Bhalla v Juniper Networks, Inc.
2021 NY Slip Op 31930(U)
February 5, 2021
Supreme Court, Queens County
Docket Number: 710101/2020
Judge: Cheree A. Buggs

Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
Justice

----------X Index No.: 710101/2020

RAHUL BHALLA,

Plaintiff,

Motion
Date: January 20, 2021

-against-

Motion Cal. No.:9

JUNIPER NETWORKS, INC.

Motion Sequence No.: 1

Defendant .
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The following e-file papers numbered EF 7-12 and 15-25 submitted and considered on this motion by defendant JUNIPER NETWORKS, INC. (hereinafter referred to as "Juniper") pursuant to Civil Practice Law and Rules (hereinafter referred to as "CPLR") 3211(a) (7) dismissing plaintiff RAHUL BHALLA's (hereinafter referred to as "Plaintiff") Complaint and such other and further relief as this Court deems just and proper.

	Papers Numbered
Notice of Motion-Affidavit-Exhibits.....	EF 7-12
Memo in Opp- Exhibits.....	EF 15-24
Memo in Reply.....	EF 25

The facts as alleged in the Complaint are as follows: Plaintiff was employed by Juniper within the sales department for approximately nine (9) years. Plaintiff was Juniper's leader of direct sales to Comcast. Among other things, Juniper sold its ACX products to Comcast which were used to enable Voice over Internet Protocol for transmission of voice and data digitally ("VoIP"). VoIP is the primary means of communication for many business, most emergency services and medical providers. Individuals rely on VoIP communications in emergencies, therefore the failure of the system could present an immediate danger to anyone who depends on it. Comcast was experiencing failures with the ACX products at a rate of 10-20% which exceeded acceptable service levels in the Comcast Master Service Agreement and accepted industry standards. Plaintiff and his supervisor Giuseppe Di Geso ("Di Geso") repeatedly notified Juniper of these failings. In response, they were told to sell the products. Plaintiff and Di Geso were treated with hostility by member of Juniper's Engineering Department due to their complaints. Juniper paid restitution or fines to Comcast totaling to hundreds of thousands of dollars due to Juniper's problems with the ACX products. Plaintiff

submitted reimbursements for travel and expenses he incurred during his employment, he traveled up to 250 days per year. Juniper had a submission system which was designed to catch and flag duplicate submissions. However, due to the volume of expenses, sale employees routinely generated duplicate submissions. Plaintiff discovered the duplicates and notified Juniper requesting that someone contact him, however no one responded. Plaintiff repaid duplicates on his own. On or about May 8, 2019, Marcus Jewell ("Jewell") head of sales told Di Geso that Juniper was going to have a hearing or investigation of Plaintiff. Plaintiff alleges that he was told that if he was found to have double billed for travel and expenses, it would lead to a "slap on the wrist." Di Geso expressed to Jewell that he doubted there was any intentional duplication of claims by Plaintiff or any member of his teams. Di Geso's supervisor Dan Reddington requested Di Geso's assistance in the investigation and in a finding of guilt on the part of Plaintiff but Di Geso declined. In July of 2019, Juniper held a hearing and investigation. On July 31, 2019, Plaintiff was fired without warning or offer of severance.

Plaintiff claims he was fired for his complaints regarding the failures of the ACX products. Among other things, Plaintiff claims he is owed $9,172 in un-reimbursed business expenses that he incurred at Juniper's direction and for their benefit. Plaintiff instituted this action claiming: retaliatory discharge NY Labor Law § 740, retaliatory discharge pursuant to Cal Lab Code § 1102.5, breach of contract, defamation and retaliatory discharge pursuant to 5 USCA § 2302.

Law and Application

"On a motion to dismiss pursuant to CPLR 3211 (a) (7), the claim must be afforded a liberal construction, the facts therein must be accepted as true, and the plaintiff must be accorded the benefit of every favorable inference" (*Sawitsky v State*, 146 AD3d 914 [2d Dept 2017]; *see also Leon v Martinez,* 84 NY2d 83 [1994]).

Retaliatory Discharge NY Labor Law § 740

NY Labor Law § 740 (2) states:

> 2. Prohibitions. An employer shall not take any retaliatory personnel action against an employee because such employee does any of the following:
>
> (a) discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety, or which constitutes health care fraud;
>
> (b) provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any such violation of a law, rule or regulation by such employer; or
>
> (c) objects to, or refuses to participate in any such activity, policy or practice in violation of a law, rule or regulation.

NY Labor Law § 740(3) states:

> 3. Application. The protection against retaliatory personnel action provided by paragraph (a) of subdivision two of this section pertaining to disclosure to a public body shall not apply to an employee who makes such disclosure to a public body unless the employee has brought the activity, policy or practice in violation of law, rule or regulation to the attention of a supervisor of the employer and has afforded such employer a reasonable opportunity to correct such activity, policy or practice.

Juniper argues Plaintiff cannot establish that the alleged deficiency of the ACX products he complained about constituted a violation of law, rule or regulation. Neither can Plaintiff argue, that the sales of those products were unlawful. Furthermore, according to Juniper, while Plaintiff alludes to industry standard requirements for communication equipment, these standards are neither tied to any enforceable regulatory body or guidance nor are they a violation of law, rule or regulation. Therefore, Plaintiff argues the claim must fail.

Plaintiff argues the defective products posed a danger to the public in violation of 47 USC §§ 225 and 255. According to Plaintiff, the aforementioned laws prohibit the sale of defective components. That, component manufacturers and providers must ensure that phone services for the disabled works twenty-four hours a day.

In reply, Juniper asserts the regulations that Plaintiff cites are anti-discrimination provisions which aim to ensure the availability of services for individuals with disabilities. Juniper argues that Plaintiff seeks to represent that the statutes and regulations are an industry standard set by the FCC. However, Juniper argues no legal standard as to the functionality of the equipment is set forth. On the contrary, Juniper asserts, the statutes and regulations seeks to ensure that telecommunication services are accessible to those with disabilities and are not restrictive as to their hours of availability. Thus, equipment related failures are not addressed in the statutes and regulations.

In this case an important distinction must be made, 47 USC §225 governs telecommunication services, Plaintiff alleges that Juniper provided telecommunication equipment. The equipment is what is used to access the service but it is not the service itself. Thus, 47 USC §225 is inapplicable.

47 USC § 225 titled Access by Persons with Disabilities addresses telecommunication equipment. 47 USC § 225 (b) states, "a manufacturer of telecommunications equipment or customer premises equipment shall ensure that the equipment is designed, developed, and fabricated to be accessible to and usable by individuals with disabilities, if readily achievable." While, 47 USC §225 is applicable to Juniper, Plaintiff has not alleged facts which indicate that Juniper violated the statute.

Retaliatory Discharge pursuant to Cal Lab Code § 1102.5

Cal Lab Code § 1102.5(b) states:

> (b) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.

Without addressing the choice of law doctrine. Assuming arguendo that California law is applicable, the Complaint fails to plead a cause of action for violation of Cal Lab Code § 1102.5 because as previously stated, Plaintiff has failed to establish that the alleged failings of the ACX equipment were a "violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation" (*see* Cal Lab Code § 1102.5)

Sarbanes-Oxley and *Dodd- Frank claims*

This Court notes that Plaintiff's Complaint does not allege violation of Sarbanes-Oxley and Dodd-Frank.

Plaintiff has failed to state a cause of action under Sarbanes- Oxley because the claim is time barred (*see* 15 USC § 1514A [b][2][D]). Plaintiff failed to state a cause of action under Dodd-Frank because Plaintiff has not established that he reported any of the alleged violations to the SEC.

Congress passed Sarbanes-Oxley and Dodd Frank to aid in rooting out corporate fraud (*Digital Realty Trust Inc. v Paul Somers,* 138 S.Ct. 767, 769 [2018]). "Sarbanes-Oxley applies to all 'employees' who report misconduct to the Securities and Exchange Commission (SEC or Commission), any other federal agency, Congress, or an internal supervisor... Dodd-Frank defines a 'whistleblower' as 'an individual who provides...information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission'" (*id* at 770 *citing* 15 USC § 78u-6[a][6]).

Breach of Contract

The elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage (*Clearmont Property, LLC v. Jacob Eisner,* 58 AD 3d 1052, 1055 [3d Dept 2009] [internal quotation marks omitted][internal citations omitted]).

"In order to plead a breach of contract cause of action, a complaint must allege the provisions of the contract upon which the claim is based... The pleadings must be sufficiently particular to give the court and [the] parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved as well as the material elements of each cause of action or defense". (*Israel Maldonado et al. V. Olympia Mechanical Piping & Heating Corp.et al,* 8 AD 3d 348, 350 [2d Dept 2004][internal quotation omitted][internal citation omitted]).

Plaintiff states he signed an agreement titled Juniper Sales and Commission Agreement ("Agreement") each year as a condition of his employment. Plaintiff claims that the Agreement incorporated Juniper's Ethics Codes, Agreements and Policies. According to Plaintiff, Junipers' Ethics Codes stated that Juniper Employees would not be penalized for reporting problems with products. Plaintiff claims the Agreement was violated because he was fired for reporting problems with Juniper products, specifically the ACX products.

Juniper argues Plaintiff was an at-will employee. Juniper points to the Agreement which states on page 4 in part:

> Participation in the Plan does not create, and shall not be construed to create, an employment contract between the Company and any Plan Participant. Except with regard to Incentive, Commission or Variable Compensation plans or programs in which the employee may participate, the Plan does not alter, either expressly or by implication, the terms or conditions under which the Company employs the Participant. Unless otherwise set forth in an employment contract or required by applicable law, the employment of all Participants is terminable by the Company at will at any time, with or without cause.

Juniper argues this clause illustrates that the parties did not have a contract. Furthermore, Juniper argues the portion of Juniper's Ethic's Codes that Plaintiff rests his claim upon is merely a statement that restates their obligations under federal, state and local law and shall not be construed as creating a contractual obligation.

Both parties cite *Anthony Lobosco v New York Telephone Company/ NYNEX* (96 NY2d 312, 314 [2001]) where plaintiff was an employee of defendant and became a party-witness for defendant in litigation between defendant and its contractors. Plaintiff met with defendant's counsel and was

instructed to limit his testimony to certain particulars and not to reveal other particulars (*id*). Plaintiff also claimed counsel pressured him to testify in ways he did not believe were accurate or true, and that counsel concealed documents. Plaintiff claims he was fired in retaliation for refusing to testify untruthfully and for blowing the whistle on a fellow employee's unethical conduct. On appeal, the court is solely considering plaintiff's breach of contract claim (*id)*. Similar to the Plaintiff in the underlying matter, the plaintiff received a manual from defendant entitled "Code of Business Conduct" which discussed legal and ethics consideration (*id* at 315). "Where the term of employment is for an indefinite period of time, it is presumed to be a hiring at will that may be freely terminated by either party at any time for any reason or even for no reason... New York does, however, recognize an action for breach of contract when plaintiff can show that the employer made its employee aware of an express written policy limiting the right of discharge and the employee detrimentally relied on that policy in accepting employment" (*id* at 316 [internal citations omitted]). The court held the breach of contract claim should be dismissed since the explicit disclaimer of a contractual relationship clearly preserved the right of defendant to maintain an at-will employment relationship with plaintiff (*id*). According to the court, "[r]outinely issued employee manuals, handbooks and policy statements should not lightly be converted into binding employment agreements... An employee seeking to rely on a provision arguably creating a promise must also be held to reliance on the disclaimer" (*id* at 317).

Plaintiff has failed to plead a cause of action for breach of contract because Plaintiff cannot establish justifiable reliance without also acknowledging justifiable reliance on the disclaimer contained in the Agreement at page 4.

Defamation

"To state a cause of action alleging defamation a plaintiff must allege that the defendant published a false statement, without privilege or authorization, to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se.... [s]ince falsity is a necessary element of a defamation cause of action and only facts are capable of being proven false, it follows that only statements alleging facts can properly be the subject of a defamation action" (*Steven Rosner v Amazon.com,* 132 AD3d 835, 836-837 [2d Dept 2015])

Plaintiff claims at a meeting which included some Juniper employees, the Chief Executive Officer and other senior executives Jewell stated that Plaintiff was fired for cause and that he had participated in wrongful or illegal behavior. Plaintiff alleges the statements made were untrue, Jewell knew they were untrue and knew they would circulate through out the company and through out the industry.

Defendant argues statements made about Plaintiff making duplicate claims for travel and expense reimbursement are true and are not disputed by the Plaintiff .

Plaintiff has failed to establish a cause of action for defamation.

Retaliatory Discharge pursuant to 5 USCA §2302

Juniper argues relief under this statute is exclusive to federal government employees. As Plaintiff is not a government employee he failed to state a cause of action for relief under this statute (*see* 5 USCA §2302).

Plaintiff has abandoned this claim as the opposition papers responsive to this motion fail to address Juniper's argument that the same should be dismissed. Therefore it is

ORDERED, that Juniper's motion is granted in its entirety. This matter is dismissed.

The foregoing constitutes the decision and Order of this Court.

Dated: February 5, 2021

Hon. Chereé A. Buggs, JSC