

**Khamcy v Entech Eng'g, PC**

2014 NY Slip Op 32244(U)

August 19, 2014

Supreme Court, New York County

Docket Number: 105886/10

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

-----X  
HOSSAIN KHAMCY,

Index No. 105886/10

Plaintiff,

**DECISION AND JUDGMENT  
AFTER TRIAL**

-against-

ENTECH ENGINEERING, PC,

Defendant.

-----X  
BARBARA JAFFE, JSC:

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On July 1, 2014, a bench trial was held before me on plaintiff's action for breach of contract, violation of Labor Law § 198(1-a), prejudgment interest, reasonable attorney fees, and liquidated damages. The sole witnesses were plaintiff and Soudabeh Bayat, defendant's president. In lieu of oral summations, the parties submitted them in writing. Plaintiff relied on his memorandum of law furnished the day of trial, whereas defendant submitted its written summation on July 15, 2014 pursuant to the schedule set. Thereafter, plaintiff electronically filed a reply memorandum to which defendant objects. It is not considered.

I. UNDISPUTED FACTS

Bayat is an environmental engineer for over 22 years, and president of defendant since August 2000. In 2008, defendant was awarded a subcontract to conduct inspections along the noise barrier at exit 37 of the Long Island Expressway for the New York State Department of Transportation. On October 31, 2008, NYSDOT's Christopher Schmidt interviewed plaintiff for

the position of Chief Inspector for the project with defendant.

Plaintiff received his BS in civil engineering in 1980 from Fairleigh Dickinson University. He has worked as a construction inspector of roads and bridges at a private consulting firm with contracts with the NYSDOT. By email to Bayat dated November 3, 2008, Schmidt approved plaintiff for the job. Anxious to fill the job promptly, and given plaintiff's intention to confer with Bayat about "wages etc.," Schmidt advised Bayat that he could not "wait too long for [plaintiff's] commitment." (Pl. Exh. 2).

On November 4, 2008, plaintiff met with Bayat at defendant's office, following which by employment contract drafted and signed by Bayat and set forth in a letter dated November 4, 2008, Bayat offered plaintiff the following compensation package: Title: "Vice President Construction"; base salary: \$54 hourly or \$112,320 annually based on 2,080 hours a year, whereas the DOT contract rate was \$45 hourly, or approximately \$93,000 annually; medical insurance upon plaintiff's request, to the extent that defendant would pay 66 percent of the premiums; a 401K plan upon plaintiff's request with defendant matching four percent; three weeks or 15 working days of annual vacation and sick leave; \$400 a month in car expenses and on-the-job mileage reimbursement; and seven paid holidays a year. In addition, the contract provides for "a year-end bonus plan" with compensation equal to the greater of two percent of the company's gross 2009 income differential between years 2008 and 2009, or one percent of the company's gross 2009 income, with future bonuses "based on mutual agreement." (Pl. Exh. 1).

In the contract, Bayat expresses her confidence that hiring plaintiff "is a step toward [her] goal of growing to become a unique and large engineering company, pursuing opportunities in

metro area and other places where they happen.” (*Id.*). Soon thereafter, plaintiff began working on the project, submitting time sheets reflecting his usual hours as 7:30 a.m. to 3 p.m. or 3:30 p.m.

By email dated October 17, 2009, Bayat expressed disappointment with plaintiff given her understanding that he would be capitalizing on his professional experience and relationships to advance and expand defendant’s business. Thus, Bayat wanted to “develop a new understanding of our working relationship if it’s to be continued.” (Def. Exh. A).

By email response to Bayat dated October 20, 2009, plaintiff observed that she had hired him as a Chief Inspector, not marketer, and that the DOT needed him, an individual with enough pertinent experience, which was to defendant’s advantage. It was his understanding that given the short-term nature of the job with defendant, Bayat had floated with him the idea of expanding defendant’s Long Island business, and that while he worked full-time on the noise barrier project, taking care of all of the related work without supervision, he nonetheless referred and fruitfully recommended defendant to several consulting firms on Long Island. In his view, the salary and benefits offered him were based on his experience and were billable to the client. He too expressed a willingness to speak with her on planning the “next step.” (Pl. Exh. 5). Plaintiff continued working for defendant until the end of December 2009 when the contract ended, Bayat told him she had no more work for him.

In January 2010, when plaintiff asked Bayat about his future with defendant, he asked for his contractual bonus. As defendant’s 2009 gross income was \$3,619,557 (Pl. Exh. 3), whereas its gross income for 2008 was \$2,207,717 (Pl. Exh. 4), plaintiff demanded from defendant \$36,195.57. Bayat refused.

## II. PERTINENT PROCEDURAL BACKGROUND

By decision and order dated September 29, 2012, the justice previously presiding in this part denied plaintiff's motion for an order granting him summary judgment on all causes of action set forth in the complaint, finding that plaintiff had failed to establish, as a matter of law, that the contract between the parties does not require plaintiff to develop new business opportunities, or that his performance as chief inspector for the project sufficiently constituted such assistance.

## III. PERTINENT TESTIMONY

Plaintiff denies that Bayat asked him about helping her expand defendant's Long Island business, and while he admits having never opened an office on Long Island for defendant, he denies having agreed to do so.

According to Bayat, when she met with plaintiff before making him the offer, he told her of his lengthy experience and his numerous high-level contacts on Long Island, and agreed to help her grow her business and identify possible office space on Long Island for defendant. While he could not do so in his capacity as chief inspector, he expressed to her his understanding that he would do so after hours. She insists that it would be irrational to offer an employee such as a chief inspector a percentage of defendant's income.

Bayat drafted the November letter contract without consulting with anyone. She denies giving plaintiff the title of Vice-President, observing that she never issued him shares in the business, and paid him more than the hourly contract rate because he was to assist with developing the business. The car allowance, she maintains, was to compensate him for reaching out to his contacts after his regular work hours, and she is not aware that he did anything in that

regard, observing that his time sheets reflect nothing other than his inspection work. Bayat nonetheless acceded to plaintiff's request that he be reimbursed for his mileage at \$600 a month, which she paid him based on her belief that he would market defendant. She also asserts that the percentage of defendant's gross profits was intended solely to compensate plaintiff for his efforts at expanding defendant's business on Long Island.

Bayat also testified that in April 2009, she began to speak with plaintiff about opening a Long Island office, and had noticed that plaintiff never stayed at work beyond 3:30 p.m., whereas other managers in her experience regularly stayed at work until 8 p.m. After a lunch meeting, Bayat took plaintiff aside and asked him about the marketing and business development she expected from him. He still made no effort.

#### IV. CONTENTIONS

Defendant contends that given the decision denying plaintiff summary judgment, the sole issue to be decided at trial is whether plaintiff tried to develop defendant's business, and that only if he proved such efforts would he be entitled to the bonus. Absent any evidence of such efforts, defendant argues that plaintiff is not entitled to the bonus.

Alternatively, defendant argues that having failed to perform the services to which he was contractually obligated, plaintiff is not entitled to the bonus. In addition, absent any contractual provision for the payment of attorney fees to the prevailing party, they are not to be awarded, and given the common law, as opposed to statutory, contractual remuneration claim in issue here, Labor Law § 198(1-a) does not apply. (NYSCEF 37).

Plaintiff relies on the November 4 letter contract for his contention that he is entitled to the bonus set forth therein. He also argues that as the bonus was not discretionary, it constitutes

a wage within the meaning of Labor Law § 190(1), the violation of which entitles him to the full amount of the underpayment, reasonable attorney fees, prejudgment interest, and liquidated damages equal to 25 percent of the total wages found due. (NYSCEF 31).

#### V. ANALYSIS

The denial of a motion for summary judgment does not bind the trier of fact. (See *Feinberg v Boros*, 99 AD3d 219, 225 [1<sup>st</sup> Dept 2012], *lv denied* 21 NY3d 851 [2013] [denial of summary judgment on ground that movant raised triable issue of fact does not mean that movant cannot prevail after evidence considered by trier of fact]).

##### A. Breach of contract (first cause of action)

To establish a breach of contract, a plaintiff must show that: 1) it entered into an agreement with the defendant; 2) it performed pursuant to the contract; 3) the defendant failed to perform; and 4) it sustained damages as a result. (See *Furia v Furia*, 116 AD2d 694 [2d Dept 1986]). And, “when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms.” (*Signature Realty Inc. v Tallman*, 2 NY3d 810 [2004]; *W.W.W. Assocs, Inc. v Giancontieri*, 77 NY2d 157, 162 [1990]). Moreover, “[e]vidence outside the four corners of the document as to what was really intended but unstated or misstated, is generally inadmissible to add to or vary the writing” (*W.W.W. Assocs.*, 77 NY2d at 162), and parol evidence is inadmissible if the contract is clear on its face and sufficient to divine the parties’ intent (*Namad v Salomon, Inc.*, 74 NY2d 751, 753 [1989]). In addition, “[a]n omission or mistake in a contract does not constitute an ambiguity . . .” (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 200 [2001]).

Here, the letter agreement, drafted solely by Bayat, sets forth a compensation package

including a year-end bonus plan unambiguously offered to plaintiff in exchange for his services as defendant's Vice President of Construction. Although plaintiff concedes that he was hired to be chief inspector of the project, nothing precluded Bayat from giving him the title of vice-president, from paying him beyond the going rate for chief inspectors, or from enticing him with the promise of a year-end bonus.

Although expressing in other portions of the contract her certainty that plaintiff's background and experience will be a great asset in growing her business, and confidence that hiring him will advance her goals, nowhere in the contract does Bayat provide that the payment of the bonus is discretionary or contingent on his assisting defendant with expanding its business. Had she intended to retain the ability to withhold the bonus for plaintiff's failure to perform in that regard, she could have done so and offers no explanation for failing to do so. Moreover, Bayat's use of the term "base salary" signals her intent to pay plaintiff above and beyond it.

In light of the clear and facially unambiguous contract drafted by Bayat, an experienced executive who chose to advance the written offer without seeking any assistance, her intent and expectations of plaintiff constitute inadmissible parol evidence. Consequently, the contract must be enforced according to its terms which require that defendant pay plaintiff pursuant to the bonus plan. Nothing contained therein, however, requires either party to pay attorney fees.

B. Labor Law claims (second-fifth causes of action)

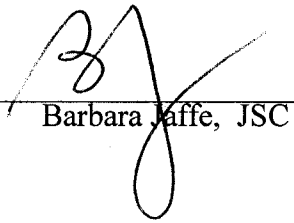
Absent a substantive claim for wages pleaded by plaintiff under the Labor Law, as opposed to his common law claim for breach of contract, plaintiff is not entitled to attorney fees, prejudgment interest or liquidated damages under the Labor Law. (*Gottlieb v Kenneth D. Laub & Co.*, 82 NY2d 457 [1993] [remedies provided in section 198 of Labor Law limited to claims

based on substantive violations of Labor Law, and do not apply to common-law contract claims]).

Accordingly, it is hereby

ADJUDGED, that judgment is granted plaintiff in the amount of \$36,195.58, with interest at the statutory rate from April 28, 2010 until entry of judgment as calculated by the Clerk plus costs and disbursements as taxed by the Clerk upon the submission of a proper bill of costs, and that the plaintiff have execution therefor; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.



Barbara Jaffe, JSC

DATED: August 19, 2014  
New York, New York