

Cohen v National Grid USA

2009 NY Slip Op 32330(U)

September 29, 2009

Supreme Court, Nassau County

Docket Number: 018536/2008

Judge: Ira B. Warshawsky

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

E

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:

HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 9

JASON COHEN, RICHARD CHOINSKI, JOHN
ADAMS, PATRICK BENSON, EILEEN BONASIA,
PATRICK BOYLE, GERALD CHIARELLA, JAMES
COMMISSO, CHRISTIAN CRUZ, JENNIFER FORST,
MARK GOERCCKE, GERARD MANGELLI, PETER
PATRONZI, ELENA THOMPSON, and KRISTIN
ZAKY,

Plaintiffs,

INDEX NO.: 018536/2008
MOTION DATE: 06/16/2009
MOTION SEQUENCE: 003 and
004

-against-

NATIONAL GRID USA, KEYSpan CORP.,
KEYSPAN SERVICES, INC., KEYSpan ENERGY
CORP., and NATIONAL GRID CORPORATE
SERVICES, LLC,

Defendants.

The following papers read on this motion:

Motion to Reargue Motion to Dismiss, Dismiss Amended Complaint and Vacate Judgment	1
Affirmation of Patrick Collins in Support of Motion & Exhibits Annexed	2
Memorandum of Law in Support of Motion to Reargue, Vacate Judgment and Dismiss Amended Complaint	3
Notice of Cross Motion, Affidavits & Exhibits Annexed	4
Memorandum of Law in Support of Cross-Motion and Opposition to Motion	5
Memorandum of Law in Further Support of Defendants' Motion	6

Affirmation of Lynn M. Brown & Exhibits Annexed	7
Plaintiff's Reply Memorandum of Law in Support of Cross-Motion	8

PRELIMINARY STATEMENT

Both sides take issue with the Order and Decision of this Court dated February 20, 2009. Defendants/Movants position is that the First, Second, Tenth and Seventeenth Causes of Action should have been dismissed. As to the First and Second Causes of Action, Defendants contend that these claims are based upon the 2007 Management Change of Control Severance Plan ("2007 Plan") and that Plaintiffs failed to plead material elements of a claim for breach of severance pay, specifically, that Defendants had a regular practice of making severance payments and that each Plaintiff was aware of and relied upon this knowledge to their detriment.

Defendants' initial contention is that the 2007 Plan was not an agreement at all, but rather is a policy or plan, and that this distinction is significant in that in the absence of a contract, Plaintiffs must prove a practice and detrimental reliance. They further claim that the Court misapprehended the time and import of the sale of Keyspan Communications Corp. to LightTower Fiber, LLC as constituting a "triggering event" for the severance claim. They state that Plaintiffs' allegation is that the sale of KCC to LightTower in July 2008 was the triggering event, and the Court misapprehended the change of control from KeySpan to National Grid in 2007 as being the cause of employment termination.

Defendants contend that Plaintiffs' future employment with LightTower was guaranteed and the Court's findings that Plaintiffs remained employees of KeySpan Communications until its sale to what ultimately became National Grid were erroneous. It confuses the 2007 National Grid acquisition in 2007 with the KCC-LightTower transaction in 2008, and Plaintiffs do not claim that they suffered an employment termination as a result of the 2007 National Grid acquisition.

Further, as part of the LightTower/KCC transaction, LightTower agreed to employ Plaintiffs, and other employees of KCC after the Closing, so there was no termination and

their employment was guaranteed.

Defendants contend that the Tenth Cause of Action for Tortious Interference with Contract should have been dismissed for the same reason previously stated, that the 2007 Plan was not a contract. Even if it were, Plaintiff failed to show a valid contract with a third party that was interfered with by Defendants. Plaintiffs allege that severance benefits are due from “the KeySpan Defendants and KeySpan Communications. It is impossible for a party allegedly liable under a contract to also be guilty of tortious interference with it.

Defendants next argue that the Seventeenth Cause of Action, relating to a 2001 grant to Plaintiff Cohen, should have been dismissed upon documentary evidence. Cohen sought declaratory relief that he is vested in the 2001 stock option agreement, and the fact is that he was so vested, and exercised his option in 2006, prior to the change of control. The Court agrees with this and never intended to grant Defendant Cohen a second right to exercise his options. The claim was that he was vested and the determination of the Court was in agreement. The Court should perhaps have made it more clear that it recognized that the vesting occurred, but was also fully exercised before the change of control.

The Judgment, to the extent it is read to entitle Cohen to now exercise his stock option pursuant to the 2001 Stock Options Agreement, must be vacated.

Defendants move to Dismiss the Amended Complaint in which Plaintiffs re-plead the Third through Ninth Causes of Action, alleging breach of contract based on the individual Memoranda with seven of the Plaintiffs. They point out that the Court previously noted that the Memoranda are not for a particular term, and do not contain a formula for calculation of a severance payment. Rather, the document stated that the employee would receive severance pay and benefits “equal to that of a comparable” employee of one of the various KeySpan subsidiaries. The Court also authorized the Plaintiffs to re-plead to include an allegation that Plaintiffs had knowledge of, and relied upon, the severance policy for comparable employees, which they have not done.

The Amended Complaint does not allege a regular practice of making severance

payments under the 2007 Severance Plan, nor that comparable employees of other KeySpan subsidiaries received severance payments under the circumstances of the Plaintiffs.

Plaintiffs' Cross-Motion for reargument seeks an order denying Defendants' motion to dismiss the Second through Ninth, Eleventh and Sixteenth Causes of Action in the original complaint, or in the alternative for leave to serve the Amended Complaint.

DISCUSSION

It is possible that the ultimate issues in this motion can be broken down as follows:

- What is the intent of the 2007 Severance Plan?
- Is this a "contract" or is it something less?
- If it is something less, do Plaintiffs have any entitlement to benefits consistent with those available to employees of subsidiaries other than KeySpan Communications Corp.?
- If they are entitled to similar benefits, must Plaintiffs allege and prove a history of severance benefits, and reliance upon the history to their detriment?

The thrust of Plaintiffs' claim is that KeySpan Defendants concluded that KeySpan Communications, which was being sold to LightTower, would have greater value if the employees, including Plaintiffs, remained in place. The 2007 Management Change of Control Severance Plan¹ provided in part as follows:

In the event of Change of Control as defined in the Senior Executive Change of Control Plan, severance pay will be provided to all management employees if terminated without cause (as defined in Senior Executive Change of Control Plan) within 18 months after the date of change of control.

The merger of KeySpan and National Grid took place on August 24, 2007. The

¹ Exh. "A" to Verified Complaint (Exh. "A" to Motion).

Plaintiffs were employed by a KeySpan subsidiary, KCC, until July 2008, when KCC was sold to LightTower. Plaintiffs contend that this was a termination within 18 months of the Change of Control, thereby entitling them to the Change of Control Severance Plan.

Defendants contend that Plaintiffs cannot rely on a severance policy statement, citing *Smith v. New York State Elec. And Gas Corp.*, 155 A.D.2d 850 (3d Dept. 1989). In that case the employee only learned of the severance policy after his discharge, and could not meet his burden of showing evidence of a regular practice by defendant to make severance payments, and his reliance on that practice in accepting or continuing his employment. Under these circumstances, the claimed contract upon which Plaintiffs relied, was unsupported by consideration, and was therefore unenforceable. The Court affirmed the dismissal of the complaint.

Baquer v. Spanish Broadcasting System, Inc., 2007 WL 2780390 distinguished *Smith* and its progeny from promissory estoppel cases. While *Smith* requires a knowledge of and reliance, it is not the type of reliance which forms a three-pronged test in promissory estoppel, including damages. Rather, as *Baquer* states, New York applies the test in *Smith* only to employees' claims for severance payments and only when such claims are based on a regular practice of the employer to make such payments. In *Deutsch v. Kroll Associates, Inc.*, 2003 WL 22203740, the Court stated that "(t)o survive summary judgment on such a claim, however, plaintiffs must produce some evidence showing '(1) a regular practice by defendant[s] to make [such] severance payments, and (2) [Deutsche's] reliance on that practice in accepting or continuing his employment.'" (quoting from *Smith*).

Given these factors, the Court must reconsider its interpretation of the impact of The2007 Management Change of Control Plan. It is not significantly different from promise to employees in *Smith*. It is not a compendium of the rights and obligations of Plaintiffs as employees, but a stated policy that if Plaintiffs remain as employees, and are terminated without cause within 18 months of the Change of Control (July 24, 2007), they

will receive benefits consistent with those received by employees of other KeySpan entities.

What differentiates the circumstances in this case from those in *Smith*, are the circumstances under which the 2007 Management Change of Control Plan was initiated. It is clear that KCC, which was being sold to LightTower, had a significant interest in maintaining control over its management personnel. As an inducement for Plaintiffs and others to remain employed by KCC, KeySpan initiated a program which amounted to a retention bonus. Plaintiffs continued in their employment, and when they ceased being employees of KCC, and became employees of LightTower, they were entitled to a severance benefit as specifically itemized in the Change of Control Plan. There is no reason to be relegated to a showing of the amount of severance pay historically given to other KeySpan employees. The document itemizes the specific amount of weeks pay to which employees are entitled in the event of termination without cause.

The Amended Verified Complaint, coupled with affidavits submitted in support of the cross-motion and in opposition to the motion, are adequate to state a claim that the Plaintiffs were aware of the severance proposal, and that they maintained their position with KCC in reliance upon it. Defendants' claim that employment by LT was guaranteed to Plaintiffs is not clear. The 2007 Change of Control Plan significantly pre-dated the acquisition of KCC by LightTower. In the interim, Plaintiffs, it seems, could not be certain as to what their future in the acquiring company would be.

Despite prior confusion as to whether Plaintiffs became employees of National Grid, or whether or not the termination was in the same year as the Change of Control, the facts remain that Plaintiffs were employees of KCC, they were the beneficiaries of a particularized statement of severance benefit entitlements upon termination without cause, they remained in their positions, allegedly with knowledge of the Change of Control Plan, and their employment with KCC came to an end (terminated) without any fault on their part. It may well be that Defendants did not believe that a continuation of employment

with equal or greater benefits constituted a termination, but by every reasonable interpretation of the work, Plaintiffs employment with KCC terminated upon the acquisition by LightTower. The motion to dismiss the First and Second Causes of Action is denied.

The Third through Ninth Causes of Action allege entitlement to severance pay under specific Memoranda with seven of the Plaintiffs. Rather than enumerate the level of benefits, the Memoranda refer to severance benefits consistent with those awarded other KeySpan employees. Despite Defendants' contention, Plaintiff has adequately pled reliance upon the Memoranda and claimed that the severance benefits in the KeySpan Severance Plan are "comparable" to benefits to which these seven Plaintiffs are entitled pursuant to the Memoranda.

The cross-motion to amend the verified complaint to modify the allegations in the Third through Ninth Causes of Action is granted. The motion to dismiss these Causes of Action is denied. Plaintiffs' contention that the memoranda were written as opposed to oral is correct. The Court's intention in its earlier decision was to show that the right to work was not enforceable beyond, at most, a single year, since the agreement had no stated term. The Court continues to believe that the Memorada must be evaluated under the circumstances in which they were created. As noted by Plaintiffs, KCC was a relatively new subsidiary which was created in a very competitive market. There was no assurance that the company would continue, or if dissolved, that the parties who left their position in more secure divisions of KeySpan, would be absorbed back into them.

Defendants therefore sought to induce people to sign on with KCC and remain there for the period of time during which they were seeking to market it to LightHouse. Seven people undertook this risk, allegedly in reliance of the promise made in the Memoranda, and remained until the completion of the transaction with LightHouse. Again, Defendants may well have meant only to protect the seven Plaintiffs if the LightHouse transaction collapsed and they were left jobless. This is hardly a fair

interpretation of the documents, and Plaintiffs, at this pleading stage, are free to allege that they relied upon the Memoranda in choosing to stay with KCC. This is different from a situation in which an employee alleges on an esoteric reference in an employment manual; these Memoranda were drafted specifically for them, and it is more likely than not that they considered the representation as to severance benefits in making their decisions. The Plaintiffs have adequately alleged reliance on the Memoranda.

The Motion to Dismiss the Third through Ninth Causes of Action is denied.

The Motion to Dismiss the Tenth Cause of Action for Tortious Interference is granted. The Court erroneously concluded that Defendants interfered with Plaintiffs' employment contracts. The Court presumed that the denial of severance benefits by a subsidiary of a parent company could well be the product of pressure placed upon the subsidiary by the parent. The reality, however, is that Plaintiffs' former employer, KCC, was acquired by LightHouse, over whom KeySpan had no control. It appears that the obligation to make severance payments remained with KeySpan Defendants, and there was no contract with third company to pay benefits and with which Defendants can be said to have interfered. A more accurate reading of the Tenth Cause of Action is a reiteration of the claims for breach of contract under the 2007 Management Change of Control Plan and the Individual Memoranda.

The Seventeenth Cause of Action in favor of Jason Cohen is dismissed and the judgment previously entered is vacated. The Court believes it was correct in determining that Cohen had vested rights in the 2001 Stock Options Agreement. It is clear that he was vested a year before the 2007 Management Change of Control Plan and, in fact, exercised his options. To the extent that the Court failed to make it clear that Cohen's claim was no longer viable, it was in error. The Nassau County Clerk is directed to file a vacatur of the Judgment upon presentation by Defendants.

Defendants oppose the Cross-Motion for a variety of reasons. Fundamental to their position is that Plaintiffs do not allege and cannot establish reliance upon a history of

Defendants in making severance payments such as those referred to in the individual Memoranda or in the 2007 Management Change of Control Plan. The Court believes that Defendants are in error in treating these documents as if they were no more than entries in an employee manual. They are not. They were created to deal with specific issues confronting the Defendants in conjunction with the creation of KCC and the subsequent sale of that subsidiary to LightHouse. These are enforceable contracts between the parties.

This constitutes the Decision and Order of the Court.

Dated: September 29, 2009


J.S.C.

ENTERED
OCT 02 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE