UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JULIE SNYDER & KAREN GOULD,

Plaintiffs,

-against-

FANTASY INTERACTIVE, INC., et al.

Defendants.

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11 Civ. 3593 (WHP)

MEMORANDUM & ORDER

WILLIAM H. PAULEY III, District Judge:

Plaintiffs Julie Snyder ("Snyder") and Karen Gould ("Gould") bring this action against their former employer, Fantasy Interactive, Inc. ("Fantasy") and several individuals. Both Plaintiffs allege violations of federal and New York privacy laws. Additionally, Gould alleges violations of federal and state wage laws, breach of contract, and violations of Hawaii privacy laws. Defendants move to dismiss all of Plaintiffs' claims pursuant to Federal Rule of Civil Procedure 12(b)(6). For the following reasons, Defendants' motion is granted in part and denied in part.

BACKGROUND

Fantasy is a web design agency with offices in New York. (Complaint, dated May 25, 2011 ("Compl.") ¶ 12.) Defendant David Martin is Fantasy's Chief Executive Officer, and Defendant Camilla Martin is Fantasy's Chief Operating Officer, (collectively, "the Martins"). (Compl. ¶¶ 9-10.) Defendant Ben Knight ("Knight") is an information technology employee at Fantasy. (Compl. ¶ 11.)

Gould joined the firm as a senior producer in August 2008. (Compl. ¶ 14.) On October 19, 2010, Gould executed an employment agreement ("the Employment Agreement") with Fantasy that provided that "[i]f either party decides to terminate this agreement, a two weeks [sic] written notice is required." (Compl. ¶ 15.) In November 2010, Gould moved to Hawaii and worked for Fantasy remotely. (Compl. ¶ 14.)

Snyder began working at Fantasy as an administrative assistant in February 2009. (Compl. ¶ 13.) She worked in the New York office at all relevant times.

During their employment, Plaintiffs maintained accounts with Skype, a computer program that allows users to send instant messages to each other. (Compl. ¶ 18.) Instant messages sent via Skype are encrypted and can only be viewed by logging into a user's account with a password. (Compl. ¶ 20.) Skype stores instant message conversations for up to one year. (Compl. ¶ 21.) Plaintiffs engaged in instant message conversations with each other on Fantasy's computers and on their personal computers. (Compl. ¶ 24.)

Plaintiffs claim that on November 17, 2010, the Martins and Knight accessed their Skype accounts and read their instant message conversations. (Compl. ¶ 26.) Snyder discovered this when she logged into her Skype account and noticed that Knight was listed as one of her contacts even though she had never added him to her list. (Compl. ¶ 27.) On November 18, 2010, Fantasy prohibited Gould from logging onto her work computer. (Compl. ¶ 28.) That same day, the Martins informed Snyder that they had read Snyder's instant message conversations for three hours and that they knew "all about [her] and [her] boyfriends." (Compl. ¶ 30.) Fantasy terminated Snyder and Gould later that day. (Compl. ¶ 31.) Plaintiffs allege that in December 2010, Knight told several Fantasy employees that he "hacked" into Snyder's Skype account at the direction of the Martins. (Compl. ¶ 33.)

DISCUSSION

I. Conversion to Summary Judgment

Defendants ask the Court to treat the instant motion to dismiss as a motion for summary judgment. On a motion to dismiss, a court may only consider "facts stated on the face of the complaint, in the documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken." Allen v. WestPoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991). However, a court may consider matters outside of the pleadings and treat a motion to dismiss as a motion for summary judgment if all parties have had a "reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d). The Court declines to convert this motion to dismiss into one for summary judgment because Plaintiffs have not had the opportunity to conduct discovery. See Fed. R. Civ. P. 12(d); see also Brodeur v. City of New York, No. 99 Civ. 651 (WHP), 2002 WL 424688, at *2 (S.D.N.Y. 2002) (declining to convert motion to dismiss into motion for summary judgment where discovery not was complete).

II. Legal Standard

On a motion to dismiss, a court must accept the material facts alleged in the complaint as true and construe all reasonable inferences in plaintiff's favor. See Grandon v. Merrill Lynch & Co., 147 F.3d 184, 188 (2d Cir. 1998). Nonetheless, "factual allegations must be enough to raise a right of relief above the speculative level, on the assumption that all of the allegations in the complaint are true." Bell Atl. Corp. v. Twombly, 540 U.S. 544, 556 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (quoting Twombly, 555 U.S. at 570). "The plausibility standard is not akin to a

'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Iqbal, 129 S.Ct at 1949 (citation omitted). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 555).

III. Federal and State Privacy Claims

A. Electronic Communications Privacy Act

The Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. § 2510 et seq., provides a civil cause of action against persons who intentionally "intercept" electronic communications. Courts addressing the meaning of "intercept" narrowly define it to include only "acquisitions of communication contemporaneous with transmission, not storage." Conte v. Newsday, Inc., 703 F. Supp. 2d 126, 139 n.11 (E.D.N.Y. 2010); see e.g., Fraser v. Nationwide Mut. Ins. Co., 352 F.3d 107, 113-14 (3rd Cir. 2003) (following Fifth, Ninth, and Eleventh Circuits and adopting the narrow definition); United States v. Meriweather, 917 F.2d 955, 960 (6th Cir. 1990). Courts employed this narrow definition when interpreting ECPA's predecessor, the Omnibus Crime Control and Safe Streets Act of 1968. See Steve Jackson Games, Inc. v. U.S. Secret Serv., 36 F.3d 457, 460-62 (5th Cir. 1994); see also Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 876 (9th Cir. 2002). And after reviewing the legislative history, the Fifth Circuit concluded that Congress intended to retain this definition under ECPA. See Steve Jackson Games, Inc., 36 F.3d at 462. While the Second Circuit has not addressed this issue, Conte, 703 F. Supp. 2d at 139 n.11, the Fifth Circuit's reason for maintaining the narrow definition is sound, and this Court adopts it. Because Plaintiffs plead no facts suggesting that

Defendants accessed their communications during transmission, their ECPA claims are dismissed with prejudice.

B. Stored Communications Act

The Stored Communications Act ("SCA"), 18 U.S.C. § 2701 et seq., provides: "whoever (1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished . . . ." 18 U.S.C. § 2701(a).

Defendants contend that Plaintiffs fail to state a claim because Fantasy's Human Resources Manual ("the Manual") authorizes Fantasy to monitor its employees' communications. However, on a motion to dismiss, a Court may only consider those documents attached to the Complaint or incorporated by reference. See Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002). "Even where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, which renders the document integral to the complaint." Chambers, 282 F.3d at 153 (internal quotation marks omitted). Defendants argue that the Court should consider the Manual because the Complaint relies on the Employment Agreement, which in turn references the Manual. But the Employment Agreement does not reference the Manual. Moreover, Defendants cannot show that the Complaint relies on the Manual's terms and effect. See Chambers, 282 F.3d at 154 (declining to consider document where complaint did not refer to it, parties did not rely on it in drafting their complaint, and where document was unsigned).

Even assuming the Court could consider the Manual, it only governs the parties'

employment relationship. And Plaintiffs allege that Defendants accessed communications occurring outside of the workplace on Plaintiffs' personal computers. See Penrose Computer Marketgroup, Inc. v. Camin, 682 F. Supp. 2d 202, 210-211 (N.D.N.Y. 2010) (where employer was authorized to access plaintiff's computer for limited purpose, allegation that he exceeded authorized scope and accessed plaintiff's e-mail was sufficient to survive a motion to dismiss). Accordingly, Plaintiffs state a claim under the SCA.

C. Hawaii Privacy Claims

Gould alone alleges that the Defendants violated Hawaii law when they "intentionally intercept[ed]" her "wire, oral, or electronic communication." See HI Rev. Stat. § 803-42; see also HI Rev. Stat. § 803-48 (providing private cause of action). Gould also asserts claims for invasion of privacy under Hawaii common law. Defendants rely on essentially the same argument for dismissing these claims as they do for dismissing Plaintiffs' SCA claims. The Court rejects these arguments for the reasons previously stated and denies Defendants' motion to dismiss the Hawaii privacy claims.

D. New York Privacy Claims

Plaintiffs assert claims of unauthorized use of a computer and computer trespass, arising under New York Penal Law §§ 156.05 and 156.10, respectively. There is conflicting authority regarding whether these statutory provisions provide a private right of action. Compare Casey Sys., Inc. v. Firecom, Inc., 94 Civ. 9327 (KTD), 1995 WL 704964, at *3-4 (S.D.N.Y. Nov. 29, 1995) (finding no private right of action); with Blissworld, LLC v. Kovak, Index No. 125431/00, 2001 WL 940210, at *5 (N.Y. Sup. Ct. July 9, 2001) (recognizing private right). "Rarely is there a private right of action under a criminal statute." Firecom, 1995 WL 704964, at *3. In determining whether a criminal statute gives rise to a private right of action, courts look to

"(1) whether the plaintiff is a member of a class for whose special benefit the statute was enacted, (2) whether there is any indication of legislative intent to create or deny a private right, (3) whether it would be consistent with the purposes of the underlying statutory scheme to create a private right, and (4) whether the cause of action is one traditionally relegated to state law." Firecom, 1995 WL 704964, at *3 (citing Cort v. Ash, 422 U.S. 66, 79 (1975)). Since Cort, the Supreme Court has clarified that while the Cort factors are relevant, the "central inquiry" remains whether the legislature "intended to create, either expressly or by implication, a private cause of action." Touche Ross & Co. v. Redington, 442 U.S. 560, 575 (1979); see also Gonzaga Univ. v. Doe, 536 U.S. 273, 286 (2002) ("where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit . . . ."). The court in Blissworld did not address whether the legislature intended to create a private right of action, as required by the Supreme Court. Because there is no indication that the legislature intended to create a private right of action, this Court declines to adopt the reasoning in Blissworld and dismisses these claims. See Firecom, 1995 WL 704964, at *3.

IV. Gould's Additional Claims

A. Wage Claims

Gould alleges that Fantasy and the Martins violated the Fair Labor Standards Act and New York Labor Law when they failed to pay her overtime after she worked in excess of forty hours per week. See 29 U.S.C. § 207; N.Y. Lab. Law § 652. Fantasy's policy of requiring its employees to obtain approval prior to working overtime does not absolve Fantasy of liability. See Chao v. Gotham Registry, 514 F.3d 280, 288-89 (2d Cir. 2008). But Gould fails to plead a viable FLSA claim because she does not allege the number of overtime hours that she worked. See Eng v. Argsoft Consultants, Inc., 11 Civ. 2180 (LBS), 2011 WL 4936951, at *2 (S.D.N.Y.

Oct. 17, 2011); see also Nichols v. Mahoney, 608 F. Supp. 2d 526, 547 (S.D.N.Y. 2009). Gould also fails to state a claim under New York Labor Law because "[t]he relevant portions of the Labor Law do not diverge from the FLSA" with respect to overtime. See Nichols, 608 F. Supp. 2d at 548; see also Hinterberger v. Catholic Health, 08 Civ. 380S, 2008 WL 5114258, at *2 n.2 (W.D.N.Y. Nov. 25, 2008) (requirements for stating FLSA overtime claim are the same as those under New York Labor Law). These claims are dismissed without prejudice, and Gould is granted leave to amend the Complaint to allege the number of overtime hours that she worked.

B. Breach of Contract

Gould asserts a breach of contract claim against Fantasy. To establish a breach of contract under New York Law, Gould must demonstrate (1) the existence of an agreement, (2) performance by the plaintiff, (3) breach by the defendant, and (4) damages. See Hajny v. Best Roofing of N.J, Inc., No. 11 Civ. 00173 (LLS), 2011 WL 2493737, at *5 (S.D.N.Y. June 22, 2011).

Gould asserts that Fantasy failed to provide her with two weeks notice before terminating her, as required by the Employment Agreement. Fantasy offers affidavits to support its argument that Gould resigned without notice, and that she, and not Fantasy, breached the contract. But because those affidavits were not attached to the Complaint or incorporated by reference, the Court may not consider them on this motion. See Chambers, 282 F.3d at 153 (2d Cir. 2002). Accepting all of Gould's factual allegations as true, she has adequately pled this claim, and Fantasy's motion is denied.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss is granted in part and denied in part. Defendants' motion is granted with respect to Plaintiffs' Electronic Communications Privacy Act claims and New York Penal Law claims, and those claims are dismissed with prejudice. Defendants' motion to dismiss is also granted with respect to Gould's Fair Labor Standards Act claim and New York Labor Law claims, but those claims are dismissed without prejudice. Gould must submit her amended complaint by February 29, 2012. Defendants' motion to dismiss is denied with respect to Plaintiffs' Stored Communications Act claim, and Gould's breach of contract and Hawaii privacy law claims. The Clerk of the Court is directed to terminate the motion pending at ECF. No. 17.

Dated: February 9, 2012
New York, New York

SO ORDERED:

WILLIAM H. PAULEY III
U.S.D.J.

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