

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

MINUTE ORDER

DATE: 11/01/2017

TIME: 01:43:00 PM

DEPT: C-73

JUDICIAL OFFICER PRESIDING: Joel R. Wohlfeil

CLERK: Juanita Cerda

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT:

CASE NO: **37-2015-00034545-CU-BT-CTL** CASE INIT.DATE: 10/13/2015

CASE TITLE: **Johnson vs. HUFFMAN [IMAGED]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Business Tort

APPEARANCES

The Court, having taken the above-entitled matter under submission on 10/27/17 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

After entertaining the arguments of counsel and taking the matter under submission, the Court confirms the tentative ruling on the motion for summary judgment and summary adjudication, as asserted by Defendants and Cross-Defendants DAVID HUFFMAN, RICHARD TURNER, MANUEL ALTAMIRANO, DAVID KINNEY and DAVID SMILJKOVICH.

Tentative as Confirmed by the Court

The Motion for summary judgment of the First Amended Complaint in case number 2015-0003454, as asserted by Defendants DAVID HUFFMAN, RICHARD TURNER, MANUEL ALTAMIRANO, DAVID KINNEY and DAVID SMILJKOVICH is DENIED.

The Motion for summary judgment of the Complaint in case number 2016-00030822, as asserted by Defendants DAVID HUFFMAN, MANUEL ALTAMIRANO, DAVID KINNEY and DAVID SMILJKOVICH is DENIED. The Motion for summary judgment of the Complaint in case number 2016-00030822, as asserted by Defendant RICHARD TURNER is GRANTED.

The Motion for summary adjudication of cause of action 2 (fraud) in the Cross-Complaint in case number 2015-00028262, as asserted by Cross-Defendants DAVID HUFFMAN, RICHARD TURNER, MANUEL ALTAMIRANO, DAVID KINNEY and DAVID SMILJKOVICH is DENIED.

The three rulings set forth above are premised on the following analysis:

First Amended Complaint in 2015-00034545: Whether Johnson and Sassi Can Adequately Represent The Interests of Storix

Defendants' notice of Motion contends as follows: "...Plaintiffs Anthony Johnson and Robin Sassi are disqualified from bringing claims on behalf of Storix, Inc. They cannot fairly and adequately represent the interests of Storix, Inc. or its shareholders because their interests are antagonistic to both." As set forth in Defendants' memorandum (page 4), the primary basis for this contention is the argument that the individual claims asserted by Plaintiffs against Storix results in Plaintiffs' inability to also prosecute the derivative action. As discussed below, this argument lacks merit.

"To maintain a derivative suit brought under federal law (e.g., federal securities statutes), the plaintiff shareholder must fairly and adequately represent the interests of similarly situated shareholders." Fotenos and Rybka. Cal. Prac. Guide: Corporations (The Rutter Group 2017) at ¶ 6:620a (citing FRCP 23.1). "In a suit governed by federal law, a shareholder pursuing personal litigation against a corporation ordinarily will not qualify to serve as the 'representative' plaintiff who must 'fairly and adequately' represent the other shareholders (per FRCP 23.1) in the derivative suit." Id. at 6:620.1 (citing Zarowitz v. Bank-America Corp. (9th Cir. 1989) 866 F. 2d 1164, 1166). This action is premised on state common law claims, not federal securities law. See Complaint in Case No. 2015-00034545 at pages 39-44. California Corporations Code, section 800 does not address the adequacy of the representative Plaintiffs. Defendants fail to cite any authority setting forth the applicability of the federal rule in the context of a state law claim. The only authority cited by Defendants is Hornreich v. Plant Industries, Inc. (9th Cir. 1976) 535 F. 2d 550, a class action prosecuted under the provisions of FRCP 23.1. Thus, the basic premise for Defendants' summary judgment Motion lacks merit, and as a result they have not satisfied their burden of persuasion. See Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 850 ("...from commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law.").

This Court's previous analysis set forth within its April 29, 2016 ruling on the Demurrer (ROA # 110) may have been in error. The only state law authority cited within this Court's April ruling addressed the rule of continuous stock ownership, not "fair and adequate" representation. See Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1115. However, in a footnote the Grosset Court references the federal rule, and the potential applicability of a similar rule in state law actions: "Huang argues the cases involving rule 23.1 of the Federal Rules of Civil Procedure are inapt because that rule contains a provision requiring a derivative Plaintiff to 'fairly and adequately represent' the interests of similarly situated shareholders (Fed. Rules Civ. Proc., rule 23.1(a), 28 U.S.C.), whereas section 800 does not. While we agree the lack of a proprietary interest logically bears on the question of fair and adequate representation, we reject the implication that section 800's failure to expressly state a fair and adequate representation requirement reflects any intent on the part of our Legislature to secure the standing of a derivative plaintiff who, for whatever reason, cannot provide fair and adequate representation...." Id. at 1115, fn. 10. To the extent the fair and adequate representation standard does apply, it is a broad standard that generally defines the standing to pursue a derivative action. There is no authority that prosecuting an individual action results in automatic disqualification.

In this case, disputed facts exist demonstrating that Plaintiffs continue to maintain stock ownership in Storix and currently serve on the board of directors. They have a financial interest similar to other shareholders. Disputed facts exist tending to demonstrate that Plaintiffs are acting in the best interest of similarly situated shareholders given the way in which Defendants are managing the company. Disputed facts exist demonstrating that Plaintiff Johnson's continued involvement in the company will result in maximum value for the SBAdmin product, given Johnson's expertise. Disputed facts exist as to whether Plaintiff Johnson intended to start a competing company, or was simply using this threat as leverage in his bid to retake control of Storix. Ultimately, it remains disputed as to whether or not Storix would benefit

from Plaintiffs' involvement in company operations.

Complaint in 2016-00030822: Consent and Damages

The tort of false imprisonment is the nonconsensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time, however short. *City of Newport Beach v. Sasse* (1970) 9 Cal. App. 3d 803, 810. False imprisonment is the unlawful violation of the personal liberty of another. *Id.* A person is falsely imprisoned if he is wrongfully deprived of his freedom to leave a particular place by the conduct of another. *Schanafelt v. Seaboard Finance Co.* (1951) 108 Cal. App. 2d 420, 422–423. The fact that there has been false imprisonment at all establishes a cause of action for at least nominal damages. *Scofield v. Critical Air Medicine, Inc.* (1996) 45 Cal. App. 4th 990, 1008. Therefore, it is not necessary that any damage result from it other than the confinement itself, since the tort is complete with even a brief restraint of Plaintiff's freedom. *Id.* In view of the nature of the interest protected, a cause of action may be brought even where the damage is purely nominal. *Id.* Frequently, emotional distress is the primary injury resulting from an intentional tort such as false imprisonment, and that injury clearly is compensable. *Id.* The responsive separate statement sets forth disputed facts supported by evidence regarding whether Plaintiff consented to the alleged confinement. Thus, Plaintiff is entitled to seek an award of emotional distress damages.

Complaint in 2016-00030822: Defendant Turner's Participation

The responsive separate statement sets forth disputed facts supported by evidence regarding whether Defendant Turner was present at the office on the day of the purported incident. Also, it is disputed whether Defendant Turner was aware of and witnessed the purported incident.

Complaint in 2016-00030822: Defendant Turner's Duty to Act

Liability may be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act, or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person. *Fiol v. Doellstedt* (1996) 50 Cal. App. 4th 1318, 1325-1326. Mere knowledge that a tort is being committed and the failure to prevent it does not constitute aiding and abetting. *Id.* at 1326. However, the Court has carved out an exception to the rule of no liability in cases in which Defendant stands in some special relationship to either the person whose conduct needs to be controlled or in a relationship to the foreseeable victim of that conduct. *Tarasoff v. Regents of University of California* (1976) 17 Cal. 3d 425, 435 (a relationship of patient-therapist will suffice). A duty of care may arise from either (a) a special relation between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation between the actor and the other which gives to the other a right of protection. *Id.* Defendant Turner's mere knowledge and failure to intervene does not constitute aiding and abetting. In addition, it is undisputed that a special relationship does not exist. As a result, Defendant Turner is not liable for aiding and abetting the purported assault, battery, false imprisonment and intentional infliction of emotional distress, and his Motion for summary judgment of case number 2016-00030822 is granted on this basis.

Cause of Action 2 (Fraud) in Cross-Complaint in 2015-00028262: Resulting Act and Damages

As alleged, this cause of action is premised on three falsities: (1) Cross-Defendants falsely represented that Johnson needed to implement software updates, when in fact Cross-Defendants had no intention of

implementing these updates; (2) Cross-Defendants falsely represented their authority to sue Johnson in the name of Storix; and (3) Cross-Defendants concealed that they were attempting to oust Johnson from Storix, and force him to give up his remaining shares. The first alleged basis has been abandoned by Johnson. The second alleged basis was stricken in response to Cross-Defendants' anti-SLAPP Motion. Regarding the third basis, it is undisputed that the following acts constituted the attempt to "oust" Johnson: (1) Defendants sought to have Storix take out a loan to buy Johnson's shares; (2) Defendants had an attorney draft a buy / sell agreement to force Johnson to sell his stock if his employment was terminated, and (3) Defendants treated Johnson with hostility and made unreasonable demands on him so Johnson would become frustrated thus giving Defendants reason to terminate Johnson's employment. However, it is also undisputed that no loan was obtained, a buy-sell agreement was never executed, and Johnson, who was an "at will" employee, was not terminated.

The elements of an action for fraud and deceit based on concealment are: (1) Defendant must have concealed or suppressed a material fact, (2) Defendant must have been under a duty to disclose the fact to Plaintiff, (3) Defendant must have intentionally concealed or suppressed the fact with the intent to defraud Plaintiff, (4) Plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, Plaintiff must have sustained damage. *Boschma v. Home Loan Center, Inc.* (2011) 198 Cal. App. 4th 230, 248.

Cross-Complainant Johnson presents evidence demonstrating that he remained an employee of Storix at less than one-third of his former salary after giving up 60 percent of his shares in the company. After returning from his medical leave of absence, Johnson worked full-time for Storix, but did not demand an increased salary. Importantly, paragraph 26 of Johnson's declaration states: "I would never have returned to work at Storix in 2013, especially at a fraction of my former salary, nor would I have invested the time and effort in improving SBAdmin for Storix, had I known the Defendants were secretly making plans to buy-out the rest of my stock, thereby nearly doubling their own shares in Storix, while depriving me of all future income from the company I founded and the 15 years of work on the software I created." Thus, it is disputed whether Cross-Complainant Johnson has a claim for lost wages as a result of the fraudulent concealment. In other words, it is disputed whether he would have continued working at Storix, or would have demanded a higher salary but for the concealment.

Defendants' Request (ROA # 410) for judicial notice is GRANTED.

Defendants' evidentiary objections (ROA # 495) are OVERRULED.

Defendants' objection and motion to strike (ROA # 496) Plaintiffs' opposition to Defendants' Motion is OVERRULED / DENIED.



Judge Joel R. Wohlfeil