

August 26, 2020

Marty B. Ready
619.881.6431 (direct)
Marty.Ready@wilsonelser.com

Court of Appeal
Fourth Appellate District
Division One
750 B Street, Suite 300
San Diego, CA 92101

Re: Respondents' Responsive Supplemental Letter Brief
Storix, Inc. v. Anthony Johnson: Case No. D075308

To the Hon. Justices:

On July 30, 2020, the Court requested supplemental letter briefing addressing the timeliness of Defendant, Cross-complainant, and Appellant's appeal from the order granting Cross-defendants/Respondents' anti-SLAPP motion. On July 31, 2020, Appellant filed his supplemental letter brief. On August 12, 2020, Respondents' filed their supplemental letter brief. On August 12, 2020, Appellant filed his reply to Respondents' supplemental letter brief. Respondents' now respond to Appellant's July 31, 2020 supplemental letter brief.

Appellant incorrectly frames the issue and has a fundamental misunderstanding of the relevant statutes. Specifically, Appellant states "[t]he issue is whether Johnson untimely appealed from the final judgment under Code Civ. Proc. ("CCP") § 904.1(a)(1) and an intermediate order under CCP § 906 rather than taking a direct appeal pursuant to CCP § 904.1(a)(13) of an order granting or denying a special motion to strike under ("anti-SLAPP" motion) under CCP § 425.16)." (Appellant's Supp. Ltr. Br., p. 1.) Based on his statement of the issue, Appellant argues the March 6, 2017 order granting in part Respondents' anti-SLAPP motion was interlocutory because it disposed of fewer than all of the causes of action. (*Id.* at 2.) Thus, Appellant argues he could not immediately appeal the March 6, 2017 order on Respondents' anti-SLAPP motion but rather had to appeal it "as an intermediate order after final judgment under CCP §§ 904.1(a)(1) and 906." (*Id.* at 3.) Appellant is wrong.

Cal. Civ. Proc. Code § 906 states "[u]pon an appeal pursuant to Section 904.1 or 904.2, the reviewing court may review the verdict or decision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from." And according to Appellant, he is appealing the March 6, 2017 order pursuant to Cal. Civ. Proc. Code § 904.1(a)(1), which states in relevant part, "[a]n appeal, . . . may be taken from any of the following: (1) [f]rom a judgment, except an interlocutory judgment, other than as provided in paragraphs (8), (9), and (11)." While this is a correct recitation of the statute, it is

incomplete. The remainder of Cal. Civ. Proc. Code § 906, and specifically the last sentence, includes the dispositive language refuting Appellant’s position.

The last sentence of Cal. Civ. Proc. Code § 906 states “[t]he provisions of this section do not authorize the reviewing court to review any decision or order from which an appeal might have been taken.” In other words, because Cal. Civ. Proc. Code §§ 425.16(i) and 904.1(a)(13) authorize an immediate appeal of an order granting or denying a special motion to strike, Cal. Civ. Proc. Code § 906 does not authorize a reviewing court to review an order from which an appeal might have been taken. See *Hewlett-Packard Co. v. Oracle Corp.*, 239 Cal. App. 4th 1174, 1185 & fn. 7 (2015). Thus, **as pointed out in *Hewlett-Packard Co.*, a plaintiff must decide whether to immediately appeal the order granting in part an anti-SLAPP order or forever forego that right.** *Id.*

Appellant did not timely appeal the March 6, 2017 order granting in part Respondents’ anti-SLAPP motion. Appellant did not file his notice of appeal until December 10, 2018 more than one and one-half years after the March 6, 2017 order issued. Because the Court is divested of jurisdiction to entertain this issue on appeal, the Court must dismiss it from the appeal.

Respectfully,

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP



Marty B. Ready