Court of Appeal of the State of California

Fourth Appellate District, Division One

ANTHONY JOHNSON,

Plaintiff, Appellant

v.

DAVID HUFFMAN,
RICHARD TURNER,
MANUEL ALTAMIRANO, and
DAVID KINNEY,

Defendants, Respondents.

Court of Appeal Case No.:
D077096

Superior Court Case No.:
37-2019-00002457-CU-BT-CTL

Appeal from Orders of the
Superior Court, County of San Diego

Honorable Judge Katherine A. Bacal

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Defendants state numerous false facts to paint Johnson as nothing more than a disgruntled former employee of Storix and a vexatious litigant by citing to points in the record that in no way support such facts. Defendant's simply repeat in their response brief the same arguments and authority put forth in the trial court without reference to any arguments or authority in Johnson's opening brief proving their arguments misleading and irrelevant to this case. In most instances, when read in proper context, the cases cited by Defendants not only fail to support their position but actually support Johnson's position.

Johnson argued that (1) the lower court erroneously found Defendants' anti-SLAPP motion would have been granted on a ground which, at best, rendered Johnson's malicious prosecution claim premature and subject to a stay; (2) the lawsuit underlying the malicious prosecution was brought without probable cause; (3) Johnson voluntarily dismissed this case for reasons other than to avoid Defendants' anti-SLAPP motion; and (4) Defendants incurred no costs or fees, thus any award against Johnson would improperly allow them to profit from the litigation. Johnson provided substantial evidence and authority in support of every argument, none of which Defendants disputed.

DISCUSSION

A. Defendants Do Not Dispute Johnson's Showing That He Would Have Prevailed on His Malicious Prosecution Claim

1. Defendants provided no authority contrary to Johnson's arguments regarding severability of unrelated claims.

Johnson raised and supported with substantial authority that claims may be severed from the underlying lawsuit to establishing favorable termination as long as the malicious prosecution action is directed only to the *non-severable* claims. (AOB at pp. 13-15.) Defendants continue to

ignore Johnson's argument and simply repeat that "A partial victory in an underlying action is not favorable termination." (RB at p. 10, citing *Lane v. Bell* (2018) 20 Cal.App.5th 61, 66 (*Lane*).)

Defendants have done everything possible to confuse an issue that is really quite simple. The "severability rule" provides that a claim is severable from the favorable termination element of a malicous prosecution action as long as the action is directed only to unrelated claims on which the underlying defendant prevailed. Even related claims are severable if they are pending appeal and the malicious prosecution action is directed only to non-appealed claims. No cases cited by Defendants disapprove the rule, every aspect of which applies to the circumstances of Johnson's case.

First, Defendants argue that a "partial victory" bars a malicous prosecution action by citing cases involving "partial recovery" on a single claim. (RB at p. 12, citing *Lane, supra,* at 75; *Murdock v. Gerth* (1944) 65 Cal. App. 2d 170, 177.) Defendants also argue the "judgment as a whole" must be considered, but refer only to cases involving no monetary relief but where "affirmative relief" was granted on the same claim. (RB at pp. 9-12, See *Lane, supra*; *Staffpro, Inc. v. Elite Show Servs., Inc.* (2006) 136 Cal. App. 4th 1392; *Casa Herrera, Inc . v. Beydoun* (2004) 32 Cal. 4th 336; *Crowley v. Katleman* (1994) 8 Cal.4th 666; *Freidberg v. Cox* (1987) 197 Cal. App. 3d 381.) Defendants mischaracterize these cases as requiring that the "entire lawsuit" underlying the malicious prosecution claim terminate in the plaintiff's favor by ignoring that cases involved a single claim.[1]

Defendants concede that "[a]t most, the so-called 'severability rule' enunciated in *Albertson* has limited applicability where there is a partial

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[1] Other cases involving more than one claim find the "entire lawsuit" must terminate in the plaintiff's favor when the malicious prosecution action is directed to the entire lawsuit.

appeal." (RB at 10, citing *Lane, supra at 75*.) They nevertheless ignore Johnson's argument and evidence showing that Storix's only successful claim of $3,739.14 for "loss of employee productivity" is pending appeal and his malicious prosecution action was directed only to the $1.25 million claim of "unfair head start" on which he prevailed. Defendants attempt to confuse the issue by asserting:

> "As in *Lane*, there is no partial appeal in this underlying matter. On the contrary, the Second Amended Complaint only contained one cause of action asserted against Johnson - breach of fiduciary duty."

(RB at 10.) Defendants argue that Johnson's appeal is not "partial" because it's directed to a claim not alleged in the complaint. Yet, they also argue that "a judgment not based upon an allegation in a complaint can still be relied upon to determine the favorable termination element." (RB at p. 13, citing *Murdock v. Gerth, supra, at* 176-177.) Defendants admit Storix's claim of $3,739 represents the entire judgment *against Johnson* and also that it is separate from the claim alleged in the complaint.[2] Johnson's appeal is clearly partial or he would also be appealing the claim he successfully defended.

Defendants ignore Johnson's argument that, even a malicious prosecution action directed to the "entire lawsuit" and thereby a claim pending appeal, the action is considered "premature". (AOB at p. 14.) Had Johnson directed the action to the claim pending appeal (he didn't), it would have been an error of law to strike the claim rather than stay it. See *Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 458-9. Therefore, even if the court rejected all authority providing for severability of claims,

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[2] Johnson reiterates that Storix and Defendants are the same. Defendants remain in majority control of Storix and all acts and decisions of Storix are exclusively those of Defendants.

Johnson's claim was merely premature and could not have been stricken without addressing its merits.

Lastly, Defendants apparently try to raise an issue of *res judicata* by stating that, in the federal case filed after the voluntarily dismissal of this case, the court "considered and ruled on Johnson's assertion that the severability of claims applies in the context of the favorable termination element of a malicious prosecution claim." (RB at p. 11, referring generally to *Johnson v. Altamirano,* 2020 U.S. Dist. LEXIS 15775.) The federal suit followed the dismissal of this one, so the order is not *preclusive* to this claim, nor does it provide precedent since it's neither final nor published. Still, the federal court didn't address Johnson's argument regarding severability of claims, much less claims severed by appeal. This Court should rely on the many published California cases cited by both parties.

2. Defendants' assertion that there was only one claim in the underlying lawsuit is patently false.

Knowing the "severability rule" was created for and specifically applicable to the circumstances of Johnson's case, Defendants try to argue there was only one claim. Johnson provided evidence showing there were two claims, including the jury's specific verdict rejecting Storix's $1.25 million claim for "unfair head start" unrelated to the $3,739.14 claim for "loss of employee productivity" on which Storix prevailed. (AOB at p. 9.)

Defendants absurdly argue that both claims are alleged as a "breach of fiduciary duty" and thus the same claim. Johnson argued that two different acts committed in breach of fiduciary duty give rise to two different claims. (AOB at p. 14.) The cases cited by Defendants do not support their argument since they differentiate claims based on the "primary rights" theory. (RB at pp. 9-12, citing *Crowley v. Katleman, supra*; *Lane, supra*; *Staffpro, Inc. v. Elite Show Servs., Inc.,* (2006) 136 Cal. App. 4th 1392, 1403; *Casa Herrera, supra; Freidberg v. Cox, supra*;

Albertson v. Raboff (1956) 46 Cal. 2d 375.) Storix asserted two separate and *unrelated claims*, not different *theories of recovery* on a single claim.

3. Defendants do not dispute Johnson's facts or evidence proving the underlying lawsuit lacked probable cause.

If Defendants' contention is true that the probable cause element of the malicious prosecution action need not be addressed by this Court, then this factor must be determined in Johnson's favor. In determining the probability of success on an anti-SLAPP motion, it is "the court's responsibility … to accept as true the evidence favorable to the plaintiff.'" *Soukup v. Law Offices of Herbert Hafif* (2006) 46 Cal.Rptr.3d 638, 662-663. Defendants never disputed Johnson's facts or evidence proving the lawsuit against him was filed and maintained without probable cause, nor did they provide any evidence to the contrary.

Defendants support their only argument that an "entire judgment" and any "verdict favorable to Storix in the underlying action" establish probable cause by reference to *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal. 4th 811, 817, 823-824 (citing *Sheldon Appel Co. v. Albert, & Oliker* (1989) 47 Cal.3d 863, 886.) (RB at pp. 13-14.) The primary case on which Defendants rely states, "'A claim for malicious prosecution need not be addressed to an entire lawsuit; it may ... be based upon only some of the causes of action alleged in the underlying lawsuit.'" *Lanel, supra,* 20 Cal.App.5th at fn. 6. Johnson argued that Defendants conflated the favorable termination and probable cause elements of a malicious prosecution action when making the same argument in the trial court. (AOB at p. 17.) Defendants nevertheless repeat the same argument without reference to Johnson's authority to the contrary. Every case cited by Defendants involved a verdict or judgment on a single claim and are thus inapplicable to this case.

Defendants never disputed Johnson's facts, arguments or authority showing lack of probable cause. In reviewing an order granting a special motion to strike *de novo*, this Court should therefore find, as a matter of law, that Johnson established a minimal probability of success.

B. Defendants Failed to Address Johnson's Arguments that Anti-SLAPP Fees Should Not Have Been Awarded Regardless of any Potential Success on the Motion

Defendants provide no support for their conclusion that "why Johnson dismissed his complaint does not bear on Respondents' right to attorneys' fees for a meritorious anti-SLAPP motion." (RB at p. 15.) They instead assert that Johnson was "form shipping" by again misrepresenting a case that actually supports Johnson's position:

> "To allow a plaintiff to forum shop and avoid the mechanism the Legislature created to address SLAPP suits, would have a significant chilling effect on a party's right to petition the courts. There would be no downside risk for the Plaintiff filing a SLAPP suit. [citation] Under these circumstances, why Johnson dismissed his complaint does not bear on Respondents' right to attorneys' fees for a anti-SLAPP motion."

(RB at p. 15, referring to *Coltrain v. Shewalter* (1998) 77 Cal.Rptr.2d 600, 608.) *Coltrain* actually states, "[R]egardless of whether the action is a SLAPP suit or not, the plaintiff may have good faith reasons for the dismissal that have nothing to do with oppressing the defendant or avoiding liability for attorney's fees." *Ibid*.

Johnson provided authority to support his position that anti-SLAPP fees should not be awarded when an action is voluntarily dismissed for reasons other than to avoid the motion, and he provided evidence proving he *specifically* dismissed the complaint because of Defendants' tactical manipulation of the court process that denied him due process. (AOB at p. 10-22, 19.) Defendants dispute none of Johnson's facts showing he had *no*

choice under the circumstances but to dismiss and refile his complaint in federal court. (AOB at pp. 19-20.)

Ignoring Johnson's arguments to the contrary, Defendants baldly conclude they "prevailed on a practical level by gaining a dismissal in their favor." (RB at p. 16.) Johnson not only proved the dismissal was due to their own misconduct, but that Defendants obtained no "practical benefit" from the dismissal because their refusal to compromise only caused the litigation to start over. (AOB at pp. 20-21.)

Defendants further failed to address Johnson's arguments regarding the reasonableness of the fees given the minimal success of the motion and that Defendants block-billed multiple motions containing the exact same arguments and language. (AOB at p. 21.)

Finally, Defendants provided no response to Johnson's argument and authority providing that they have no entitlement to attorney's fees they never incurred because they self-approved imposing all their personal litigation expenses on Storix (thereby forcing Johnson to fund 40% of their *entire* defense). Only if Defendants were obligated by statute or contract to repay Storix would they have "incurred" the expenses. To hold otherwise would allow defendants, especially corporate agents, to improperly profit from the litigation. (AOB at pp. 22-24.)

C. Defendants Do Not Dispute Johnson's Arguments that No Costs Should Have Been Awarded

Defendants again try to divert from Johnson's well supported arguments by ignoring them and simply restating the same generic arguments regarding a prevailing party's costs that have no relevance to this case. They argue that costs must be awarded to a defendant following a dismissal without regard to Johnson's authority providing that, under the specific circumstances of this case, no costs should have been awarded.

Defendants acknowledged Johnson's argument that "Respondents are not entitled to costs associated with their successful defense because Respondents did not incur any costs" but provided no response to the argument. (RB at p. 17.) Johnson provided authority defining what it means to "incur" costs and fees and evidence proving Defendants incurred nothing. (AOB at pp. 22-24.) For the same reason Defendants are not entitled to take anti-SLAPP fees from Johnson, they cannot profit from the litigation by obtaining costs from Johnson they already took from Storix and have no obligation to repay.

CONCLUSION

Defendants provided no response to any of Johnson's arguments, but only reasserted the same arguments asserted in the trial court. They also fail to dispute any facts or evidence proffered by Johnson. The Court should therefore find Johnson would have prevailed against Defendants' anti-SLAPP motion (thereby mooting the fee motion) and that Defendants are entitled to no costs or fees they never incurred.

Dated: March 16, 2020

Respectfully submitted,

By: s/Anthony Johnson

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed **APPELLANT'S REPLY BRIEF** is produced using a 14-point Roman type font, including footnotes, and contains 2,246 words, which is less than the 7,000 words allowed by the rules of court. I relied on the word count of Microsoft Word used to prepare this brief.

Dated: March 16, 2020

Respectfully submitted,

By: s/ Anthony Johnson
Pro Se Appellant

PROOF OF SERVICE

I, Anthony Johnson, declare that I am over the age of 18 and self-represented in the foregoing action. I am familiar with the business practice for electronic filing and service through the TrueFiling system, pursuant to which practice I served the foregoing **APPELLANT'S REPLY BRIEF** by electronic filing and sending to the e-mail addresses of the counsel listed below:

Marty B. Ready, Esq. Michael P. McCloskey, Esq. Wilson Elser Moskowitz Edelman & Dicker LLP 401 West A Street, Suite 1900 San Diego, CA 92101	Attorneys for Respondents DAVID HUFFMAN, MANUEL ALTAMIRANO, RICHARD TURNER and DAVID KINNEY Telephone: (619) 321-6200 marty.ready@wilsonelser.com michael.mccloskey@wilsonelser.com

A copy of the afore-mentioned document was also served on the San Diego Superior Court in Case No. 37-2019-00002457-CU-BT-CTL in accordance with the court's policy by sending to the email below:

San Diego Superior Court Appeals Dept.
appeals.central@sdcourt.ca.gov

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

Executed on March 16, 2020 at Las Vegas, Nevada.

s/ Anthony Johnson