

Er v Genie Quest LLC

2024 NY Slip Op 33510(U)

September 4, 2024

Supreme Court, New York County

Docket Number: Index No. 652925/2019

Judge: Denise M. Dominguez

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DENISE M DOMINGUEZ PART 21

Justice

-----X INDEX NO. 652925/2019

ONUR ER

Plaintiff

- v -

GENIE QUEST LLC (D/B/A GENIE A/K/A GENIEOUSLY),
DAVID ELMEKIES

DECISION AFTER TRIAL

Defendants

-----X

In 2019, Plaintiff through counsel, commenced an action in New York County Supreme Court alleging Defendants had breached an employment contract. Plaintiff specifically alleged that Defendants owed \$20,733.32 in back pay. Plaintiff also sought prejudgment interest and attorneys' costs and fees, as well as asserting that Defendants violated the New York City Administrative Code § 20-928 (Freelance Isn't Free Act). Plaintiff further alleged that Defendant David Elmekies be held personally liable. In their answer, Defendants through counsel denied Plaintiff's allegations and asserted counterclaims against Plaintiff for failing to timely complete his work.

On November 13, 2023, a bench trial was held on this matter. At trial, only Plaintiff, Onur Er and Defendant David Elmekies testified. Sixty-nine documents were admitted into evidence and the parties' pre-trial memorandum were also incorporated into the trial record.

Based on the trial evidence, in early 2017, Plaintiff applied for an online job posted in the employment website Indeed.com. The position was for a software engineer consultant with Genie Quest LLC (hereinafter GENIE). Plaintiff was then interviewed, and the salary was negotiated with Defendant David Elmekies, President, CEO, and Founder of GENIE.

On March 15, 2017, at 4:57 p.m., Plaintiff received an email from a GENIE employee, Martha Sanowska, with the subject line “New Hire Paperwork.” The email included a GENIE work for hire agreement (hereinafter the Agreement), a GENIE non-disclosure agreement, a GENIE confidentiality and non-compete agreement, and a blank W-9 form. Plaintiff was instructed to review and return the completed forms with a copy of a voided check for direct deposit and a brief biography by Monday March 20, 2017. The email ended with “Welcome to the GENIE team.” Later that day, at 9:12 p.m. Plaintiff responded with all the completed documents signed and he initialed the bottom of every page with the letters OE.

Regarding the Agreement, it was a 7-page document that began, “This Agreement is made by between Genie Quest LLC, a New York cooperation having an address at, and Onur Er effective the March 15th, 2017 (“Effective Date”). The last page of the document included the following terms, “Description of Work: The work shall be specified by Genie Quest in collaboration with Consultant in accordance with the Schedule of the weekly sprint as indicated in Clause (5)...Payment for Work: A total monthly payment of \$9,166.66 Dollars which will be paid on the 15th of the end of each month into a bank account as specified by Consultant.”

According to Plaintiff and undisputed by Defendant, Plaintiff began to work for GENIE on March 20, 2017. Plaintiff further testified that beginning in April 2017 until the end of May 2018, Plaintiff received bimonthly timely payments from GENIE in the amount of \$4,583.33, a monthly total of \$9,166.66 as per the Agreement. Twice a month, Plaintiff would email an invoice to GENIE for software consulting and shortly thereafter he was paid. Plaintiff’s exhibits 8 to 33, are all the invoices from April 2017 to May 2018.

After, over a year of work with timely payments, in June of 2017, GENIE began to pay Plaintiff late. Also, approximately around this time, GENIE lost one of its largest customers,

“Jimmy Jazz.” Plaintiff further testified that the invoices he emailed on June 13, 2018, June 28, 2018, and July 13, 2018, were paid 21 days late, 10 days late, and 25 days late.

Plaintiff further testified he performed his regular consulting work and emailed invoices to GENIE as usual in the amounts of \$4583.33 for July 28, 2018, August 13, 2018, August 28, 2018, September 13, 2018, and an invoice for September 30, 2018, in the amount of \$2400 but was never paid.

Plaintiff also testified that although he wasn’t getting paid, he wanted to continue to work and agreed to an hourly pay with Defendant. He also stated that in September 2018 he was in the process of moving to California and did not work a full week and therefore, the invoice submitted for September 30, 2018 was for \$2400 instead of the biweekly agreed upon amount of \$4583.33.

Defendant did not deny that by October 24, 2018, Defendant was paying Plaintiff on an hourly rate and tried to find projects for Plaintiff to work on. However, Defendant denied signing the contract and argued it was only a draft agreement. Defendant also testified that Plaintiff did not get paid for July to September of 2018 because he did not do the work.

Plaintiff continued work for Defendant on an hourly rate until January 2019. Thereafter, Plaintiff commenced this action.

Personal Liability of Defendant Elmekies

Plaintiff alleges that Defendant should also be held personally liable because at the time the Agreement was entered into, GENIE was not a legal entity. Defendant argued that although GENIE was not registered in New York, it was duly registered in the State of Delaware.

Findings of Fact

Upon review of the agreement, GENIE identified itself as a New York corporation, with an address at 53 West 36th Street, New York, New York. GENIE's paystubs also use two New York Addresses, 53 West 36th Street New York, NY and 16 East 34th Street, New York, NY.

Based on Defendant's testimony, Defendant acknowledged that GENIE was not registered in New York but was a duly registered as a corporation in the State of Delaware. Defendant introduced a certification from the Delaware Division of Corporations establishing that GENIE was registered on May 2, 2014. Defendants also submit a copy dated October 7, 2019, for an application to incorporate in New York State.

Discussion

While an individual who executes a contract on behalf of a non-existing entity may be held personally liable, here GENIE was not a non-existing entity (*see Geron v. Amritraj*, 82 AD3d 404 [1st Dept 2011]). Plaintiff's theory of Defendant's personal liability hinged only upon the claim that the Agreement was entered into on behalf of a non-existent entity. Yet the evidence showed that GENIE although not in New York, was nonetheless incorporated as a legal entity registered in the State of Delaware. Accordingly, Defendant, Elmekies is not personally liable (*see New York Limited Liability Company Law §808; Herman v. Ness Apparel Co.*, 305 AD2d 217 [1st Dept 2003]).

Breach of Contract

Plaintiff alleges that he entered into a written Agreement to work as an independent contractor for GENIE in March of 2017 and that GENIE breached the terms by failing to pay Plaintiff for work completed. Defendant testified that there was no written contract and that the agreement relied upon by Plaintiff was merely a draft agreement.

Findings of Fact

Plaintiff introduced the Agreement dated March 15, 2017. The agreement is signed by Plaintiff but not by GENIE. The Agreement identifies Plaintiff as a consultant and reflects the payment terms and work. There is also a separate non-disclosure agreement, confidentiality agreement and a mutual disclosure agreement all drafted and prepared by GENIE and emailed to Plaintiff under “New Hire.”

Per the agreement, in exchange for his work as an independent consultant, GENIE would pay Plaintiff \$9,166.66 per month. The evidence further established that for over one year, Plaintiff received payment without issue. However, in June of 2018 GENIE’s payments to Plaintiff started arriving late and by July 31, 2018, the payments stopped. Plaintiff did not receive the July 31st, August 15th, August 31st, or September 15th payments of \$4,583.33,

Plaintiff submitted all of the invoices he sent to GENIE and copies of numerous correspondence between Plaintiff and Elmekies: “Slack” messages from July 30, 2018 and October 16, 2018; texts from March 21, 2018 through January 29, 2019; and emails from September 14, 2018, October 19, 2018, November 20, 2018, November 28, 2018 and December 19, 2018. Plaintiff also submitted records from a system referred to as “GIT”, which reflects the software work he performed pursuant to the agreement. GENIE submitted paystubs reflecting payment to Plaintiff, there are no paystubs for the period in dispute.

Discussion

It has long been held that a contract may be valid even if not signed by the parties (*Flores v. Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363 [2005]; *Brown Bros. Elec. Contractors v. Beam Const. Corp.*, 41 NY2d 397 [1977]; *see also Nash v. Walker Mem'l Baptist Church, Inc.*, 220 A.D.3d 595 [1st Dept 2023]).

This Court finds that Plaintiff established that both sides acted in a manner reflecting their intent to be bound by the Agreement until mid-September 2018. The consultant agreement, along with the confidentiality and mutual disclosure agreements, were prepared and drafted by GENIE, and emailed to Plaintiff specifically requesting signature. While a better practice would have been for GENIE to sign the agreements and send Plaintiff a copy of the agreements with both signatures, here the Agreement is nonetheless enforceable. The evidence further shows that both parties acted in accordance with the terms of the agreement. Plaintiff duly returned the signed agreement, submitted payment invoices, and was paid by GENIE for over a year without dispute. The evidence further shows that Plaintiff continued regularly performed the work agreed upon, as well as direct involvement, contribution, and feedback by GENIE.

Accordingly, this Court finds that the Agreement is enforceable, and that GENIE did not pay Plaintiff for his work for the invoices submitted for July 31st, August 15th, August 31st, and September 15th in the amounts of 4,583.33 for a total of \$ 18,333.32.

The Agreement also had a provision that “no modification or amendment of this agreement shall be effective unless in writing and signed by the parties.” While the parties both testified that at some point in September 2018 or October 2018, Plaintiff was paid by the hour until January 2019, this Court does not find sufficient credible evidence to establish an unequivocally referable to the modification of the Agreement, even if oral (see General Obligations Law 15-301[1]; see e.g., *Fairchild Warehouse Associates v United Bank of Kuwait*, 285 AD2d 444 [2nd Dept 2000]). Accordingly, Plaintiff did not establish entitlement to payment in the amount of \$2400 for an invoice submitted for September 30, 2018.

Violation of Freelance Isn't Free Act

Plaintiff alleges that Defendants violated the Freelance Isn't Free Act, Admin. Code of the City of New York §20-928 and that he is therefore also entitled to double damages. Defendants argues that even if the agreement is found to be enforceable, Freelance Isn't Free Act is not applicable here.

Findings of Fact

It is undisputed that the Agreement was signed by Plaintiff on March 15, 2017 and returned to GENIE the same day. This Court also finds that Plaintiff testified credibly that he began consulting work with GENIE on March 20, 2017 and that Plaintiff submitted his first invoices for payment on or about April 13, 2017.

Discussion

The Freelance Isn't Free Act provides legal protections for freelance workers against nonpayment for work performed (*Chen v. Romona Keveza Collection LLC*, 208 AD3d 152 [1st Dept 2022]). The Freelance Isn't Free Act was enacted on November 16, 2016, and went into effect on May 15, 2017 (Admin Code of City of NY § 20-927, Note 1; *Chen*). It is specifically indicated that the "... local law takes effect 180 days after it becomes law and applies only to contracts entered into on or after the effective date...." (*Id.*) Accordingly, as the Agreement was entered into before the Freelance Isn't Free Act went into effect, the Act is not applicable here (*see e.g., Clement v. Fuchs*, 2020 N.Y. Slip Op. 31520(U) [Sup. Ct. New York County 2020] [J. Crane]).

Defendants' Counterclaim

Defendant alleged that Plaintiff was unjustly paid \$20,000 for work he did not complete on a project, a mobile "app" for a Defendant's customer referred to as "Jimmy Jazz." Defendant

also alleged that it lost \$150,000 due to Plaintiff's incomplete work and lost future business from the customer. Plaintiff argued that the agreement between the parties was not based upon the satisfaction of any of GENIE's customers.

Findings of Fact

Defendant's testimony alone was insufficient to establish that Plaintiff was unjustly paid for work he did not complete on the "Jimmy Jazz" project or that Defendant lost money because of Plaintiff's incomplete work.

Discussion

None of the trial testimony or other evidence established any intent or actions by the parties to pay Plaintiff by either a "milestone" point in a project, upon project completion, or upon the customer's satisfaction regardless of whether GENIE received payment from its customers upon project completion or satisfaction for a particular project. Accordingly, Defendants did not establish this counterclaim for damages.

Defendants' Second Counterclaim

Defendant also alleged that Plaintiff is not the real party in interest and has no standing to bring this claim since Plaintiff signed the agreements with the name "Atesh Entertainment, Inc." (hereinafter Atesh). At trial Plaintiff testified that he is the only Atesh employee, and that Atesh was included in the agreement to allow Plaintiff to deposit payments into his business banking account, rather than his personal account. In addition, Defendant received invoices from Plaintiff under his name and under Atesh and Defendants paid Plaintiff under his name and also under Atesh.

VERDICT

Upon due deliberation and considering the evidence presented and the credibility of the parties, this Court finds that there is no basis to hold Defendant Elmekies personally liable and finds in favor of Plaintiff as to the breach of contract claim and denies Plaintiff's claims pursuant to Admin Code of City of NY §20-928 and §20-933 as well as denies Defendants' counterclaims. Accordingly, Plaintiff is awarded \$18,333.32 in damages.

ORDER

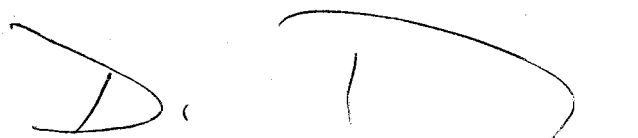
Accordingly, it is hereby **ORDERED** that the Clerk is directed to enter judgment in favor of Plaintiff ONUR ER against Defendant GENIE QUEST LLC (D/B/A GENIE A/K/A GENIEOUSLY), in the amount of \$18,333.32; it is further

ORDERED that Plaintiff's counsel is to submit reasonable accounting fees by email to the Court by October 15, 2024, unless this is resolved between the parties; and it is further

ORDERED that the parties are to appear for an attorney fee hearing before this Court, Part 35, on November 6, 2024, at 10:30 a.m. unless the parties resolve the attorneys' fees prior to the hearing date.

This constitutes the decision, verdict, and order of the Court.

DATE: 9/4/2024



DENISE M DOMINGUEZ, J.S.C.

Check One: Case Disposed

Non-Final Disposition

Check if Appropriate: Other (Specify _____)