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13 UNITED STATES DISTRICT COURT
14 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
15

16 ANTHONY JOHNSON, an individual,
17 Plaintiff,

18 v.

19 MANUEL ALTAMIRANO, an individual,
20 RICHARD TURNER, an individual,
21 DAVID KINNEY, an individual, DAVID
22 HUFFMAN, an individual, PAUL
23 TYRELL, an individual, SEAN
24 SULLIVAN, an individual, STORIX, INC.,
25 a California corporation, and DOES 1-5,
26 inclusive,

27 Defendants.
28

Case No. 19-cv-01185 H (BLM)

REPLY IN SUPPORT OF THE
MOTION TO DISMISS
PURSUANT TO FEDERAL RULE
OF CIVIL PROCEDURE 12 BY
DEFENDANTS PAUL A. TYRELL
AND SEAN M. SULLIVAN

Filed: June 24, 2019
Hearing: October 7, 2019
Time: 10:30 a.m.
Judge: Hon. Marilyn L. Huff
Court: Courtroom 15A

I. INTRODUCTION

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2 Anthony Johnson's entire opposition to the motion of Storix's attorneys Paul
3 Tyrell and Sean Sullivan ("Movants") to dismiss the malicious prosecution claim
4 against them relies on acceptance of the "severability rule" that has now been
5 expressly rejected by the California Court of Appeal as applied to the first element of
6 malicious prosecution, namely the favorable termination analysis. The law requires
7 that in assessing the first element of malicious prosecution, the plaintiff must
8 establish a favorable termination of the *entire* prior action. Absent that showing, a
9 malicious prosecution claim cannot survive. That is the situation here, as Storix, not
10 Johnson, obtained judgment in its favor in the prior state court litigation. Since
11 Johnson cannot overcome the first hurdle, the court need not even address whether
12 there are any "severable" claims to address probable cause. Apart from this fatal flaw
13 in Johnson's case, he conflates the favorable termination analysis with that of
14 probable cause to argue that some semblance of the "severability rule" survives. But
15 even if it did, the court would conclude, just like the state trial court, that the
16 complained of acts that supported the verdict and judgment against Johnson were
17 part and parcel of the same series of conduct that breached his fiduciary duty to
18 Storix, and not some distinct "claims" as Johnson now tries to recharacterize events.
19 In other words, Storix (and its counsel) pursued a single cause of action for breach of
20 fiduciary duty against Johnson with probable cause. Accordingly, Movants' motion
21 should be granted, since Johnson cannot establish the requisite elements of malicious
22 prosecution as a matter of law.

II. ARGUMENT AND AUTHORITIES

A. Johnson Misconstrues Legal Authorities and Cannot Establish a "Favorable Termination" as a Matter of Law

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24
25
26 Johnson faces an insurmountable obstacle in pursuing a malicious prosecution
27 claim against Movants (or Storix) because he had a judgment rendered against him in
28 the prior litigation, so cannot establish a "favorable termination" of the entire action.

1 Johnson wrongly seeks to rely on the severability rule to circumvent this required
2 first element of a malicious prosecution claim.

3 The judgment in the prior action is “the criterion by which to determine who
4 was the successful party.” *Crowley v. Katleman*, 8 Cal.4th 666, 684-686 (1994).
5 Johnson, however, completely ignores the reality of the underlying action (and
6 judgment) and instead asserts he is entitled to sever certain claims when analyzing
7 favorable termination.

8 The appellate court in *Lane v. Bell*, 20 Cal.App.5th 61 (2018) (“*Lane*”), and
9 the California Supreme Court in *Crowley v. Katleman*, 8 Cal.4th 666 (1994)
10 (“*Crowley*”), specifically addressed the cases that Johnson relies upon to argue
11 application of the severability rule. In sum, those courts concluded that the
12 severability rule does not apply when determining the first element of malicious
13 prosecution, i.e., favorable termination. Instead, a malicious prosecution plaintiff
14 must establish that he obtained a favorable termination as to the entire underlying
15 action. The Fourth District California Court of Appeal’s 2018 *Lane* opinion,
16 authored by Associate Justice Dato, provides a thorough discussion of the cases and
17 history of the severability rule on which Johnson seeks to rely. *See Lane*, 20
18 Cal.App.5th at 75-78. The *Lane* court thoroughly analyzed the progeny of cases from
19 *Albertson v. Raboff*, 46 Cal.2d 375 (1956), to *Crowley* nearly forty years later, as
20 well as multiple Court of Appeal cases interpreting *Crowley*, and correctly concluded
21 that the severability analysis does not apply to the favorable termination element of a
22 malicious prosecution claim. Instead, it confirmed the rule that the “a malicious
23 prosecution plaintiff [must] show ‘there [was] a favorable termination of the entire
24 [underlying] action’ in the plaintiff’s favor,” such that “a partial recovery against the
25 malicious prosecution plaintiff in the underlying action is fatal to showing the
26 favorable termination element.” *Lane v. Bell*, 20 Cal.App.5th at 75 (brackets added).
27 “Any other rule would strip the ‘favorable termination’ requirement of its
28 independent significance because any individual ‘claim’ that lacks probable cause

1 will necessarily be terminated in the underlying defendant’s favor.” *Id.*

2 Subsequent courts, including a recent California district court, have agreed
3 with the analysis set forth in *Lane* and have followed the rule requiring a favorable
4 termination of the entire action to support a malicious prosecution claim. *See, e.g.,*
5 *Hagenbuch v. Steel*, No. D073394, 2019 WL 3423451, at *12 (Cal. Ct. App. July 30,
6 2019), *as modified on denial of reh’g* (Aug. 16, 2019) [“An entire action must
7 favorably terminate to support a malicious prosecution action,” and expressly stating
8 that the court “also rejected cases that held favorable termination could be based on a
9 severable claim,” citing *Lane*]; *Weissensee v. Argentos*, No. A151726, 2018 WL
10 5730273, at *7 (Cal. Ct. App. Nov. 2, 2018) [Court explaining that “while the
11 underlying action was resolved generally in favor of” the plaintiffs, a ruling by the
12 court in defendant’s favor “in several particulars” meant “[s]imply, plaintiffs cannot
13 show ‘a favorable termination of the entire action,’” citing *Crowley*, *supra*, 8 Cal.4th
14 at 686]; *DeVaughn v. Cty. of Los Angeles*, No. CV 08-1461 AB (FFM), 2018 WL
15 7324527, at *9 (C.D. Cal. Dec. 12, 2018), *report and recommendation adopted*, No.
16 CV 08-1461 AB (FFM), 2019 WL 631887 (C.D. Cal. Feb. 13, 2019) [Relying on
17 *Lane*, *Crowley*, and *Staffpro, Inc. v. Elite Show Servs., Inc.*, 136 Cal.App.4th 1392,
18 1403 (2006), in recognizing the rule that “it is not sufficient that some or most of the
19 claims in the prior action terminated in favor of the malicious prosecution plaintiff,”
20 but that “for a malicious prosecution claim to lie under California law, there must
21 first be a favorable termination of the entire action.”]

22 Here, Storix obtained entry of judgment in its favor against Johnson on its sole
23 cause of action for breach of fiduciary duty. *See* Request for Judicial Notice (“RJN”)
24 No. 22. Based on this fact alone Johnson cannot state a cause of action for malicious
25 prosecution. His reliance on the severability analysis to overcome this first required
26 showing fails to follow the law. Here, the judgment as a whole in the underlying
27 action did not terminate in Johnson’s favor as required by *Crowley* and *Lane*. As a
28 result, Johnson cannot satisfy the first gate keeping element of a malicious

1 prosecution claim, and so the Court need not even consider the probable cause and
2 malice elements of malicious prosecution. *See Lane*, 20 Cal.App.5th at 64.

3 **B. There are No “Severable” Claims to Support a Claim of Lack of**
4 **Probable Cause**

5 Even if the Court were to assess the probable cause element, notwithstanding
6 the fact that it need not do so for the reasons stated above, Johnson still could not
7 survive Movants’ motion.

8 As a threshold matter, he fails to rebut the application of the interim adverse
9 judgment rule. While Johnson merely states that his failed summary judgment
10 motion does not invoke application of the interim adverse judgment rule, he
11 disregards the express language of the court’s order. The court stated as follows:

12 **The Motion** (ROA # 327) **of Defendant Anthony Johnson**
13 (‘Johnson’ or ‘Defendant’), pursuant to Code of Civ. Proc. 437c and
14 437c(f)(1), **for summary judgment** of the Second Amended
15 Complaint (‘SAC’) in consolidated case number 2015-00028262, or
16 in the alternative, summary adjudication of issues in favor of
17 Defendant, **on the grounds that no triable issues of material fact**
18 **exist** and Defendant is entitled to judgment as a matter of law as to
19 Plaintiff STORIX, INC.’s first cause of action for breach of fiduciary
20 duty and second cause of action for aiding and abetting breach of
21 fiduciary duty, **is DENIED**.

22 RJN No. 16. The court did not accept Johnson’s contention that “no triable issues of
23 material fact exist.” In other words, triable issues of material fact *did exist* that
24 required denial of the motion. That is precisely the type of order that implicates the
25 interim adverse judgment rule.¹ Further, in its post-trial orders, the trial court
26 repeatedly issued orders recognizing the “probable cause” supporting Storix’s breach
27 of fiduciary duty claim against Johnson, irrespective of any remedy ultimately
28 awarded. *See, e.g.*, RJN Nos. 21, 23, 24.

¹ Johnson makes a baseless accusation that somehow the court’s denial of his
summary judgment motion was based on “perjury.” *See Opp.* at p. 9. He submits no
evidence whatsoever to establish this frivolous accusation.

1 Finally, Johnson attempts to recast the jury’s verdict and judgment rendered
2 against him. The jury did not find him liable for sending a single email, as he now
3 argues. Rather, Johnson’s breaching conduct involved a series of actions taken to
4 undermine Storix. This included standing up the Janstor entity and taking other
5 efforts to prepare that company to directly compete with Storix, as well as Johnson’s
6 repeated harassment of Storix’s customers and employees via email. The jury found
7 Johnson breached his duty of loyalty to Storix. *See* RJN No. 17, Dkt. 34-4, p. 202-
8 203. It did not limit its verdict to particular acts. Johnson’s arguments about Storix’s
9 “claims” and whether they were “actually asserted” simply mischaracterizes the
10 events and the trial.

11 And, as the trial court ruled: “Storix reasonably and in good faith brought an
12 unlimited civil action against Johnson.” RJN No. 24, Dkt. 34-4, p. 245. Nothing
13 Johnson now argues can change that conclusion.

14 **III. CONCLUSION**

15 Johnson relies on outdated, rejected authorities to try to circumvent the
16 required showings for a valid malicious prosecution claim. Because he cannot
17 establish any of the elements as a matter of law, Movants’ motion should be granted
18 in its entirety.

19 Respectfully submitted,

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21 DATED: September 30, 2019

PROCOPIO, CORY, HARGREAVES &
SAVITCH LLP

22
23 By: s/ Sean M. Sullivan
24 Paul A. Tyrell
25 Sean M. Sullivan
26 Attorneys for Defendants Storix, Inc.,
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CERTIFICATE OF SERVICE

I hereby certify that on Monday, September 30, 2019, I electronically filed the foregoing through this Court’s electronic transmission facilities via the Notice of Electronic Filing (NEF) and hyperlink, to the parties and/or counsel who are determined this date to be registered CM/ECF Users set forth in the service list obtained from this Court on the Electronic Mail Notice List.

s/ Sean M. Sullivan _____
Sean M. Sullivan