

No. D077096

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

ANTHONY JOHNSON,
Plaintiff and Appellant,

vs.

**DAVID HUFFMAN, RICHARD TURNER, MANUEL
ALTAMIRANO and DAVID KINNEY**
Defendants and Respondents.

Appeal from Order
of the San Diego County Superior Court
Case No. 37-2019-00002457-CU-BT-CTL
Hon. Katherine A. Bacal

**RESPONDENTS' OPPOSITION TO APPELLANT'S
APPLICATION FOR CONSOLIDATION OF APPEALS**

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Defendants/Respondents’ David Huffman, Richard Turner, Manuel Altamirano, and David Kinney (collectively, "Respondents") respectfully submit this response in opposition to the motion, filed July 7, 2020, by Plaintiff and Appellant Anthony Johnson (“Appellant”) to consolidate this appeal with California Court of Appeal, 4th Appellate District, Division One Case No. D075308. As explained below, consolidation is not appropriate given the number of and different issues on appeal and differences between the parties involved. Further, Appellant’s asserted interdependence of the two appeals is non-existent. Consolidation based on this alleged interdependence therefore will not promote judicial economy but risks confusing the issues on appeal.

I. DISCUSSION

Appellant argues Case No. D077096 is “related and interdependent” with Case No. D075308 and should be consolidated because reversal in Case No. D075308 would compel reversal in Case No. D077096. (Appellant’s Motion at 1.) Nothing could be further from the truth as the two appeals are not interdependent and involve different parties and issues on appeal.

A. Relevant Background of Case No. D075308 and Case No. D077096

The issues on appeal in Case No. D075308, arise from judgment in a consolidated matter involving direct and derivative claims. The relevant consolidated matter in Case No. D075308 involved a direct claim brought by Storix, Inc. against Appellant Anthony Johnson for breach of his fiduciary duty when he, as a

director of Storix, Inc., **stood up a competing business**. After trial, the Judgment on Consolidated Actions Following Trial unequivocally ordered judgment be entered “[i]n favor of Plaintiff Storix, Inc. and against Defendant Anthony Johnson on Storix Inc.’s complaint for breach of fiduciary duty.” (Case No. D077096, RA 584.) Appellant appealed the judgment in the consolidated matter in favor of Storix, Inc., as well as appealed denial of his judgment notwithstanding the verdict, an award of attorneys’ fees for a successful anti-SLAPP motion on cross-claims filed by Johnson, an award of costs, and an award of attorneys’ fees in the shareholder derivative action secured by a bond. These are the issues on appeal in Case No. D075308.

Appellant, however, ignoring the result of the judgment at issue in Case No. D075308 filed a malicious prosecution action against Respondents’ as directors of Storix, Inc. for prosecuting the direct claim for breach of fiduciary duty. Appellant’s complaint for malicious prosecution is the underlying action in Case No. D077096.

The appeal in Case No. D077096, is based on Respondents filing a successful anti-SLAPP motion in response to Appellant’s malicious prosecution claim among others. (Case No. D077096, 1 AA 98.) Procedurally, before Appellant’s opposition to Respondents’ anti-SLAPP motion was due, Appellant voluntarily dismissed his case without prejudice. (*Id.*, 1 AA 229.) Respondent’s therefore filed a motion for attorneys’ fees, which was granted by the trial court. (*Id.*, 2 AA 410.) Appellant appealed the attorney fee and cost award, which frames the issues in Case No. D077096.

B. The Two Appeals Are Not Interdependent and Should Not Be Consolidated

Appellant's basis for the alleged interdependence of the two appeals is founded on a fundamental misunderstanding of the necessary elements to maintain a malicious prosecution claim. Specifically, Appellant mistakenly believes he was the prevailing party in the underlying matter upon which he bases his malicious prosecution claim and therefore satisfied the favorable termination element of malicious prosecution. (See Appellant's Motion at 3 asserting Appellant won the underlying action instituted by Storix, Inc. contrary to the actual judgment.) For example, on appeal in Case No. D077096, Appellant argued the Court should consider the breach of fiduciary duty asserted against him by Storix, Inc. as two separate claims: 1) unfair head start; and 2) loss of employee productivity. (Case No. D077096, AOB, p. 14 - 15.) Appellant asserted the alleged unfair head start claim was favorably terminated but **the loss of employee productivity claim was severed and appealed by Appellant.** (*Ibid.*) Thus, Appellant believes he satisfied the favorable termination element as to the "unfair head start" claim and could maintain a malicious prosecution action. **The trial court, however, disagreed based on this Court's holding in *Lane v. Bell*, 20 Cal. App. 5th 61 (2018).** As a result, the trial court awarded Respondents' attorneys' fees on their attorney fee motion under Cal. Civ. Proc. § 425.16 because Appellant could not satisfy the favorable termination element of his malicious prosecution claim. (Case No. D077096, 2 AA 410.)

Now, by way of this motion to consolidate, Appellant contradicts his previous position that he satisfied the favorable termination element. Appellant argues in his motion to consolidate that the “assumption [there was no favorable termination] was premature because the Email Judgment was pending appeal and its reversal will establish favorable termination of the entire lawsuit. (Johnson Decl. □ 27.)” Based on this new argument, Appellant incorrectly asserts reversal in Case No. D075308 will compel reversal in Case No. D077096 because there will now be a favorable termination of the entire underlying action. What Appellant misunderstands is that the Judgment on Consolidated Actions Following Trial against him means he cannot satisfy as a matter of law two of the elements, favorable termination and lack of probable cause, necessary to maintain a malicious prosecution action. *See Bertero v. National General Corp.*, 13 Cal. 3d 43, 50 (1974). Thus, no matter what happens in Case No. D075308, it will have no effect whatsoever on the issue on appeal in Case No. D077096.

This alleged interdependence is the entire basis for Appellant’s motion to consolidate. But as discussed above, the Court should deny the motion to consolidate the two appeals because no interdependence exists as a decision in Case No. D075308 will have no effect on Case No. D077096.

C. The Issues and Parties Are Not Related

The issues on appeal, as well as the record, in Case No. D075308 are much more complex and voluminous than the issues and record in Case No. D077096. Case No. D075308 involved a three week jury trial, subsequent bench trial, and post-trial motions. Case No. D077096 was dismissed prior to the date Appellant's opposition to Respondents' anti-SLAPP motion was due. As a result, the issue in Case No. D077096 is limited to the Court determining whether the award of attorneys' fees was warranted because Appellant could not satisfy his burden on prong two of the anti-SLAPP statute to establish there was a probability he would have prevailed on his malicious prosecution claim. Moreover, the consolidated matters at issue in Case No. D075308 involve parties not involved in Case No. D077096. The limited issue in Case No. D077096 as well as the difference between the parties weigh heavily in favor of maintaining the appeals separately. For these reasons, the Court should deny the motion to consolidate.

II. CONCLUSION

Appellant's motion to consolidate should be denied because the alleged relatedness and interdependence of Case No. D075308 and Case No. D077096 is non-existent. As discussed above, the interdependence is based on Appellant's flawed understanding of his claim for malicious prosecution, and more specifically, his ever-evolving theory to satisfy the favorable termination element of malicious prosecution. Because the underlying judgment was against Appellant, he cannot, as a matter of law, maintain a claim for malicious prosecution.

Further, the issues and parties in Case No. D075308 involve issues that are much more complex and derive from a voluminous record. Case No. D077096, however, is limited to a narrow issue and does not include all of the parties involved in Case No. D075308. The motion to consolidate should be denied.

Dated: July 22, 2020

**WILSON, ELSER, MOSKOWITZ
EDELMAN & DICKER, LLP**

/s/ Marty B. Ready, Esq.

By: Marty B. Ready, Esq.
Attorneys for Respondents DAVID
HUFFMAN, RICHARD TURNER,
MANUEL ALTAMIRANO, and
DAVID KINNEY

COURT OF APPEAL NO. No. D077096

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

I am employed in the County of San Diego, State of California. I am over the age of 18. I am not a party to this action. My business address is 401 West A Street, Suite 1900, San Diego, California 92101.

On **July 22, 2020**, the documents described as

RESPONDENTS' OPPOSITION TO APPELLANT'S APPLICATION FOR CONSOLIDATION OF APPEALS

Served on the following parties in this action:

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By the following method of service:

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Executed on **July 22, 2020** at San Diego, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

/s/ Irene Gonzales

IRENE GONZALES

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