TO BE
ARGUED BY:
David G. Goldbas
(TIME REQUESTED: 10 MINUTES)

APL # 2020-00151

New York State
Court of Appeals

ERSIN KONKUR,

Plaintiff-Appellant,

-against-

TURKISH CULTURAL CENTER AND HIGHWAY EDUCATION.

Defendants-Respondents.

BRIEF FOR PLAINTIFF-APPELLANT ERSIN KONKUR

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QUESTION PRESENTED

Was the Appellate Division in error when it ruled that Labor Law §198-b is exclusively a criminal statute and that Plaintiff has no cause of action based on Defendant's violation of that statute?

Plaintiff-Appellant argues that the Appellant Division was in error and that its Decision should be reversed.

STATEMENT OF THE CASE

References to the Record on Appeal filed in the Court of Appeals shall be made herein by the designation at "R" followed by the appropriate page number.

Plaintiff Ersin Konkur (hereinafter "Plaintiff") commenced an action in 2017 against his former employer, the Utica Academy of Science Charter School (hereinafter "Utica Academy") and the High Way Education (Appellant-Defendant below, hereinafter "Defendant") also known as the Turkish Cultural Center, seeking various relief under the NY Labor Law and the Federal Labor Standards Act (R60-65). That action was dismissed on motions by Defendants pursuant to CPLR § 3211 (R155). The dismissal was without prejudice (R158).

Plaintiff then commenced the instant action in 2018 under Index # EFCA2018-000883 seeking the same relief (R36-43). Plaintiff's only cause of action against Defendant was entitled Third Cause of Action (paragraphs 30 and 31, R171) and alleged damages from an illegal kickback scheme under Labor Law §198-b.

Both Defendant and the Utica Academy moved to dismiss all of Plaintiff's causes of action pursuant to CPLR § 3211. The Court declined to consider either Defendant's or the Utica Academy's motions as summary judgment motions (R8).

The Court then dismissed with prejudice certain causes of action which had been asserted against Utica Academy (R8) and sustained others (R8).

The Court also sustained the Third Cause of Action against Defendant and Utica Academy which had alleged the illegal kick-back scheme. (R9).

The Defendant then appealed that portion of the Supreme Court's order which had sustained the kick-back cause of action (R3).

On March 13, 2020, the Appellate Division, Fourth Judicial Department, granted Defendant's appeal and dismissed Plaintiff's remaining cause of action against it, ruling that "the legislature did not intend to create a private right of action for violations of Labor Law §198-b" and "plaintiff may not assert a cause of action based on an alleged violation of Labor Law §198-b" (R ii).

Plaintiff then sought leave to appeal by motion to the Court of Appeals and leave was granted by Order entered October 15, 2020.

STATEMENT OF FACTS

Because this case comes up for review on a CPLR 3211 dismissal in which a court "must accept Plaintiff's allegations as true" *Whitebox Concentrated Convertible Arbitrage Partners, L.P. v. Superior Well Servs., Inc.,* 20 N.Y.3d 59, 63 (2012), the facts which follow are taken from the Appellate Division Record on Appeal (now filed as the Record in the court of Appeals) including Plaintiff's Complaint and his Affidavit sworn September 11, 2018 with Exhibits 1-11 annexed thereto (R179-226) which was submitted in opposition to the two motions to dismiss.

For the school years 2013-2014 and 2014-2015, Plaintiff was employed by Utica Academy as a mathematics teacher. His employment contracts required him to teach regular classroom hours for a set salary; and also allowed additional work outside the regular classroom schedule (R187-191). Plaintiff therefore tutored Utica Academy students on Saturdays for extra pay (R181).

Plaintiff is a native of Turkey. When he worked for Utica Academy, he held an H-1 visa which was wholly dependent on his employment for Utica Academy (R180). The majority of the Utica Academy Board of Directors and its faculty were Turkish nationals (R180).

During the Plaintiff's employment, Utica Academy was closely affiliated with the Defendant. The Turkish nationals at Utica Academy and within the Defendant's organization were followers of the Gulen Movement which claims authority from and exclusive allegiance to Fetullah Gulen, a Muslim cleric. Turks from the Utica Academy and from the Defendant refer to the Gulen Movement as "the Service" (R181).

The Gulen Movement has as its goal the promotion of Fetullah Gulen's spiritual teachings, the recruitment of students of all ages to his group of adherents and the raising of money for his organization. The Gulen Movement is actually a cult which tries to strictly control the facts and actions of its adherents (R181-182).

Utica Academy required Plaintiff and other Turkish faculty members to attend regular meetings at the school or at the homes of various teachers. These

meetings were run by the Defendant's regional director/ spiritual advisor, Serif Meral. Mr. Meral was addressed at these meetings as "our Imam" which translates as "our leader" (R182).

The Plaintiff and Turkish faculty members at the Utica Academy were required to read and report on articles and books written by Fetullah Gulen which have typical chapters entitled "How to Receive God's Mercy"; "The Builders of Tomorrow's Ideology" ; "God is Enough for Us" and "The Time to Listen to Our Soul" (R 182).

The Defendant was well informed about the Plaintiff's private business affairs and criticized him about them (R 184).

At the meetings with the Defendant's representatives, including Serif Meral, the discussions always devolved into money demands (R182). Plaintiff was constantly pressured by the Defendant's representatives, including Serif Meral and Mohammed Dogan and another man named Selchuk, to turn over their wages to the Defendant or to Utica Academy personnel who would collect for the Defendant (R 182-185).

In his Verified Complaint in the case below, the Plaintiff pleaded that "at all times material to this Complaint, Defendants [High Way Education and the Utica Academy] acted jointly or as agents of each other or as wholly owned affiliates of each other." (R 168, paragraph 5). He also pleaded in his Third Cause of Action, subtitled "Violation of Labor Laws §§ 198 and 198-b" as follows:

> "30. Defendants demanding and collecting from Plaintiff on threat of employment or demotion of employment portions of Plaintiff's wage, salary and /or overtime pay constitute illegal kick-backs which are prohibited by Labor Law § 198-b.
>
> "31. Defendant's taking illegal kickbacks from Plaintiff's wage, salary and or overtime pay, entitles Plaintiff to judgment including compensatory damages; liquidated damages; attorney fees, and costs per statute of $50 (Fifty Dollars) per day, not exceed $5,000.00; plus punitive damages." (R171)

The Defendant's demands were specifically directed toward the wages that Plaintiff or his fellow teachers earned.

In opposition to the motions to dismiss, Plaintiff gave specific instances of payment demands made by the Defendant or by Utica Academy administrators who collected or pressured him on behalf of the Defendant.

On February 1, 2014, Kadir Yavuz, the Utica Academy School Director texted the Plaintiff demanding money on behalf of the Defendant. The Plaintiff saved these texts, translated them from Turkish and provided them to Supreme Court (R183-204).

On February 20, 2014, Serif Meral on behalf of the Defendant conducted a meeting at the Utica Academy building with school administrators and teachers in attendance, including the Plaintiff. Plaintiff, who was required to attend, recorded the meeting , transcribed it and had it translated from Turkish (R194-196). At the meeting, Serif Meral repeated Defendant's demands that teachers, including the Plaintiff, kick-back their income tax refunds (R194) and pressured them to revise their returns to maximize the amount of their refunds (R 194-195).

Plaintiff understood that if he did not comply with these demands, he would be demoted or terminated and thereafter lose his right to remain in the United States (R 186).

On July 11, 2014, Utica Academy's Superintendent, Tolga Hayali directed the Plaintiff to pick him up in Syracuse and drive with him to the

Defendant's offices in Rochester (R 184). Mr. Hayali explained that the Plaintiff would meet with Serif Meral and Mohammed Dogan, the Defendant's accountant.

At that meeting, Messrs. Meral and Dogan criticized the Plaintiff's decision to invest in local real estate because they believed such investment would lower the Plaintiff's payments to the Defendant (R 184). The Plaintiff involuntarily paid the Defendant $2,000.00 at this time (R184).

On September 27, 2014 (a Saturday), the Plaintiff was directed by Utica Academy's School Director to drive to Rochester to meet with Mr. Meral. En route, he was redirected to the home of the Defendant's accountant, Mr. Dogan (R 183). When he arrived, Mr. Dogan handed him a note which laid out his requirements for kicking back wages to the Defendant. This note, in Turkish, was translated and submitted to Supreme Court to reveal a formula of forced contributions to the Defendant based on the Plaintiff's wages at Utica Academy. In effect, he was required to pay "the Service" (a nickname for the Gulen Movement, as represented by the Defendant) the difference between his gross pay and his net pay (R184).

Between September 1, 2013 and November 4, 2014, the Plaintiff made involuntary payments to the Defendant totaling $6,274.91. The Defendant acknowledged receipt of some of these funds, specifically $ 2,797 (R161).

The Plaintiff was also forced to purchase worthless magazine subscriptions, in bulk, which contained Gulenist drivel. The payment for these subscriptions was ultimately turned over to the Defendant (R 185).

The Plaintiff was also forced to kickback his tutorial wages to Utica Academy School Director Kadir Yavuz who collected on behalf of the Defendant. These kickbacks totaled $2,821.00 (R185-186).

When the Plaintiff told the Utica Academy superintendent, Tolga Hayali, that he would no longer pay these kickbacks, he was demoted in his employment and his pay was cut (R186).

DISCUSSION

THE APPELLATE DIVISION ERRONEOUSLY DISMISSED THE PLAINTIFF'S CAUSE OF ACTION FOR DAMAGES UNDER LABOR LAW § 198-B BECAUSE THE STATUTE IS NOT EXCUSIVELY CRIMINAL BUT RATHER ALLOWS A PRIVATE RIGHT OF ACTION

Labor Law §198-b states as follows:

"§ 198-B. "Kick-Back" of Wages Prohibited.

***

"2. Whenever any employee who is engaged to perform labor shall be promised an agreed rate of wages for his or her services, be such promise in writing or oral, or shall be entitled to be paid or provided prevailing wages or supplements pursuant to article eight or nine of this chapter, it shall be unlawful for any person, either for that person or any other person, to request, demand, or receive, either before or after such employee is engaged, a return, donation or contribution of any part or all of said employee's wages, salary, supplements, or other thing of value, upon the statement, representation, or understanding that failure to comply with such request or demand will prevent such employee from procuring or retaining employment. ***Further***, any person who directly or indirectly aids, requests or authorizes any other person to violate any of the provisions of this section shall be guilty of a violation of the provisions of this section.

***

"5. A violation of the provisions of this section shall constitute a misdemeanor." [emphasis supplied]

In interpreting a statute, "[i]t is fundamental that a court should attempt to effectuate the intent of the Legislature." *Patrolmen's Benevolent Assn. of*

City of N.Y. v. City of New York, 41 N.Y.2d 205, 208 (1976). To effectuate the intent of the Legislature, the courts must therefore "look first to the statutory text, which is the clearest indicator of legislative intent." *People ex rel. Negron v. Superintendent, Woodbourne Corr. Facility*, No. 76, 2020 WL 6828791 (N.Y. Nov. 23, 2020) citing *Matter of New York County Lawyers' Assn. v. Bloomberg,* 19 N.Y.3d 712, 721 (2012). Since "the clearest indicator of legislative intent is the statutory text... the starting point in any case of interpretation must always be the language of itself, giving effect to the plain meaning thereof." *People v. Anonymous,* 34 N.Y.3d 631, 636, (2020).

Here, the statutory text is clear: the practice of forcing wage kick-backs is denounced as "unlawful" *and* that practice is also a crime. The crime is separately defined, set off by the use of the word "further" to introduce the criminal prohibition. There is a disjunct, compelling the inference that the statute is legislating two remedies, one which is handled by the criminal justice system and the other which is not.

To argue, as did the Appellate Division below, that the statute is purely criminal is to make the first sentence, the declaration of "unlawfulness", purely superfluous, and would violate the solemn deference that the courts must grant

to the entire text of any legislative enactment. *See People ex rel. McCurdy v. Warden, Westchester County Corr. Facility,* No. 73, 2020 WL 682, 8846 at *3 (N.Y., November 23, 2020) ("A statute must be construed as a whole and its various sections must be considered together and with reference to each other" and "courts must harmonize the various provisions of related statutes and construe them in a way that renders them internally compatible.")

Here, the context of § 198-b is crucial. The statute is promulgated not in the Penal Law, but in the Labor Law. The original statute was passed as a penal law by § 962 of Chapter 171, Laws of New York, 1934, but in 1965 it was transferred to the Labor Law. *See* Laws of New York 1965 page 2502 [Penal Law of 1965 §500.05].

Moreover, the statute was transferred to Article 6 of the Labor Law, entitled "Payment of Wages", which is primarily a civil statutory scheme. *See* Labor Law § 191 (requiring every employer to pay wages according to specified frequencies); §192 (requiring wages to be paid in cash) §; 193 (prohibiting certain deductions from wages); §194 (prohibiting wage differentials based on gender); §195 (requiring employers to keep certain records and provide employees with certain notices); 196 (Commissioner of

Labor empowered to, among other things, maintain judicial actions to recover wages on behalf of assigning wage earners); §197 (civil penalties can be recovered by the Commissioner against any employer who fails to pay wages or discriminates in payment of wages); and §198 (in claims brought privately by a wage earner, a court may award counsel fees and upon a willful violation, double damages).

This Court has expressly held that "the overall objective" of Labor Law Article 6 was to strengthen and clarify the substantive laws protecting the rights of employees to the payment of wages. *Gottlieb v. Laub & Co.*, 82 N.Y. 2d 457, 461 (1993); *see also Truelove v. Northeast Capital and Advisory,* 95 N.Y.2d 220, 223 (2000). By placing §198-b in Article 6 of the Labor law, the Legislature expressed a clear intent to provide an additional protection to the rights of workers to collect their wages in a civil remedy as well as to create a criminal deterrent.

The mere presence in the statute of a criminal penalty should not eliminate the civil remedy. In the Labor Law, the two remedies exist side by side and in the courts, they are concomitantly applied. *See for example*, § 198-a (criminal penalty provided for failure to pay wages) and *Epelbaum v. Nefesh*

Achath B'Yisrael, Inc., 237 AD 2d 327, 329 (2nd Dept 1997) (wage earning teacher granted summary judgment for unpaid wages); see also §198-c (criminal penalty for nonpayment of employment benefits or wage supplements) and *Hartshorne v. Roman Catholic Diocese of Albany,* 68 Misc. 3d 849, 859 (N.Y. Sup. Ct. 2020) (Plaintiff's cause of action to enforce pension contributions as a wage supplement sustained).

The civil remedy is also clear from the Legislature's emphasis in §198-b on "wages, salary, supplements or other thing of value". This phraseology connects directly to the definition of "wages" as used in Article 6, see in §190 (1), and to the remedies granted in §198 to a civil action brought "upon a wage claim". Section 198-b could not have meaning without reference to the other two defining statutes which are civil in nature.

Even if the civil remedy against kickbacks were not clearly demonstrated in the wording and the placement of §198-b, any textual ambiguity should be resolved by reference to the legislative history, *Desrosiers v Perry Ellis Menswear, LLC, 30 N.Y.3d 488, 494 (2017); Albany Law School v. NYS Office of Mental Retardation and Developmental Disabilities*, 19 N.Y.3d 106, 120 (2012) . Section §198-b began as a section of the Penal Code, but was

ultimately transferred out of it and into the Labor Law, *see* Laws of New York 1965 page 2502 [Penal Law of 1965 § §500.00, 500.05].

In what is essentially its current form, the statute was passed by Chapter 171 of the Laws of New York 1934. That bill was passed based on a recommendation from the Committee on Legislation of the New York County Lawyers Association which urged passage based on the following rationale:

> "The recent exposure of the prevalent practice commonly known as the "kickback" justifies the enactment of a law such as this. Persons engaged in public works should be protected from unscrupulous contractors who attempt to invade the provisions of the Labor Law and from other racketeers who have recently invaded this field. While threats to have a person discharged unless the worker pays a certain sum of money, may have been held to constitute extortion under § 851 of the Penal Law... the section *is not broad enough* to include threats to the effect that failure to comply with the request or demand will prevent the workman from procuring employment.
>
> ***
>
> "The proposed bill deals directly with the *vicious practice* and *adds strength to the provisions of the Labor Law* ... The bill therefore not only aids honest and legitimate contractors but *protects the worker* and should be approved." [Bill Jacket to Ch. 171, Laws of 1934, pages 4, 5; emphasis supplied]

The law was amended by Chapter 851 of the Laws of 1939 to include workers besides prevailing wage earners. In support of that bill, the

Committee on Criminal Courts Law and Procedure of the Association of the Bar of the City of New York wrote:

> " We believe that each of these proposed amendments is desirable. The same considerations of public policy which support the present statute governing contracts for the payment of the prevailing rate of wages are equally applicable to all contracts for personal services." [Bill Jacket Ch. 851, Laws of 1939, page 8]

The Committee went on to say "It is apparent that the public interest would be served by correcting the mechanical inaccuracy in the present law." [Bill Jacket to Ch. 851 Laws of 1939, page 9].

In addition, the New York State Federation of Labor endorsed the 1939 amendment by writing to the Governor:

> " The New York State Federation of Labor is confident that these amendments will more fully carry out the original purpose of this section *to protect workers from extortion under threat of loss of employment.*" [Bill Jacket to Ch. 851 Laws of 1939, page 12; emphasis supplied].

Thus the legislative history reveals a strong and repeated initiative to combat the "vicious practice" of forced wage kickbacks and to protect the victims of it.

The legislative history also shows that the lawmakers wanted to enhance worker protections that were already in the Labor Law and decisional law at that time. *See Sciasscia v. Fredburn Constr. Corp.*, 248 A.D. 608 (1st Dept. 1936).

If there is any doubt in the private right of action allowed by §198-b, it should be resolved in favor of the wage earner. That statute and the legislative scheme of Labor Law Article 6 are remedial in nature and should therefore be liberally construed. "A statute beneficial to the public, though penal as to some persons, will receive an equitable construction in order not to defeat its general as well as its specified purpose." West's McKinney's Consolidated Laws of New York, Statutes §275, citing *Cotheal v Brouwer* 5 N.Y. 562, 568 (1851) and *State v Strong Oil Co.*, 105 Misc. 2d 803 (Sup Ct Suffolk Co. 1980) *appeal dismissed* 87 A.D.2d 374 (2d Dept 1982)

"In the absence of an express private right of action, [a] plaintiff [] can seek civil relief in a plenary action only if the legislative intent to create such a right is fairly implied in the statutory provisions and their legislative history." *Cruz v. T.D. Bank, N.A,* 22 N.Y. 3rd 61, 70 (2013) *citing Carrier v. Salvation*

Army, 88 N.Y. 2nd 398, 402 (1996). In this case, the private right of action to a wage claim to recover forced kickbacks should, in fairness, be implied.

In *Cruz*, this Court explained that the determination of a "fairly implied" right of action is predicated on three factors: (1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether the recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme." *Cruz*, 22 N.Y.3d at 70 *citing Sheehy v. Big Flats Community Day*, 73 N.Y. 2nd 629, 633 (1989).

In this case, the Plaintiff's right to a civil action against illegal kickbacks is fairly implied from the statute. All three of the *Cruz* factors are met.

First, the Plaintiff is one of the class which is protected by the statute because he is a wage earner. Second, the private right of action would promote the legislative purpose because it would provide a prompt recovery of extorted wages and, by the prospect in §198 of attorneys fees and double damages, it would deter the unlawful conduct.

Third, and most importantly, *Cruz* 22 N.Y.3d at 70-71, the private right of action is not inconsistent with the legislative scheme. To the contrary, it is entirely consistent with it.

The issue of wage kickbacks is not addressed in any New York statute besides the Labor Law. Thus the test of inconsistency must be confined to an analysis of the Labor Law.

As discussed above, a claim for kicked-back wages is *a Labor Law* wage claim because the terms "wages" and "wage claim" are consistently if not identically defined in §§190 (1), 198 and 198-b of that Law. Labor Law §198(2) specifically allows Article 6 remedies—private/civil as well as administrative and criminal—to be enforced simultaneously or consecutively. A private right of action is therefore entirely consistent with the legislative scheme of Labor Law Article 6.

In the Decision below, the Appellate Division reasoned that "the legislature specifically considered and expressly provided for enforcement mechanisms in the statute itself." The Decision does not explain where the Legislature "specifically considered" a private right of action. In fact, the

legislative history only discussed "enhancing" or "adding to" existing protections; it never discussed, much less rejected, the private right. Moreover, the Appellate Division in denying the private right of action overlooked the expansive allowance of various remedies set out in §198 (2).

In addition, the Appellate Division Decision below, if affirmed, would lead to an anomalous result. A wage earner who is deprived of wages by the employer could maintain a private cause of action under Article 6, but by the Appellate Division Decision that same wage earner would be barred from the action if the employer deprived the wages by force or intimidation, or worked through an intermediary to do so.

The Appellate Division Decision below would also lead to an unfair result. That Decision refers to an "enforcement mechanism" already provided in the statute, meaning an exclusive criminal remedy. Such a remedy requires the aggrieved wage earner to seek his or her compensation through an already overburdened criminal justice system. It would require the wage earner to convince a prosecutor to take the case, locate the perpetrator, assemble proof beyond reasonable doubt and obtain a conviction, which may or may not result in a restitution order. The delays and uncertainties attending such a system

would mean that the "enforcement" is, for the individual wage earner, no enforcement at all.

CONCLUSION

Section 198-b of the Labor Law is not exclusively a criminal statute. Its wording, its key definitions in Article 6, its interrelationship with all of the civil remedies in Article 6, its legislative history and its conformity with the standard set by *Cruz v. T.D. Bank, N.A,* 22 N.Y. 3rd 61 (2013) and *Sheehy v. Big Flats Community Day*, 73 N.Y. 2nd 629 (1989), all warrant the private right of action.

The Decision of the Appellate Division entered March 13, 2020, should therefore be REVERSED.

Dated at Utica New York
December 10, 2020

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