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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU : IAS PART 20
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NIKHIL KAUSHAL,

Plaintiff,

-against- Index No. 5963/04

EDUCATIONAL PRODUCTS INFORMATION EXCHANGE INSTITUTE D/B/A EPIE INSTITUTE,

Defendants.

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Present: Hon. TIMOTHY S. DRISCOLL, J.S.C.

Attorney for Plaintiff	Attorney for Defendants
David M. Lira, Esq. 595 Stewart Avenue, Suite 510 Garden City, NY 11530	Reynold A. Mauro, Esq. 353 Veterans Memorial Highway Commack, NY 11725

DECISION AFTER TRIAL

This action was commenced by plaintiff Nikhil Kaushal ("Plaintiff") filing a summons and complaint in which he alleged breach of contract and violation of Article 6 of the New York State Labor Law. Plaintiff seeks damages of approximately $100,000 plus reimbursement of tuition expenses that he incurred while attending the University of Bridgeport. The action was tried before the Court on January 24 and 28, 2011. The parties then submitted post-trial memoranda in March 2011.

Plaintiff's case at trial consisted of his own testimony and the deposition testimony of Ken Komoski, who is the president of defendant EPIE. The defense case consisted of the testimony of Professor Jerald Cole and the testimony of Ken Komoski. Each witness was subject

to cross-examination, and various documents were admitted in evidence by stipulation and during the course of the testimony.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff is a foreign-born student who met Professor Cole in 2000 when the former was a student at New York Institute of Technology. In the summer of that year, Cole told Plaintiff about a full-time job at EPIE, which is a 501(c)(3) non-profit organization, that would become available shortly thereafter. Specifically, Komoski, who is the president of EPIE, had directed Cole to hire programmers to develop a product that would match school-age children with various educational software. The University of Bridgeport would provide office space, copy machines and phones for the programmers. Funding for the project was to be obtained from governmental grants.

Plaintiff learned that he needed a special H1-B visa in order to obtain this position, and Cole worked with him to obtain this visa. More specifically, Cole accompanied Plaintiff to an attorney's office in Manhattan to meet with counsel hired by Plaintiff to assist in obtaining the visa. As part of this process, Cole, on behalf of EPIE, submitted INS form I-129 (Px 1), entitled "Petition for Nonimmigrant Worker." That document listed Plaintiff's name, date of birth, and country of origin. It further stated that Plaintiff's proposed employment would be to serve as a full-time "Internet Programmer/Analyst" at EPIE at a salary of $46,500 per year, along with "tuition remission and usual benefits." Cole signed this document on September 28, 2000, and listed his title as "Project Manager." Plaintiff did not sign the document.

Plaintiff then began employment at EPIE. He testified that his pay was somewhat sporadic, and that he received only $38,000 during his three years of employment at EPIE, rather

than the $139,500 that he expected. He provided tax returns and earnings statements supporting his arithmetic. Nevertheless, he stayed at EPIE because he hoped to receive these funds, and because his work at EPIE allowed him to remain in the Untied States.

Originally, Plaintiff reported to Cole, and then began to report to Komoski when Cole stopped working on the project in April 2001. There were two other programmers, in addition to plaintiff, who worked on the project. Plaintiff acknowledged that he did not keep records regarding the number of hours that he worked. Plaintiff further acknowledged that Komoski never represented that he was affiliated with the University of Bridgeport, and that neither Komoski nor anyone affiliated with the University made any promises regarding tuition reimbursement.

In addition to working at EPIE, Plaintiff enrolled at the University of Bridgeport in Fall 2000 to pursue a Masters degree. He claims to have completed the requisite course work, but has not received his degree because he owes tuition payments to the University. He stated that, during the time he attended classes, he brought his tuition bills to Cole, who apparently then negotiated reimbursement with the university bursar.

Plaintiff had four or five discussions with Cole, and then two or three discussions with Komoski, regarding his claim that he was not receiving his promised wages and was not receiving tuition reimbursement. Komoski told Plaintiff that the company was awaiting funding, and said that he would address Plaintiff's claims after funding was obtained. Plaintiff admitted that he did not know how the project was funded.

Komoski testified credibly regarding the funding for the project. Initially, the project was federally funded, but this funding was terminated in late 2001 or early 2002. Komoski then tried

to obtain additional funding from other private and public sources, but was unsuccessful. In total, Komoski raised approximately $700,000 for the project, which was used to pay salary for the programmers, payments for telephone, databases and software, and some salary for Komoski himself. Komoski described Plaintiff as the "least productive" of the three programmers who worked on the project. He did not remember Plaintiff ever complaining that he was not receiving wages or benefits to which he claimed to be entitled. He further stated that Plaintiff was working on a "task" basis, and that there were no time or attendance records regarding Plaintiff's work. In sum, Komoski stated that EPIE's funding was the driving force for the work, and payment, of the programmers who worked on the project.

The Court concludes that Plaintiff has not established a right to recover on his breach of contract claim. In so doing, the Court is guided by several hornbook principles. First, it is well-settled that a party seeking to recover for breach of contract must establish (1) formation of a contract between the parties, (2) performance by the plaintiff, (3) failure to perform by the defendant, and (4) resulting damages. *See, e.g., JP Morgan Chase v. J.H. Elec.*, 69 A.D.3d 802 (2d Dept. 2010); *Brualdi v. Iberia*, 79 A.D.3d 959 (2d Dept. 2010). Second, a plaintiff establishes formation of an enforceable contract by demonstrating the existence of an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound. *Kowalchuk v. Stroup*, 61 A.D.3d 118, 121 (2d Dept. 2006). Third, the Statute of Frauds, codified at General Obligations Law § 5-701, requires any agreement to be in writing if, by its terms, that agreement is for a period longer than one year.

Here, both parties acknowledge that the Statute of Frauds applies to the present case. In light of that acknowledgment, with which the Court agrees, the Court concludes that there is

insufficient evidence of the formation of a contract between the parties. Indeed, the sole document upon which Plaintiff relies to establish formation is Px 1, which is a form submitted to the Immigration and Naturalization Service in conjunction with Plaintiff's application for an H-1B visa. The specific section of that form upon which Plaintiff relies is entitled "Basic Information about the proposed employment and employer" (emphasis added). It further provides that the "Dates of intended employment" (emphasis added) are from October 1, 2000 to October 1, 2003. It does not list any of Plaintiff's responsibilities in the proposed employment. In sum, Px 1 is simply a document prepared in conjunction with Plaintiff's visa application. It specifies the Plaintiff's proposed employment to assist in the processing and determination of that visa application. It is not an expression of an intent by the parties to be bound to an employer-employee relationship. Rather, Px 1 appears, at most, akin to an "agreement to agree," which is not an enforceable contract. *Minelli Constr. Co. v. Volmar Constr., Inc.*, 917 N.Y.S.2d 687 (2d Dept. 2011); *Schaffe v. Simms Parris*, 2011 NY Slip Op. 1824 (2d Dept. 2011).

The Court's conclusion is buttressed by Komoski's unrefuted, credible testimony regarding the funding for the project on which Plaintiff worked. As Komoski testified, funding for the project diminished, and eventually ceased, in either late 2001 or early 2002. This is not surprising, especially given that EPIE depended on governmental funding. Indeed, both the government's priorities and its ability to fund programs are continually under review, and are continually subject to change. *Cf. Gokhlerner v. Rhea*, 2011 NY Slip Op. 30550U (N.Y. Cty. 2011) (Housing Authority's decision to deny vouchers due to insufficient funding upheld as rational exercise of discretion). In sum, given the vicissitudes of governmental and grant funding upon which EPIE relied, it would seem most unusual for EPIE to enter into an employment

contract requiring payments to Plaintiff over a three-year period when the very funding that would provide the monies for these payments was itself far from certain.

The Court further concludes that there is insufficient proof for Plaintiff to recover on his claim for tuition benefits. At the outset, as discussed above, the failure of the Plaintiff to establish the existence of a contract is fatal to any claim for damages, such as tuition benefits, that he claims resulted from EPIE's alleged breach of that contract. Even if the Plaintiff had established such a contract, however, the evidence of Plaintiff's alleged damages on this claim were speculative, and thus the Court could not award such damages. To be recoverable, damages must be proximate in effect, neither speculative nor uncertain, and reasonably foreseen as a result of the wrong. *Haven Associates v. Donro Realty Corp.*, 121 A.D.2d 504, 507-508 (2d Dept. 1986), citing, *inter alia*, *Lloyd v. Town of Wheatfield*, 67 N.Y.2d 809 (1986). *See, e.g., Rakylar v. Washington Mutual Bank*, 51 A.D.3d 995 (2d Dept. 2008) (trial court properly dismissed complaint alleging breach of contract where damages alleged were too speculative to sustain cause of action). Here, Plaintiff did not provide any documents specifying the amount of tuition for which he claimed reimbursement. Nor did his testimony explain either the absence of these documents, or credibly delineate the amount for which he seeks reimbursement. Thus, his claim for tuition reimbursement must fail.

Nor is the Plaintiff entitled to recover on his Labor Law claim. At the outset, the Court notes that Plaintiff did not provide any argument in his post-trial submission to the Court as to why this claim should succeed. Nor does the evidence support such a claim, as the Plaintiff himself was unable to point to any time records that would entitle him to the wages that he claims. In sum, the proof at trial established that Plaintiff resembled an independent contractor

in the tasks he performed for EPIE, and thus he is not an "employee" under the Labor Law. *E.g., Bhanti v. Brookhaven Memorial Hosp.*, 260 A.D.2d 334 (2d Dept. 1999). Moreover, in the absence of any time records setting forth the hours that Plaintiff claims to have worked, the Court has insufficient credible evidence to determine any wages or other sum that Plaintiff should have received even if Plaintiff had demonstrated that EPIE violated the Labor Law.

Settle judgment on ten days notice.

Dated: Mineola, NY
April 7, 2011

Hon. Timothy S. Driscoll, J.S.C.