Oracle Corporation et al v. SAP AG et al
Doc. 817 Att. 40

EXHIBIT 40

Dockets.Justia.com

LEXSEE 2007 U.S. DIST. LEXIS 20909

Caution
As of: Mar 29, 2010

JOYCE R. GARLAND-SASH, Plaintiff Pro Se -against- DAVID LEWIS, et al., Defendants.

05 Civ. 6827 (WHP)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2007 U.S. Dist. LEXIS 20909

March 26, 2007, Decided
March 26, 2007, Filed

SUBSEQUENT HISTORY: Decision reached on appeal by, Remanded by Garland-Sash v. Lewis, 2009 U.S. App. LEXIS 22141 (2d Cir. N.Y., Oct. 8, 2009)

COUNSEL: [*1] Joyce R. Garland-Sash, Closter, NJ, Plaintiff, Pro se.

John P. Cronan, Esq., Assistant United States Attorney, Office of the United States Attorney, New York, NY, Counsel for Defendants Federal Bureau of Prisons, Gregory Parks, Marvin, Marvin D. Morrison, J.D. Robinson, Patricia Rodman, Jerry C. Martinez, Glenn A. Carrino, Allen Beard, John Blangor, John Harrington and Diane Ford.

Steven L. Herrick, Tully, Rinckey & Associates P.L.L.C., Albany, NY, Counsel for Defendant David Lewis.

JUDGES: WILLIAM H. PAULEY III, U.S. District Judge.

OPINION BY: WILLIAM H. PAULEY III

OPINION

MEMORANDUM AND ORDER

WILLIAM H. PAULEY III, District Judge:

Plaintiff *pro se* Joyce Garland-Sash ("Garland-Sash") brings this action against prison counselor David Lewis ("Lewis"), the Federal Bureau of Prisons ("BOP") and ten of Lewis' superiors (the "BOP Officials") (BOP and the BOP Officials together the "BOP Defendants"), alleging violations of the Computer Fraud and Abuse Act ("CFAA"), *18 U.S.C. § 1030*. Presently before the Court are the BOP Defendants' and Lewis' separate motions to dismiss the complaint pursuant to *Fed. R. Civ. P. 12(b)(1)* and *12(b)(6)*. For the following [*2] reasons, the BOP Defendants' motion to dismiss is granted and Defendant Lewis' motion to dismiss is granted in part and denied in part.

BACKGROUND

Garland-Sash is the wife of Eliot S. Sash ("Sash"), who in 2003 was an inmate at the Metropolitan Correctional Center ("MCC") in New York, New York. (Complaint, dated July 27, 2005 ("Compl.") P 6.) Plaintiff regularly traveled from her home in New Jersey to the MCC to see Sash, and was listed on his authorized visitor record. (Compl. PP 10-11.) The authorized visitor record for each inmate is stored on a protected computer that can be accessed only by BOP employees. (Compl. P 11.)

On September 3, 2003 Plaintiff attempted to visit Sash but was denied access to the MCC on the ground that Sash's authorized visitor record did not contain her name. (Compl. P 21.) Plaintiff alleges that Lewis improperly accessed Sash's visitor record on a protected computer and deleted the names of all persons authorized to see him. (Compl. P 23.) She further alleges that the BOP Officials failed properly to train and supervise Lewis to ensure he complied with the law, failed to respond adequately to her complaints, and conspired to cover up Lewis' alleged [*3] misconduct. (Compl. PP 46-66.) Plaintiff contends that she suffered $ 50 in damages resulting from travel and parking expenses associated with her September 3, 2003 visit to the MCC. (Compl. PP 68-69.) She further seeks a total of $ 10 million in general, exemplary, punitive and emotional distress damages. (Compl. PP 69-73, 76.)

DISCUSSION

I. *Standard on a Motion to Dismiss*

When deciding a motion to dismiss for lack of subject matter jurisdiction pursuant to *Fed. R. Civ. P. 12(b)(1)*, "a court must accept as true all material factual allegations in the complaint." *Shipping Fin. Servs. Corp. v. Drakos, 140 F.3d 129, 131 (2d Cir. 1998)*. It is the plaintiffs responsibility to affirmatively establish subject matter jurisdiction. *Makarova v. U.S., 201 F.3d 110, 113 (2d Cir. 2000)*.

When deciding a motion to dismiss for failure to state a claim pursuant to *Fed. R. Civ. P. 12(b)(6)*, the court must "accept[] all factual allegations in the complaint as true and draw[] all reasonable inferences in the plaintiff['s] favor." *Ganino v. Citizens Utils. Co., 228 F.3d 154, 161 (2d Cir. 2000)*. Dismissal is appropriate only [*4] when "it appears beyond doubt that the plaintiff can present no set of facts entitling [her] to relief." *Chosun Int'l. Inc. v. Chrisha Creations, Ltd., 413 F.3d 324, 327 (2d Cir. 2005)*. Further, the pleading standards for a *pro se* litigant are less stringent than those that would be expected of counsel. *Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972)*. "[T]he submissions of a *pro se* litigant must be construed liberally and interpreted 'to raise the strongest arguments that they suggest.'" *Triestman v. Fed. Bureau of Prisons, 470 F.3d 471, 474 (2d Cir. 2006)* (quoting *Pabon v. Wright, 459 F.3d 241, 248 (2d Cir. 2006))*.

II. *CFAA Claims*

A. *Legal Standards*

Plaintiff alleges that Defendants violated *§§ 1030(a)(2)(B)* and *1030(a)(5)(A)(i)* of the CFAA. *Section 1030(a)(2)(B)* provides, in relevant part: "Whoever ... intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains ... information from any department or agency of the United States" shall be punished in accord with the provisions of *§ 1030(c)*. *Section 1030(a)(5)* provides for similar [*5] punishment of any person who

> (A)(i) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer; (ii) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; (iii) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage; and (B) by conduct described in clause (i), (ii), or (iii) of subparagraph (A), caused (or, in the case of an attempted offense, would, if completed, have caused) - (i) loss to 1 or more persons during any 1-year period ... aggregating at least $ 5,000 in value; (ii) the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of 1 or more individuals; (iii) physical injury to any person; (iv) a threat to public health or safety; or (v) damage affecting a computer system used by or for a government entity in

> furtherance of the administration of justice, national defense, or national security.

18 U.S.C. § 1030(a)(5). [*6] The term "protected computer" means, *inter alia,* a computer "exclusively for the use of ... the United States Government." *18 U.S.C. § 1030(e)(2)(A)*. The term "exceeds authorized access" means "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter." *18 U.S.C. § 1030(e)(6)*. The term "damage" is defined as "any impairment to the integrity or availability of data, a program, a system, or information." *18 U.S.C. § 1030(e)(8)*. The term "loss" is defined as "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damages assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service." *18 U.S.C. § 1030(e)(11)*.

While *§ 1030(c)* enumerates criminal punishments for violators of these provisions, *§ 1030(g)* provides: "Any person who suffers damage or loss by reason of a violation [*7] of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief." As indicated by the plain language of the statute, actions for punitive and emotional distress damages are not permitted. *See In re DoubleClick Inc. Privacy Litig., 154 F. Supp. 2d 497, 524 n.33 (S.D.N.Y. 2001)* (finding only economic losses recoverable under *§ 1030(g)*); *Letscher v. Swiss Bank Corp., No. 94 Civ. 8277 (LBS), 1996 U.S. Dist. LEXIS 4908, 1996 WL 183019, at *3 (S.D.N.Y. Apr. 16, 1996)* (holding that *§ 1030(g)* "does not provide recovery for emotional distress"). Moreover, "[a] civil action for a violation of this section may be brought only if the conduct involves [one] of the factors set forth in clause (i), (ii), (iii), (iv), or (v) of subsection *(a)(5)(B)*." *18 U.S.C. § 1030(g)*. "Damages for a violation involving only conduct described in *subsection (a)(5)(B)(i)* are limited to economic damages." *18 U.S.C. § 1030(g)*.

B. *Sovereign Immunity*

Defendants argue that all CFAA claims against the BOP and the individual Defendants in their official capacities should be [*8] dismissed on the ground of sovereign immunity. Under the doctrine of sovereign immunity, actions against the United States are barred unless Congress has unequivocally expressed a waiver. *United States v. Mitchell, 445 U.S. 535, 538, 100 S. Ct. 1349, 63 L. Ed. 2d 607 (1980)*. Such a waiver must "appear clearly in any statutory text" and must be "strictly construed ... in favor of the sovereign." *Lane v. Pena, 518 U.S. 187, 192, 116 S. Ct. 2092, 135 L. Ed. 2d 486 (1996)*. Absent a waiver, neither federal agencies nor federal officers acting in their official capacities are subject to suit. [1] *Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 510 (2d Cir. 1994)*.

> 1 There is an exception to the general presumption of immunity where a "clearly established" constitutional right has been violated. *Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)*. However, Plaintiff does not allege the violation of any such right and it is highly doubtful that she could do so. *See Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 464-65, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989)* (declining to recognize a right for inmates to receive visitors); *Young v. Vaughn,* 2000 U.S. Dist. LEXIS 10667 ("Convicted prisoners, their family and spouses have no constitutional right to visitation.") (citing *Mayo v. Lane, 867 F.2d 374, 375-76 (7th Cir. 1989)*; *Thorne v. Jones, 765 F.2d 1270, 1273-74 (5th Cir. 1985))*.

[*9] The text of the CFAA does not contain a waiver of sovereign immunity. Accordingly, all CFAA claims against the BOP are dismissed. All CFAA claims against the remaining Defendants for acts undertaken in their official capacities are also dismissed.

C. *Claims Against Lewis and the BOP Officials in Their Individual Capacities*

Plaintiff asserts claims against Lewis and the BOP Officials in their individual capacities pursuant to CFAA *§§ 1030(a)(2)(B)* and *1030(a)(5)(A)(i)*. (Compl. P 1.) *Section 1030(g)* permits such claims "only if the conduct involves 1 of the factors set forth in clause (i), (ii), (iii), (iv), or (v) of subsection *(a)(5)(B)*." *18 U.S.C. § 1030(g)*. Since the factors set forth in clauses (ii), (iii) and (iv) are clearly inapposite to this action, the Court proceeds to consider each cause of action in light of the factors set forth in clauses (i) and (v).

1. *Section 1030(a)(5)(B)(i)*

To fall within the ambit of *§ 1030(a)(5)(B)(i)*, a defendant's conduct must cause "loss to 1 or more persons during any 1-year period ... aggregating at least $ 5,000 in value." *18 U.S.C. § 1030(a)(5)(B)(i)*. "[L]oss" is defined [*10] as "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damages assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service." *18 U.S.C. § 1030(e)(11)*. "Damages for a violation involving only conduct described in *subsection (a)(5)(B)(i)* are limited to economic damages." *18 U.S.C. § 1030(g)*.

Plaintiff has alleged economic damages of only $ 50 in this action, (Compl. PP 67-76), and her claims for emotional distress and punitive damages are beyond the pale of *§ 1030(g)*. Thus, Plaintiff has failed to satisfy *§ 1030(a)(5)(B)(i)*'s facial requirement that the misconduct complained of cause "loss ... aggregating at least $ 5,000 in value."

2. *Section 1030(a)(5)(B)(v)*

To be covered by *§ 1030(a)(5)(B)(v)*, a defendant's conduct must cause "damage affecting a computer system used by or for a government entity in furtherance of the administration of justice, national defense, or national security." *18 U.S.C. § 1030(a)(5)(B)(v)*. [*11] "Damage" is defined as "any impairment to the integrity or availability of data, a program, a system, or information." Lewis allegedly impaired the availability of data and information on a BOP computer involved in the administration of justice. Accordingly, Plaintiff's claim for $ 50 in compensatory damages may proceed under *18 U.S.C. §§ 1030(a)(2)(B)*, *1030(a)(5)(A)(i)*, *1030(g)* and *1030(a)(5)(B)(v)*.

Defendants' argument that Plaintiff lacks constitutional and statutory standing to assert a claim under *§ 1030(a)(5)(B)(v)* is without merit. Plaintiff suffered an injury in fact of $ 50 in damages for which she seeks a compensatory award pursuant to a right of action conferred by *§ 1030(g)*. Under that provision, a plaintiff must demonstrate merely that *§ 1030* was violated and that the "[mis]conduct involve[d] 1 of the factors set forth in clause (i), (ii), (iii), (iv), or (v) of *subsection (a)(5)(B)*." Nothing in the language of *§ 1030(g)* suggests that *§ 1030(a)(5)(B)(v)* requires a plaintiff to own the computer that was injured by the defendant's misconduct in order to have standing. *See Nexans, 319 F. Supp. 2d at 472* [*12] (citing *Theofel v. Farey-Jones, 341 F.3d 978, 986 n.5 (9th Cir. 2003)* (holding in the context of a *§ 1030(g)* claim that "[t]he district court erred by reading an ownership or control requirement into the Act")).

D. *Liability of BOP Officials Under § 1030(g)*

The BOP Officials argue that Plaintiff has failed to state a claim against them because she does not allege that any of them personally violated *§ 1030*. (Compl. §§ 46-66.) *Section 1030(g)* provides, in relevant part: "Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against *the violator* to obtain compensatory damages ...." *18 U.S.C. § 1030(g)* (emphasis added). The statute does not provide a cause of action against individuals who fail to supervise violators, fail to train them properly or conspire to cover up their misconduct. Accordingly, Plaintiff's *§ 1030* claims against the BOP Officials are dismissed. *See Doe v. Dartmouth-Hitchcock Med. Ctr., No. CIV 00-100-M, 2001 U.S. Dist. LEXIS 10704, 2001 WL 873063, at *4-5 (D.N.H. July 19, 2001)* (holding that *§ 1030(g)* "creates only a limited private right of action against *the violator"* [*13] and dismissing claims against other defendants) (emphasis in original).

The Court is mindful that in some circumstances, courts have recognized the potential for vicarious liability under *§ 1030(g)*. *See Nexans Wires S.A. v. Sark-USA, Inc., 319 F. Supp. 2d 468, 472 (S.D.N.Y. 2004)* (allowing claim for vicarious liability under *§ 1030(g)* to proceed where defendants were alleged to have directed the violator's wrongful conduct for their own benefit); *Charles Schwab & Co. v. Carter, Civ. No. 04-7071, 2005 U.S. Dist. LEXIS 5611, 2005 WL 2369815, at *6-7 (N.D. Ill. 2005)* (same). However, in each of those cases the defendants were alleged to have directed the wrongful conduct of the individual "violator" for their own benefit. *18 U.S.C. § 1030(g)*. This case, in contrast, does not involve any allegation that the BOP Officials directed or encouraged Lewis' wrongdoing, much less that they benefited from it, and *§ 1030(g)* accordingly bars Plaintiffs claims against them. *See Butera & Andrews v. Int'l Bus. Machs. Corp., 456 F. Supp. 2d 104, 112 (D.D.C. 2006)* (rejecting claim of vicarious liability where plaintiff did not allege that employer [*14] affirmatively urged employee to commit acts that violated the CFAA); *Role Models Am., Inc. v. Jones, 305*

F. Supp. 2d 564, 568 (D. Md. 2004) (rejecting CFAA claim where plaintiff did not allege employer had directed or encouraged its employee to violate the terms of the statute).

III. *The Federal Tort Claims Act*

The Complaint arguably raises certain claims pursuant to the Federal Tort Claims Act ("FTCA"). To initiate an action under the FTCA, the "claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing." *28 U.S.C. § 2675(a)*. Moreover, such "a claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months ... of notice of final denial of the claim by the agency to which it was presented." *28 U.S.C. § 2401(b)*. These threshold requirements for the filing and denial of an administrative claim are jurisdictional and cannot be waived. *See McNeil v. United States, 508 U.S. 106, 113, 113 S. Ct. 1980, 124 L. Ed. 2d 21 (1993)*; [*15] *Keene Corp. v. United States, 700 F.2d 836, 841 (2d Cir. 1983)* ("[B]ecause the FTCA constitutes a waiver of sovereign immunity, the procedures set forth in *Section 2675* must be adhered to strictly."). These requirements apply with equal force to *pro se* litigants. *Adeleke v. United States, 355 F.3d 144, 153 (2d Cir. 2004)*. And the "burden is on the plaintiff to both plead and prove compliance with the statutory requirements." *In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 210, 214 (2d Cir. 1987)*; *see also Luckett v. Bure, 290 F.3d 493, 496 (2d Cir. 2002)* (holding that plaintiff bears the burden of proving, by a preponderance of the evidence, that subject matter jurisdiction exists).

Plaintiff did not plead in the Complaint that she exhausted her administrative remedies prior to filing this action, but seeks to circumvent that omission with two arguments: First, Plaintiff contends that she sought administrative relief from the BOP but received no response; and second, she urges the Court to consider the Complaint as a notice of administrative claim to the BOP. These arguments are unpersuasive.

Although the [*16] Second Circuit has not yet addressed the issue, numerous other courts have held that, in order to satisfy the presentment requirement of *28 U.S.C. § 2675(a)*, a claimant must do more than allege she mailed an administrative claim. Rather, a plaintiff must establish that the agency actually received the claim. *See Drazan v. United States, 762 F.2d 56, 58 (7th Cir. 1985)* ("[T]he district court was quite right to hold that mailing is not presenting; there must be receipt."); *Bellecourt v. United States, 994 F.2d 427, 430 (8th Cir. 1993)* (upholding dismissal where "the request for administrative remedy was not mailed by certified mail [and] the request for administrative remedy was not received by the Federal Bureau of Prisons") (internal quotations omitted); *Moya v. Department of Veteran's Affairs, 35 F.3d 501, 504 (10th Cir. 1994)* (It is the plaintiffs burden to establish the proper agency's receipt of the request for reconsideration"); *Vacek v. U.S. Postal Service, 447 F.3d 1248, 1251-53 (9th Cir. 2006)* ("[T]he claim was not presented, i.e., received by the agency, as the statute and the regulation require, [*17] within two years.") (internal quotations and citation omitted); *but see Barnett v. Okeechobee Hosp., 283 F.3d 1232, 1238-39 (11th Cir. 2002)* (finding that evidence of mailing of a notice of claim raised an inference that the presentment requirement had been satisfied); *Cordaro v. Lusardi, 354 F. Supp. 1147, 1148-49 (S.D.N.Y. 1973)* (holding that proof of mailing creates a rebuttable presumption that the presentment requirement has been satisfied).

Plaintiff has provided only bald assertions that she submitted a notice of claim to the BOP. Moreover, Defendants have submitted a declaration from a BOP official denying that the BOP has any record of receiving a notice of claim from Plaintiff. (Declaration of Adam M. Johnson, dated Mar. 9, 2005, P 3.) Accordingly, Plaintiff has failed to satisfy the presentment requirement of *28 U.S.C. § 2401(b)* and her claim under the FTCA is barred. *See Vecchio v. United States, No. 05 Civ. 0393 (PAC), 2005 U.S. Dist. LEXIS 26817, 2005 WL 2978699, at *5-6 (S.D.N.Y. Nov. 3, 2005)* (declining to decide whether proof of mailing creates a presumption of receipt on the ground that, even if it did, rebuttal affidavits [*18] from the Government were sufficient to overcome such a presumption); *Payne v. United States, 10 F. Supp. 2d 203, 205 (N.D.N.Y. 1998)* (holding proof of mailing insufficient to satisfy *28 U.S.C. § 2401(b)* because "evidence of actual receipt is required"); *Bakowski v. Kurimai,* No. 3:98cv2287 (DJS), 2000 WL 565230, at *3 (D. Conn. Mar. 20, 2000) (same).

Plaintiff's request that this Court construe the Complaint to satisfy the presentment requirement is also unavailing. Even if this Court could grant such a request, the FTCA provides that all administrative claims must be

filed within two years of their accrual. *28 U.S.C. § 2401(b)*. Plaintiff did not make her request of this Court until May, 2006 - more than two years after the events that form the basis for this action. Accordingly, Plaintiff's FTCA claims are time-barred. *See Johnson v. Smithsonian Inst., 189 F.3d 180, 189 (2d Cir. 1999)* ("[U]nless a plaintiff complies with this [statute of limitations] requirement, a district court lacks subject matter jurisdiction over a plaintiff's FTCA claim.").

CONCLUSION

For the foregoing [*19] reasons, the BOP Defendants' motion to dismiss is granted, and Defendant Lewis' motion to dismiss is granted in part and denied in part. Specifically, Plaintiff's CFAA claims for $ 50 in compensatory damages may proceed against Defendant Lewis pursuant to *18 U.S.C. §§ 1030(g)* and *1030(a)(5)(B)(v)*. All of Plaintiff's other claims are dismissed with prejudice.

Dated: March 26, 2007

New York, New York

SO ORDERED:

WILLIAM H. PAULEY III

U.S.D.J.