherance of the defendant's right of petition or free speech"). Assertions that are "merely incidental," "collateral," or "merely provide context" are not subject to section 425.16. *Baral v. Schnitt* (2016) 1 Cal.5th 376, 394.

The gist of the 2<sup>nd</sup> cause of action is defendants' unauthorized use of corporate funds for personal purposes. That the funds were used for litigation rather than some other allegedly improper purpose is

collateral. Thus, defendants did not demonstrate that the 2<sup>nd</sup> cause of action arose out of protected activity.

The 3<sup>rd</sup> cause of action for conversion alleged defendants converted \$475,560 that the company owed plaintiff before defendants became shareholders. Compl., ¶ 45. This allegation clearly did not arise out of protected activity. Defendants also allegedly converted company profits to pay their personal attorneys. *Id.* This allegation is a variation of the breach of fiduciary claim and, for the same reason, did not arise out of protected activity.

The 5<sup>th</sup> cause of action for fraud/constructive fraud alleged defendants breached their fiduciary duty to disclose facts for their personal benefit. Compl., ¶ 57. Defendants allegedly misrepresented that plaintiff had received all profits owed to him before defendants became shareholders and that they were not using corporate funds for their defense in the Derivative Suit. *Id.* at ¶ 59. For the reasons already explained, these allegations did not arise out of protected activity.

As only the 1<sup>st</sup> cause of action fell within the anti-SLAPP statute, the Court need only consider whether defendants had a substantial probability of prevailing on that claim.

### *Probability of Prevailing*

The 1<sup>st</sup> cause of action alleged defendants directed Storix's counsel to file the Direct Suit without probable cause. Because this claim fell within the anti-SLAPP statute, the burden shifts to the plaintiff to establish a probability of prevailing. To establish a probability of prevailing, a plaintiff "must show both that the claim is legally sufficient and there is admissible evidence that, if credited, would be sufficient to sustain a favorable judgment." *McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 108.

In order to establish a claim for malicious prosecution, a plaintiff must prove that the prior proceeding was (1) commenced by or at the direction of the defendant, (2) pursued to a legal termination in plaintiff's favor, (3) brought without probable cause, and (4) initiated with malice. *Crowley v. Katleman* (1994) 8 Cal.4th 666, 676.

In the Direct Action, the jury found that plaintiff breached his duty of loyalty while serving on the Board of Directors. RJN, Ex. 8 [Judgment], pp. 2, 3, 6, 8. Storix was awarded \$3,739.14. As a result, defendants argue, plaintiff cannot meet the favorable termination requirement. Relying on the severability of claims analysis in *Albertson v. Raboff* (1956) 46 Cal.2d 375, plaintiff says he obtained a favorable termination because the jury concluded he did not breach his duty of confidentiality. See, RJN, Ex. 8, p. 3. While *Albertson* might be interpreted as creating a new rule that would allow a malicious prosecution action for partial success so long as the claims on which the defendant prevailed were "severable," the Fourth District Court of Appeal has made clear that there must be a favorable termination of the *entire* underlying action. *Lane v. Bell* (2018) 20 Cal.App.5th 61, 75. It is undisputed that Storix obtained a judgment against plaintiff. The fact that plaintiff obtained a favorable ruling on one issue is insufficient to show a favorable termination. Thus, plaintiff has not demonstrated a probability of prevailing on his claim for wrongful use of civil proceedings.

## 2. Attorneys' Fees

Having concluded that defendants would have partially prevailed on their anti-SLAPP motion, the Court turns to the amount of fees to be awarded.

Defendants were represented by David Aveni and Marty Ready. Aveni is a partner whose hourly rate is

\$475. Ready Decl., ¶ 3. Ready is a 14-year associate who performed the bulk of the work on the motion. *Id.* at ¶¶ 6, 13-14. Ready billed at \$325. The Opposition does not dispute the reasonableness of these rates. Aveni billed 1.9 hours and Ready billed 45.3 hours for the anti-SLAPP motion for a total of \$15,625. *Id.* at ¶ 13 & Ex. 1. Some of the work was related to the demurrer, service issues, and other unrelated issues. Further, defendants prevailed on only one of the challenged claims. Aveni's time and 25 hours of Ready's time is reasonable. Defendants are awarded \$9,027.50 for time spent on the anti-SLAPP motion.

The prevailing party is also entitled to recover its fees incurred on the motion for fees. *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1141. Defendants claim 16 hours of attorney time and 2 hours of paralegal time for a total of \$5,810. Ready Decl., ¶ 14. The paralegal's time and eight hours of attorney time is reasonable. Defendants are awarded \$3,210 for the fee motion. Consequently, plaintiffs are awarded a total of \$12,237.50.

The minute order will be the order of the Court.



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Judge Katherine Bacal