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 OPENING BRIEF

Anthony Johnson
In propria persona
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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

California Rules of Court 8.208

There are no interested entities or persons that must be listed in this certificate under rule 8.208(e).

Dated: January 22, 2020

Respectfully submitted,

By: s/Anthony Johnson
Pro Se Appellant

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INTRODUCTION

A year ago, Plaintiff and appellant Anthony Johnson ("Johnson") brought the above-titled lawsuit against defendants and respondents, David Huffman, Richard Turner, Manuel Altamirano and David Kinney (collectively "Defendants"). For six months, Johnson was deprived due process, including entry of default against Defendants, his statutory right to amend his complaint before or after Defendants filed an untimely demurrer, and a peremptory challenge. As a result, Johnson dismissed the case without prejudice, then revised and filed the same claims in federal court.

Following dismissal, the court ordered Johnson to pay all costs to Defendants. The court held a hearing on Defendants' motion for attorney's fees related to the special motion to strike ("anti-SLAPP motion") that was filed concurrent with their demurrer. Finding the anti-SLAPP motion would have been granted as to one of the four challenged claims, the court awarded attorney's fees to Defendants for their partial success.

The court erred in determining that Johnson's malicious prosecution claim would have been stricken because he did not prevail on the entire underlying lawsuit ("Janstor Suit"). But the court failed to acknowledge Johnson's argument and authority providing that a claim pending appeal is severable from the favorable termination element if the action is directed only to the non-appealed claims.

The court failed to exercise discretion when awarding anti-SLAPP attorney's fees because it failed to consider considering whether Johnson dismissed the lawsuit to avoid the anti-SLAPP motion or for reasons unrelated to the merits of his claims. The court also failed to consider whether Defendants prevailed on a practical level. The court further erred in awarding costs and attorney's fees to Defendants after they imposed all obligation for their defense costs on Storix, Inc. ("Storix"), thereby forcing Johnson to pay 40% of their entire defense.

This Court should independently review the merits of the anti-SLAPP motion and reverse the order awarding attorney's fees. The Court should also reverse the anti-SLAPP attorney's fee award because Johnson did not dismiss his complaint to avoid the motion. Lastly, the Court should reverse the costs and fee awards to Defendants because they incurred no costs or fees.

STATEMENT OF THE CASE

Johnson filed the complaint on January 14, 2019 alleging wrongful use of civil proceedings, breach of fiduciary duty, conversion, economic interference and fraud. (1AA 12.) Johnson filed a request to dismiss the entire lawsuit without prejudice on May 30. (1AA 229.) The clerk entered the dismissal on May 30 and noticed the entry of dismissal on June 14. (*Id*.) Johnson served the notice of entry of dismissal on June 24. (1AA 231.) On July 16, Defendants filed a cost memorandum (1AA 232) and a motion for attorney fees related to the special motion to strike. (1AA 238.) On July 27, Johnson filed a motion to strike or tax costs. (1AA 295.)

On October 25, the court denied Johnson's motion to strike or tax costs and granted Defendants $2,364.45 in costs. (2AA 406, 409.) On December 4, the court issued the order granting Defendants $12,237.50 in attorney fees after finding Defendants would have prevailed on one of the four defenses asserted in their anti-SLAPP motion. (2AA 412.) Notice of this appeal was timely filed on December 12, 2019. (2AA 424.)

STATEMENT OF APPEALABILITY

Ordinarily, "[an] order awarding attorney's fees under section 425.16, subdivision (c) is appealable under 904.1, subd. (a)(13)." *Johnston v. Corrigan* (2005) 25 Cal.Rptr.3d 657, 659. Determination of the prevailing party on a special motion to strike under § 425.16 following voluntary dismissal is likewise appealable. *See gen. Kyle v. Carmon* (1999)

84 Cal.Rptr.2d 303, 71 Cal.App.4th 901; *Liu v. Moore* (1999) 81 Cal.Rptr.2d 807, 69 Cal.App.4th 745; *Coltrain v. Shewalter* (1998) 77 Cal.Rptr.2d 600, 66 Cal.App.4th 94. Similarly, an order on a motion to strike or tax costs is appealable as a post-judgment order under Section 904.1(a)(2). When such orders follow a voluntary dismissal without prejudice, "where doing so would serve the interests of justice and judicial economy, an appellate court may use its discretion to construe an appeal as a petition for writ of mandate." *Mon Chong Loong Trading Corp. v. Superior Court of Los Angeles County* (2013) 218 Cal.App.4th 87, 92; *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 732.

STATEMENT OF FACTS

In 2003, Johnson formed Storix to sell the software he designed and developed under a corporate entity. (1AA 14.) From 2003 through 2011, Johnson was Storix's sole shareholder, officer and director. (*Id.*) In 2011, due to a terminal cancer diagnosis, Johnson stepped down from his leadership position and gifted a sixty percent (60%) share of Storix to his four long-term employees, defendants Huffman, Turner, Altamirano and Kinney. (*Id.*) At all times since 2011, Defendants occupied the majority of Storix's board and all officer positions. (*Id.*)

In 2013, after an unexpected full recovery, Johnson returned to Storix to continue improving the software, but Defendants antagonized Johnson until he resigned due to the hostile work environment. (1AA 15.) Around June 2015, Johnson sold his San Diego home and moved to Florida. (*Id.*) A month later, Defendants directed Storix to file the Janstor Suit against Johnson claiming he breached a fiduciary duty to Storix by "intending" to operate a competing business in San Diego. (2AA 372; 1AA 16.) Johnson was unaware of the claim until he was served the complaint at his home in Florida. (1AA 16.) Eight months later, Defendants filed an

amended complaint that still alleged Johnson resided in San Diego and had then "manifested his intent to compete." (2AA 379.) Since the Janstor Suit was initiated, Defendants have not paid any Storix profit distributions to Johnson even though he still remains a 40% shareholder. (1AA 19.)

In February 2018, during trial of the Janstor Suit, defendant Huffman testified that Johnson was not asked if he had any intention of competing or informed of any concerns prior to filing the lawsuit. (2AA 364.) Huffman admitted he didn't know if Johnson ever operated a competing business, but that Johnson was sued because it "looked like" he "intended" to compete. (2AA 368.) Huffman knew Johnson had moved to Florida before the complaint was filed in California. (2AA 367.) Huffman further testified that he knew of no damage caused to Storix by Johnson's alleged competing business (2AA 368-9), but the Janstor Suit was maintained only to prevent him from competing. (1AA 369-70.) Storix nevertheless demanded $1.25 million in damages for "unfair head start." (2AA 356.) In closing arguments, Defendants introduced a new claim of $3,739.14 for "employees' lost productivity" related to a 2015 email Johnson sent a few customers. (2AA 357.) The jury awarded nothing on the original claim of "unfair head start", finding that Johnson had not breached any duty of confidentiality or loyalty to Storix for his benefit or interest. (1AA 172.) However, the jury found that Johnson breached a duty of loyalty to Storix by sending the email and awarded Storix the $3,739.14 demanded. (1AA 174.) The judgment as to that claim is pending appeal." (2AA 327.)[1]

Johnson filed this lawsuit in January 2019. (1AA 12.) On March 14, Defendants filed motions for a $160,000 out-of-state plaintiff's cost bond

[1] California Court of Appeals, Fourth District, Case No. D075308.

and to stay proceedings pending payment of the bond. (1AA 29, 34.) On March 18, the court set a status conference regarding "Defendants' pending motion for stay and motion for an undertaking." (1AA 95; 1AA 61.)

After Defendants failed to file a responsive pleading within 30-days of service, Johnson filed requests for entry of default (1AA 52, 64, 70) and notice of intent to move for punitive damages. (1AA 69.) Johnson timely filed a request for entry of default judgment by the court against all defendants for damages stated in the complaint (1AA 190) and a declaration and evidence in support of compensatory damages and pre-judgment interest. (1AA 192.)

On April 2, Defendants contacted Johnson to arrange a meet and confer ordered by the court prior to the status conference, indicating they intended to file a demurrer. (2AA 302.) Johnson agreed to meet and confer regarding the status conference but would not agree to confer on the demurrer because of the pending default that precluded filing a demurrer or an amended complaint. (2AA 301, 308; 1AA 95.) The day before the status conference, and while the requests for default were still pending, Defendants filed a 28-day late demurrer and concurrent special motion to strike set to be heard on August 2. (1AA 75, 98.)

On April 15, Johnson made his first appearance at the status conference (1AA 220) whereat the court did not address Defendants' motions for an undertaking or to stay proceedings. Instead, the court addressed Johnson's requests for entry of default and default judgment, denying both because "there are responses on file" and "the Statement of Damages was filed after the Request for Entry of Default." (1AA 189, 204-205.) The next day, Johnson filed a petition with this Court for writ of

mandate to direct the superior court to enter default, which was summarily denied. (1AA 206.)[2]

On April 26, Johnson filed a peremptory challenge (1AA 207) which the court denied as untimely. (1AA 208.) Johnson filed an *ex parte* motion for reconsideration of the peremptory challenge. (1AA 211.) The court found no basis to reconsider the request, noting only that "there appears to be a misunderstanding regarding when the 15 days to challenge pursuant to CCP 170.6 begins." (1AA 225.) Johnson filed a petition for writ of mandate with this Court to direct the superior court to grant the peremptory challenge, which was summarily denied. (1AA 226.)[3]

On May 17, Johnson sent an email to Defendants offering to remove the claims of "wrongful use of civil proceedings, all three fraud claims" and "not add any new claims or allegations" if they withdrew the anti-SLAPP motion (which would have been rendered moot) to allow the amendment. (2AA 308.) Johnson received no response.

On May 30, Johnson dismissed the Complaint without prejudice, then revised and refiled the claims in federal court, specifically due to having been deprived his statutory right to amend either before or after the hearing on Defendants' demurrer, and because of the potential $160,000 out-of-state plaintiff's bond motion that would be heard earlier. (2AA 309.) In October, the court granted Defendants $2,364.55 in costs. In December, the court awarded Defendants $12,237.50 in attorney fees related to the anti-SLAPP motion, including fees for their fee motion. (2AA 410.)

Defendants have used over $5 million of Storix funds in litigation against Johnson. (1AA 193.) Defendants continue to pursue over $600,000 in costs and fees from Johnson in state and federal courts, all based on

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2 California Court of Appeals, Fourth District, Case No. D075691.

3 California Court of Appeals, Fourth District, Case No. D075803.

Defendants' claim that Storix suffered $3,739.14 in damages from Johnson's 2015 email. (1AA 194.) In this case, the court awarded anti-SLAPP fees to Defendants because Johnson failed to defend the same 2015 email claim. (2AA 412.) Despite the jury's verdict, Defendants continue to insist Johnson was competing with Storix. (1AA 103; 2AA 401.)

Following the Janstor Suit trial, Defendants informed Johnson at a telephonic annual shareholder meeting of Storix that they self-approved having Storix indemnify them and pay all their legal expenses in this case. (2AA 308-9.) All billing records of Defendants' counsel show "Storix, Inc." as the client. (1AA 253.)

ARGUMENT

I. THE COURT AWARDED FEES BASED ON AN ERRONEOUS FINDING THAT JOHNSON WOULD NOT HAVE PREVAILED ON THE ANTI-SLAPP MOTION

Standard of Review: De novo. "A ruling on a Code Civ. Proc. section 425.16 motion is reviewed de novo." *Schwarzburd v. Kensington Police, supra*, at 350. "Whether section 425.16 applies and whether the plaintiff has shown a probability of prevailing are both reviewed independently on appeal." *ComputerXpress, Inc. v. Jackson* (2001) 113 Cal.Rptr.2d 625, 632.

"[A] prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." Code Civ. Proc. section 425.16, subd. (c)(1). A court has jurisdiction to award fees where the challenged pleading is voluntarily dismissed while the anti-SLAPP motion is pending. *Pfeiffer Venice Properties v. Bernard* (2002) 101 Cal.App.4th 211, 215. However, defendants may not recover fees unless the court finds they would have prevailed on the anti-SLAPP motion. *Tourgeman v. Nelson & Kennard* (2014) 222 Cal.App.4th 1447, 1457.

"Only a cause of action that satisfies both prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning and lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." *Schwarzburd v. Kensington Police Protection & Community Services Dist. Bd. (2014) 225 Cal.App.4th 1345,* 1350 (citing *Navellier v. Sletten* (2002) 124 Cal.Rptr.2d 530, 536); Code Civ. Proc. section 425.16, subd. (b)(1). Johnson conceded that the cause of action for malicious prosecution arose from protected petitioning activity. (2AA 328.)

The court ruled that three causes of action challenged by Defendants' anti-SLAPP motion did not arise from protected activity. "As only the 1st cause of action fell within the anti-SLAPP statute, the Court need only consider whether defendants had a substantial probability of prevailing on that claim." (2AA 420.) "To establish a probability of prevailing, the plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' […] The plaintiff need only establish that his or her claim has 'minimal merit' to be stricken as a SLAPP." *Soukup v. Law Offices of Herbert Hafif* (2006) 46 Cal.Rptr.3d 638, 662. (citations omitted.)

A. Johnson Established Favorable Termination of the Janstor Suit

Defendants argued that "A partial victory in an underlying action is not favorable termination." (1AA 110, citing *Lane v. Bell* (2018) 20 Cal.App.5th 61, 66 (*Lane*).) *Lane* says no such thing. Johnson opposed defendants' motion with substantial authority showing that claims may be severed from the underlying lawsuit when establishing favorable termination *if* the malicious prosecution action is directed only to the *non-severable* claims. (2AA 332.) Notably, *Lane* and the cases it relies on approve the severability of claims pending appeal. (2AA 332.) "'[T]hat part

of the judgment in the former action that [was not appealed] is now final and constitutes a termination of that separable part of the proceeding favorable to plaintiff.'" *Lane* at p. 72 (citing *Albertson v. Raboff* (1956) 46 Cal.2d 375, 378.)

Johnson argued that the "claim of 'unfair head start' is severable from the unrelated claim of 'loss of employee productivity' despite both labeled as breaches of fiduciary duty." (2AA 333.) "The jury awarded Storix only $3,739.14 for [loss of employee productivity], a claim never pled or argued but that Defendants first introduced in closing arguments. [2AA 356] The claim is pending appeal." (2AA 327.) Johnson "is appealing the severable claim, thereby removing it from the 'entire lawsuit' and establishing favorable termination." (2AA 333.) If a malicious prosecution cause of action is directed to claims pending appeal, the action is considered "premature." *Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 458-9. If premature, the action must be stayed pending resolution of the appeal. (*Ibid*.) Even if the malicious prosecution action had been directed to the entire lawsuit, it would have been premature to find lack of favorable termination and thus improper to strike the claim on that basis. Johnson directed the action to the only claim actually asserted in the Janstor Suit complaint, for which he prevailed, therefore establishing favorable termination. (1AA 20.)

In their reply, Defendants again cited *Lane* and a case it relied on, *Crowley v. Katleman* (1994) 8 Cal.4th 666, arguing only that the "severability analysis does not apply to the favorable termination element of a malicious prosecution claim." (2AA 403.) The argument is nonsensical since the "severability rule" was specifically created for determining favorable termination in a malicious prosecution action. (2AA 333, citing *Paramount General Hospital Co. v. Jay* (1989) 213 Cal.App.3d 360; *Albertson v. Raboff, supra,* 46 Cal.2d 375. *Lane* noted prior case conflicts

regarding the severability *analysis*, but neither *Lane* nor any other case rejected the severability of claims pending appeal.

The superior court did not address Johnson's argument that claims pending appeal are severed from the favorable termination element when stating, "While *Albertson* might be interpreted as creating a new rule that would allow a malicious prosecution action for partial success so long as the claims on which the defendant prevailed were 'severable,' the Fourth District Court of Appeal has made clear that there must be a favorable termination of the entire underlying action." (2AA 412, citing *Lane, supra,* 20 Cal.App.5th at 75.) However, in the same paragraph, *Lane* found that "*Albertson*'s comments on the favorable termination requirement apply, at most, in situations where a partial appeal has created a severable judgment. [Citation.] We have no partial appeal in this case. That is enough for us to conclude that the underlying property action did not terminate favorably to the Lanes." *Lane* at p. 75. Ignoring this exception, the court found, "It is undisputed that Storix obtained a judgment against plaintiff. The fact that plaintiff obtained a favorable ruling on one issue is insufficient to show a favorable termination. Thus, plaintiff has not demonstrated a probability of prevailing on his claim for wrongful use of civil proceedings." (2AA 412.)

Johnson successfully defended and directed the malicous prosecution action only to the underlying $1.25 million claim of "unfair head start." Before filing the Complaint, Johnson appealed the judgment awarding $3,739 on the unrelated claim of "loss of employee productivity." Defendants cannot shield themselves from liability for years of malicious litigation by relying on a trivial claim introduced in closing arguments. It was not necessary for Johnson to await the results of the appeal on an unrelated and irrelevant claim before bringing the malicious prosecution action. The court clearly erred in barring the action on the basis that Johnson failed to establish favorable termination of the Janstor Suit.

B. Johnson Established Lack of Probable Cause in Initiating and Maintaining the Janstor Suit

Because the superior court erroneously found lack of favorable termination, it did not reach the merits of the malicious prosecution claim. This Court should find, as a matter of law, that Johnson established a minimal probability of success.

To determine the probability of success, "the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant [and …] should only grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.' [citation.] In making this assessment it is 'the court's responsibility . . . to accept as true the evidence favorable to the plaintiff.'" *Soukup v. Law Offices of Herbert Hafif, supra,* 46 Cal.Rptr.3d at 662-663 (citing *Jarrow Formulas, Inc. v. LaMarche* (2003) 3 Cal.Rptr.3d 636, 643 ["the anti-SLAPP statute requires only 'a minimum level of legal sufficiency and triability'"].) Defendants provided no evidence contrary to the allegations of the Complaint.

Defendants argued that Johnson could not show a lack of probable cause, which a matter of law for the Court to decide. "[T]he probable cause element calls on the trial court to make an objective determination of the `reasonableness' of the defendant's conduct, i.e., to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable,' as opposed to whether the litigant subjectively believed the claim was tenable." *Parrish v. Latham & Watkin* (2017) 3 Cal.5th 767, 776. "'[C]ontinuing to prosecute a lawsuit discovered to lack probable cause' may also support a claim of malicious prosecution." *Sycamore Ridge Apartments LLC v. Naumann* (2007) 69 Cal.Rptr.3d 561, 572 (quoting *Zamos v. Stroud* (2004) 12 Cal.Rptr.3d 54, 63.)

First, in a single sentence they argued that "Defendants, as shareholders, did not file and maintain the underlying [Janstor] Suit." (1AA 110.) Johnson provided evidence and authority that Defendants *directed* Storix's counsel to initiate and maintain the Janstor Suit against him and that they can be held liable for their personal acts. (2AA 331.)

Second, Defendants argued without authority that "[a] verdict favorable to Storix in the underlying action conclusively establishes Defendants had probable cause to file and maintain the [Janstor] Suit." (1AA 111.) Johnson opposed the argument, showing that Defendants were conflating the favorable termination and probable cause elements of the cause of action:

> "'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.' (*Lane, supra,* 20 Cal.App.5th at fn. 6.) […] Johnson directed the cause of action only to Storix's unsuccessful claim that Johnson was operating a competing business. [1AA 20] The fact that Storix prevailed on a different claim doesn't establish probable cause for bringing or maintaining the malicious one."

(2AA 334.)

Johnson pled sufficient facts to support all elements of a malicious prosecution claim, including lack of probable cause. Johnson nevertheless provided evidence proving the Janstor Suit was initiated *and* maintained without probable cause. As set forth in the Statement of Facts, Defendants admitted at trial that they initiated the lawsuit and filed two amended complaints alleging that Johnson breached a fiduciary duty to Storix, not knowing if he ever actually competed or caused any harm, and that they maintained the lawsuit for 3 ½ years only to *prevent* Johnson from competing. Defendants falsely alleged in the original and two amended complaints that Johnson resided in San Diego when the complaint was filed

and when all events occurred, yet the complaint was served to Johnson after he moved to Florida. (2AA 345.) The only successful claim for "loss of employee productivity" that is pending appeal (and not subject to the malicious prosecution action) was based entirely on an email that didn't exist when the complaint was served. (2AA 348.)

Defendants provided no authority to defeat Johnson's showing of favorable termination. Defendants put forth no evidence contrary to the allegations of the Complaint or Johnson's evidence proving the Janstor Suit was brought without probable cause. The Court should find, as a matter of law, that Johnson showed a probability of success on his malicious prosecution claim and reverse the order awarding attorney's fees related to the anti-SLAPP motion.

II. THE COURT FAILED TO EXERCISE DISCRETION WHEN GRANTING ATTORNEY FEES RELATED TO THE ANTI-SLAPP MOTION

Standard of review: Abuse of discretion. An appellant court reviews the amount of attorney fees awarded by the trial court to a defendant who successfully brings an anti-SLAPP motion for abuse of discretion. *Raining Data Corp. v. Barrenechea* (2009) 175 Cal.App.4th 1363, 1375.

A. Johnson Did Not Dismiss the Lawsuit to Avoid the Anti-SLAPP Motion or Attorney Fees

"[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." *Coltrain v. Shewalter*, *supra*, 77 Cal.Rptr.2d at 608. "In making that determination, the critical issue is which party realized its objectives in the litigation." *Ibid*. A defendant should not be deemed a prevailing party if plaintiff shows the lawsuit was dismissed "for other reasons unrelated to

the probability of success on the merits." *Ibid*; *see also* *Gilbert v. National Enquirer, Inc.*, *supra*, at 1277 (dismissed to expedite an appeal).

The court failed to consider whether Johnson dismissed the Complaint for reasons other than to avoid the anti-SLAPP motion or resulting fees. Johnson specifically alleged that he "did not dismiss my claims because they lacked merit or to avoid a potential attorney fee award if the anti-SLAPP motion was granted. I dismissed the complaint because I saw no way to amend it, and filed it in federal court after doing so." (2AA 309.) Johnson therein itemized the events that deprived him of a statutory right to amend his Complaint before or after Defendants' demurrer was heard:

(1) Johnson filed a request for entry of default after the deadline to file a demurrer had passed. The complaint couldn't be amended while the request for default was pending.

(2) The clerk didn't respond to the request for default before Defendants filed a demurrer 28 days later. The next day the court then denied entry of default because there was then a demurrer on file.

(3) Because the anti-SLAPP motion was heard concurrent with the demurrer, Johnson was prevented from amending the complaint after the hearing even if a curable defect was found.

The court also denied Johnson's request for default judgment (1AA 227) and denied Johnson's peremptory challenge as untimely. (1AA 210.)

Johnson faced having his claims dismissed with prejudice on the ground of insufficiency of the pleadings with no chance to amend. He also faced a motion for a $160,000 out-of state plaintiff's bond (including $75,000 in fees for the anti-SLAPP motion) that was to be heard *before* the demurrer and anti-SLAPP motions. (1AA 34.) Johnson had no choice but to

dismiss the entire lawsuit without prejudice, after which he revised and refiled the same claims in federal court. (1AA 272.)

The court failed to exercise discretion by not considering whether the Complaint was dismissed to avoid the anti-SLAPP motion or fees. Johnson alleged these facts in opposition to the fee motion (2AA 317), which Defendants did not dispute.

B. The Anti-SLAPP Motion Was of No Practical Benefit

Before awarding fees, "'the trial court must determine who is the prevailing party' by 'analyz[ing] which party had prevailed on a practical level.'" *Coltrain v. Shewalter* (1998) 77 Cal.Rptr.2d 600, 607 (quoting *Gilbert v. National Enquirer, Inc.* (1997) 55 Cal.App.4th 1273, 1276 [demurrer stage too premature to determine prevailing party]; *Heather Farms Homeowners Assn. v. Robinson* (1994) 21 Cal.App.4th 1568, 1574 [dismissal was part of global settlement agreement].) "[F]ees awarded to a defendant who was only partially successful on an anti-SLAPP motion should be commensurate with the extent to which the motion changed the nature and character of the lawsuit in a practical way." *Mann v. Quality Old Time Service, Inc.* (2006) 42 Cal.Rptr.3d 607, 619.

Before the court held a hearing or issued any rulings on the merits of the action, Johnson offered to drop the malicious prosecution and fraud claims if Defendants would drop the anti-SLAPP motion so he could amend the Complaint. (2AA 312, 316.) Johnson specifically expressed to Defendants that he did not offer to drop the claims because they lacked merit, but because he wanted the remaining claims to proceed without further delay. (*Id.*) Defendants' ignored Johnson's offer, thereby forcing the court to hear the anti-SLAPP motion rather than allow Johnson to amend the complaint and render the motion moot.

Defendants' motion achieved no practical benefit because Defendants' refusal to compromise only resulted in the litigation starting

over with the same but stronger claims in federal court, including the malicious prosecution and fraud claims that Johnson would have otherwise been dismissed.

C. The Fees Were Unreasonable Given the Minimal Success

"[T]he trial court is not bound to accept the evidence submitted by counsel when making its determination [citation], and may reduce the hours if it concludes the attorneys performed work unrelated to the anti-SLAPP motion, or represented work that was unnecessary, duplicative, or excessive in light of the issues fairly presented." *569 East County Boulevard LLC v. Backcountry Against the Dump, Inc.* (2016) 6 Cal.App.5th 426, 441 (citations omitted).

The court found that three of the four challenged causes of action did not pertain to protected activity. But, without addressing the merits, the court struck the malicious prosecution claim on the sole basis that Johnson could not allege favorable termination of the underlying action.

Defendants' counsel block-billed for concurrent time spent on the bond motion, demurrer, and anti-SLAPP motion. The arguments in the anti-SLAPP motion were identical to those in the other motions. (1AA 34; 1AA 75). The court reduced Defendants' fees by about 40% after finding that "[s]ome of the work was related to the demurrer, service issues, and other unrelated issues. Further, defendants prevailed on only one of the challenged claims." (2AA 413.)

The only successful defense asserted in Defendants' motion took only two pages. (1AA 109.) Their motion for attorneys' fees was less than 6 pages. (1AA 240.) Although reduced, it was nonetheless an abuse of discretion to award $9,027.50 in attorney's fees for 25 hours spent preparing a predominantly unsuccessful anti-SLAPP motion and another $3,210 in fees for 10 hours spent demanding the first fees. (*Id.*)

III. THE COURT ERRED IN AWARDING ATTORNEY FEES AND COSTS TO DEFENDANTS WHO INCURRED NO FEES OR COSTS

Standard of Review: De novo. The standard of review for awards of costs and attorney fees after trial is normally abuse of discretion. *Carver v. Chevron USA, Inc.* (2002) 118 Cal.Rptr.2d 569, 577. "However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law." *Id*.

The court heard concurrently Johnson's motion to strike and tax cost and Defendants' motion for attorney fees related to their anti-SLAPP motion. In both motions, Johnson argued that Defendants incurred no expenses because they self-approved having Storix indemnify them and advance all their legal expenses. (1AA 295; 2AA 318, 320.)

> "Defendants invoked Corp. Code § 317 and Storix's bylaws that mandate indemnification and advancement of all legal expenses for their defense. [2AA 299.] Defendants *incurred* no expenses, because all of their attorney fees and costs are *still* being billed directly to Storix."

(1AA 295; *See* 2AA 308; 1AA 253.) The court rejected Johnson's argument:

> "The word 'incur' does not appear in section 1032. Moreover, a prevailing party may be awarded attorneys' fees even if a third party is providing a defense. *Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1409-1410 [(*Staples*)] The same rationale should apply to costs. Defendants are entitled to recover their costs even if the company agreed to cover the costs. Consequently, the motion tax or strike costs is denied."

(2AA 407.)

Section 1032 does not include the word "incur", but Section 1021 states that "parties to actions or proceedings are entitled to *their* costs, as

hereinafter provided." (italic added.) Only if Defendants had a statutory or contractual obligation to reimburse Storix would the costs be considered "theirs." "[I]n the absence of any reason to think otherwise, the word 'incurred' […] should be interpreted as it is used in Civil Code section 1717." *Gilbert v. Master Washer & Stamping Co.* (2001), 104 Cal.Rptr.2d 461, 468. "The California Supreme Court has construed the term as used in section 1717 to mean generally 'become liable for' a fee, 'i.e., to become obligated to *pay* it.'" *International Billing Services, Inc. v. Emigh* (2000) 101 Cal.Rptr.2d 532, 543 (citing *Trope v. Katz* (1995) 11 Cal.4th 274, 280, italics in original.)

Staples and similar cases are distinguishable in that they involve provisions for attorney fees and costs in contracts. "Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section." Code Civ. Proc. section 1717, subd. (a). In such cases, "where the contract specifically provides [for] attorney's fees and costs", the parties therein are contractually obligated to pay costs and fees to "the party prevailing on the contract." (*Ibid.*) *Staples* found it irrelevant that the prevailing party was insured, citing *Wiener v. Van Winkle* (1969) 273 Cal.App.2d 774 as requiring the losing party to pay fees in accordance with the fee provision of the contract even though the prevailing party on the contract claim was insured.

Insurance contracts provide coverage regardless of whether the insured prevails, and usually obligate the insured to take steps to recover costs and fees when available to reimburse the insurer. Section 317 indemnifies only corporate agents who prevail in an action without imposing any obligation to recover expenses or reimburse the corporation. Johnson argued:

> "Storix incurred all expenses *and liability* on behalf of the defendants, thereby absolving defendants of liability *unless* 'it shall be determined ultimately that the agent is not entitled to be indemnified.' Corp. Code § 317(f)."

(1AA 295, italics in original.) Defendants invoked Corp. Code section 317, subd. (f) to have Storix advance their expenses, and "Defendants' attorneys sent all bills to Storix for payment, and their bills all show 'Storix, Inc.' as their client." (2AA 320; *See* 1AA 253.) Absent a specific finding that Defendants were not entitled to be indemnified, Defendants were absolved of any obligation to pay for their own defense and, by obtaining a dismissal, any potential obligation to reimburse Storix for the expenses *it* incurred.

The statutes refer to recovery of expenses "incurred by the agent" (Corp Code section 317, subd. (d)), "his or her attorney's fees and costs" (Code Civ. Proc. section 425, subd. (c)(1)), and "their costs." (Code Civ. Proc. section 1021.) Defendants incurred no attorney's fees or costs and thus have no fees or costs to recover.

There is no reasonable interpretation of the statutes that provide for defendants taking attorney's fees and costs from a plaintiff after taking the same fees and costs from a third party they have no obligation to reimburse. To hold otherwise would *entitle* defendants to profit from litigation, especially agents indemnified by a corporation. Defendants should not be so encouraged to spend frivolously on litigation at no personal expense.

CONCLUSION

The Court should reverse the order granting attorney's fees on Defendants' anti-SLAPP motion on the basis that Johnson showed a probability of success on his claim of wrongful use of civil proceedings. Even if the anti-SLAPP ruling is upheld, the Court should reverse the order awarding Defendants' attorney fees on the basis that Defendants incurred

no fees. The Court should likewise reverse the order granting Defendants' costs. Otherwise, the Court should reverse the fee order with instructions to significantly reduce the fees.

Dated: January 22, 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 OPENING BRIEF** is produced using a 14-point Roman type font, including footnotes, and contains 5,643 words, which is less than the 14,000 words allowed by the rules of court. I relied on the word count of Microsoft Word used to prepare this brief.

Dated: January 22, 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 OPENING BRIEF** by electronic filing and by sending to the e-mail addresses of 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

The afore-mentioned document was further served on the Superior Court under case number 37-2019-00002457-CU-BT-CTL through the OneLegal electronic filing system.

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

Executed on January 22, 2020 at Las Vegas, Nevada.

s/ Anthony Johnson

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 APPENDEX VOLUME 1 and
APPELLANT'S APPENDEX VOLUME 2

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