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STATE OF NEW YORK
COURT OF APPEALS

ERSIN KONKUR,

Appellant-Plaintiff

vs.

UTICA ACADEMY OF SCIENCE CHARTER SCHOOL,
TURKISH CULTURAL CENTER,
HIGHWAY EDUCATION

Respondent-Defendant.

NOTICE OF MOTION

LADIES AND GENTLEMEN:

PLEASE TAKE NOTICE, that upon the annexed Affirmation of David G. Goldbas, attorney for Appellant Ersin Konkur dated April 27, 2020, with Exhibits A through D attached thereto, and all prior pleadings and proceedings heretofore had herein, a motion pursuant to CPLR 5602 (a), seeking leave to appeal to the Court of Appeals that Memorandum and Order made by the Appellate Division Fourth Judicial Department, on March 13, 2020, and served with notice of entry on April 9, 2020, will be made on the 18th day of May 2020 on papers submitted to the New York State Court of Appeals, 20 Eagle Street, Albany New York 12207. Answering papers are to be filed and served no later than 8 (eight) days before the return date of the motion.

Dated: April 27, 2020
Utica, New York

Respectfully submitted by

David G. Goldbas, Esq.
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STATE OF NEW YORK
COURT OF APPEALS

ERSIN KONKUR, Plaintiff-Respondent

AFFIRMATION OF
DAVID G. GOLDBAS, ESQ.

vs.
UTICA ACADEMY OF SCIENCE CHARTER SCHOOL, and TURKISH CULTURAL CENTER, also known as HIGH WAY EDUCATION

Defendant-Appellant.

DAVID G. GOLDBAS, an attorney licensed to practice law in the State of New York and maintaining law offices at 185 Genesee Street, Suite 905, Utica, New York 13501 affirms the following under perjury pursuant to CPLR § 2106:

INTRODUCTION

1. I have been the attorney for Plaintiff-Respondent Ersin Konkur (hereinafter "Plaintiff") since the commencement of this case.

2. As Plaintiff's's attorney, I am familiar with all papers and proceedings had herein.

3. I make this Affirmation in support of the Plaintiff's motion pursuant to CPLR §5602(a) for permission to appeal an Appellate Division Memorandum and Order [one paper] to this Court.

4. The Memorandum and Order sought to be appealed (hereinafter "the Appellate Division Order") was entered in the Appellate Division, Fourth Judicial Department on March 13, 2020, and served on Plaintiff, with Notice of Entry, on April 9, 2020.

5. A copy of the Appellate Division Order, with Notice of Entry, is attached hereto as Exhibit A.

6. Plaintiff has not sought permission from the Appellate Division to appeal to this Court.

7. The Appellate Division Order finally determined by order of dismissal Plaintiff's cause of action against Defendant which had sought a remedy for an illegal kickback scheme against him in violation of Labor Law § 198-b.

STATEMENT OF PROCEDURAL HISTORY

8. Plaintiff, a former charter school teacher, commenced an action in 2017 in Supreme Court, Oneida County, against his former employer, Co-Defendant Utica Academy of Science Charter School (hereinafter "UASCS") and the Defendant High Way Education, seeking various relief under the New York Labor Law and the Federal Labor Standards Act (Record on Appeal pages 60-65).

9. The Record on Appeal filed in the Appellate Division is submitted simultaneously herewith. Hereinafter references to the Record on Appeal will be made by "R" followed by the page number.

10. Plaintiff's 2017 lawsuit was dismissed on motions by Defendants pursuant to CPLR § 3211 (R155). The dismissal was without prejudice (R158).

11. Plaintiff then commenced the instant suit in 2018 under Index # EFCA2018-000883 seeking the same relief (R 36-43).

12. In his 2018 lawsuit, Plaintiff alleged in his Third Cause of Action that Defendant and Co-defendant were controlled by the cult followers of Fetullah Gulen, a Muslim cleric. Plaintiff further alleged that Defendant and Co-Defendant demanded strict allegiance to the cult from Turkish immigrant workers, including the Plaintiff, on threat of job termination and deportation. (R181-184). Plaintiff further alleged that Defendant, working in concert with Co-defendant and claiming authority from the cult, forced Plaintiff to kick back a substantial portion of his wages (R 169-171).

13. Defendant and Co-Defendant UASCS then moved in Supreme Court to dismiss all of causes of action against them pursuant to CPLR § 3211. The rulings on Co-Defendant's motion do not concern us here because those rulings were never appealed and Co-Defendant did not participate in the Defendant's Appellate Division appeal.

14. Supreme Court sustained the Plaintiff's Third Cause of Action which had asserted an illegal kick-back scheme in violation of Labor Law § 198-b (R9) and dismissed "with prejudice and on the merits" all other causes of action against Defendant.

15. From Supreme Court's Order sustaining the Plaintiff's Third Cause of Action, Defendant appealed (R3).

16. On appeal, Defendant argued that despite the wording of Labor Law §198-b and its legislative history and its placement in Article 6 of the Labor Law, the statute did not allow a civil remedy . See Defendant's Brief on Appeal (a copy of which is attached hereto as Exhibit B) at pages 9 through 12.

17. Plaintiff filed and served a Brief of Respondent. A copy of it is attached hereto as Exhibit C.

18. Defendant filed and served a Reply Brief. A copy of it is attached hereto as Exhibit D.

19. On appeal, the Appellate Division reversed Supreme Court and ruled that "the Legislature did not intend to create a private right of action for violations of Labor Law § 198-b" and that "Plaintiff may not assert a cause of action based on an alleged violation of Labor Law § 198-b." Appellate Division Order, Exhibit A hereto, page 2.

GROUNDS FOR APPEAL TO THE COURT OF APPEALS

20. The Appellate Division Order was in error when it determined that Labor Law § 198-b is exclusively criminal and allows no private cause of action.

21. 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]

22. Labor Law § 198-b does not expressly prohibit the civil remedy. Rather, it declares that the forcing by any person of wage kickbacks shall be "unlawful." It then goes on to declare "[f]urther" that any person who forces kickbacks shall be "guilty of a violation" of this statutory section.

23. The statute must be read according to the plain meaning of its text. There is a twofold declaration of law: *first*, that the practice is unlawful and *second* that the practice is criminal. In the absence of a prohibition or elimination of a civil remedy, the statute must be read to allow both the criminal and the civil remedy. The criminalization of the kickbacks is an additional remedy, not an exclusive one, because it reflects the Legislature's paramount goal of protecting the worker's right to wages earned. See *P.L. Group, Inc. v. Garfinkel* 150 A.D.2d 663, 664 (2d Dept 1989) ("The importance of this policy [of Labor Law protections for the wage earner] is underlined by the Legislature's decision to make its violation a misdemeanor punishable by a fine or jail or both.")

24. The public policy of protecting the wage earner was expressed repeatedly in the legislative history of Labor Law 198-b. See Bill Jacket to Ch 171, Laws of 1934; Bill Jacket to Ch 851, Laws of 1939; Chapter 171 of the

Laws of 1934; Chapter 851 of the Laws of 1939. See also *Chu Chung v New Silver Palace Restaurant, Inc.,* 272 F. Supp. 2d 314, 317 (S.D. N.Y. 2003) ("The New York Labor Law was enacted to protect employees and to remedy the imbalance of power between employers and employees." *citing Saunders v. Big Bros. Inc.,* 115 Misc. 2d 845, 848 [Civ Ct. of City of N.Y. 1982]).

25. In enacting Section 198-b of the Labor Law, the Legislature codified an existing common law remedy that allowed private parties to sue for extortion of wages, *see Sciassia v. Fredburn Construction Co.,* 248 App. Div. 608 (1st Dept. 1936), but nowhere did the Legislature ever state that the statute eliminated the private right. To the contrary, the Legislature specifically reserved the civil remedy when it enacted Section 198(2) of the Labor Law which states, "the remedies of this article [meaning all of Article 6, in which §198 and §198-b are found] may be enforced simultaneously or consecutively so far as not inconsistent with each other."

26. The statute must be interpreted *in pari materia (see Golden v Koch,* 49 N.Y.2d 690, [1980]; McKinney's Consol Laws of New York, Statutes, §97) with the entire statutory article, Labor Law Article 6. That Article, entitled "Payment of Wages", has been held by this Court held to be remedial in nature,

enacted to "strengthen and clarify the substantive laws protecting the rights of employees to the payment of wages." *Gottlieb v. Laub & Co.* 82 NY 2d 457, 461 (1993).

27. In the case below, the Appellate Division's interpretation of the statute impairs this legislative scheme because it weakens wage earner protections. Under the Appellate Division's rule here, wage earners such as Plaintiff could be deprived of wages by force—which is the nature of a kickback—and have no private right of recovery which would make them whole.

28. Such a result is inconsistent with the Article's express grant of the civil remedies in Labor Law §198 which allows a plaintiff "in any action instituted upon a wage claim" double damages, special costs, and "all reasonable attorneys fees".

29. The Appellate Division Order erroneously applied this Court's settled rule on the right to a civil remedy under a criminal statute. In *Cruz v T.D. Bank, N.A*, 22 N.Y. 3rd 61, 70 (2013), this Court held "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, citing Carrier v. Salvation Army*, 88 N.Y. 2nd 398, 402 (1996).

30. Therefore, even if (assuming arguendo) §198-b had no express grant of a civil remedy, New York courts will still allow the remedy if three conditions are met, namely, "(1) [that] the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) [that] the recognition of a private right of action would promote the legislative purpose; and (3) [that] the creation of such a right would be consistent with the legislative scheme." *Cruz, supra,* 22 N.Y. 3rd at 70.

31. In this case Plaintiff is not seeking a creation of a private right of action since that right already existed in the common law. However, even if it were a created right, it should still be fairly implied because all three of the *Cruz* requirements are met.

32. First, Plaintiff here belongs to the class of wage earners whose interests the Legislature expressly acted with Labor Law Article 6 to benefit, *Gottlieb v. Laub & Co. supra*, 82 NY 2d at 461.

33. Second, the recognition of the private right would promote the legislative purpose by allowing direct judicial action, independent of taxpayer assistance, against a clearly identified social evil, namely extortion of wages.

34. Third, the private remedy is in no way inconsistent with the legislative scheme, but rather is entirely consistent with it. The legislative scheme, as expressed in Article 6, is primarily civil. As stated in Section 198, the legislation creates special rights and protections for the individual wage earner. These rights include compensatory and double damages; special costs; and counsel fees. They also include the right to seek redress through the Office of the Commissioner of Labor, who is empowered to prosecute wage claims with State resources and may itself obtain the special awards set out in Section 198.

35. The Legislature also clearly stated that "the remedies of [Article 6] may be enforced simultaneously or consecutively so far as not inconsistent with each other" thereby giving permission to both criminal and civil enforcement of the anti-kickback law.

36. In the decision below the Appellate Division erroneously relied on *Stoganovic v DiNolfo* 92 A.D.2d 729 (4th Dept. 1983) for its denial of the

private remedy. In *Stoganovic*, the issue was whether the plaintiff wage earner had the right to enforce the special remedies of §198 against the corporate defendant's officers and majority shareholders personally. The Court ruled that he did not because the Legislature had expressly provided for personal liability in Business Corporation Law §630, and the addition of the right into the Labor Law would defeat a clearly defined legislative scheme.

37. The *Stoganovic* holding should not be applied here because the Legislature has provided no other statute besides §198-b which enables the wage earner's fight against kickbacks, and it has placed §198-b in the middle of a statutory article whose primary function is civil.

38. The *Stoganovic* holding should also be distinguished because it addressed an extraordinary remedy, that of piercing the corporate veil, which at common law was allowed only to redress a fraud or to achieve equity, *Bartle v Home Owners Corp.*, 309 N.Y. 103, 106 (1955) and which was entirely omitted from the Labor Law. Contrast this case in which the remedy is not extraordinary but an essential part of the protective statute. According to the Legislature, the wage earner must have the ability to defend himself or herself against a loathsome practice. The wrong is specifically denounced as

"unlawful"; the remedy is included in Article 6; and the legislative history endorses that remedy as an enhancement of existing protections. See Bill Jacket to Ch. 171, Laws of 1934, concerning passage of the predecessor statute to Labor Law§198-b, at page 5 ("The proposed bill deals directly with the vicious practice [of forcing kickbacks] 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." [emphasis supplied])

39. The Appellate Division Order below created a conflict with the Appellate Division First Department which expressly sustained a civil remedy in a kickback case, *Martinez v Alubon Ltd,* 111 A.D. 3d 500 (1st Dept. 2013).

40. The Appellate Division Order below also heightened a conflict already existing in the Federal Courts in their interpretation of New York State law. The Appellate Division in the instant case cited with approval *Kloppel v HomeDeliveryLink, Inc.,* 2019 WL 61111523, *3, (W.D. N.Y. Nov.18, 2019, No. 17-cv-6296-FPG-MJP) and *Chan v Big Geyser, Inc.,* 2018 WL 4168967, *5-8 (S.D.N.Y. Aug 30, 2018, No. 1:17-CV-06473 [ALC]) both of which denied the civil remedy, but ignored *Chu Chang v New Silver Alice Rest. Inc.,*

272 F. Supp. 2d 314, 317 (S.D.N.Y. 2003) and *Salazar-Martinez v. Fowler Bros.* 781 F. Supp 2d 183 (W.D.N.Y. 2011), both of which allowed it.

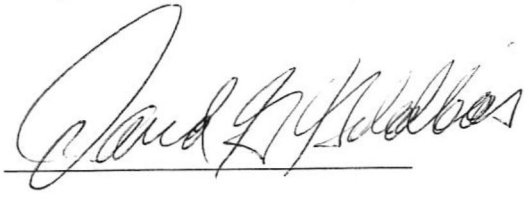
41. The conflicts among and between New York State and federal courts present a matter of great public concern throughout the State and should be resolved by this Court.

CONCLUSION

42. For all of the foregoing reasons, Plaintiff seeks leave to appeal the Memorandum and Order of the Appellate Division, Fourth Judicial Department, served April 9, 2020, to this Honorable Court.

Dated April 27, 2020

Respectfully submitted,



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April 9, 2020

VIA FIRST CLASS MAIL

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Re: ***Ersin Konkur v. Utica Academy of Science Charter School, et al***
Index No. EFCA2018-000883
Docket No. CA 19-00730

Dear Mr. Goldbas and Mr. Evans,

Relative to the above referenced matter, enclosed please find served upon you a Notice of Entry of the decision and order of the New York State Supreme Court Appellate Division for the Fourth Department

If you have any questions regarding the enclosed, please do not hesitate to let me know.

Very truly yours,

Matthew M. Piston

Enclosure

Received 4/13/2020

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1258

CA 19-00730

PRESENT: WHALEN, P.J., SMITH, CURRAN, WINSLOW, AND BANNISTER, JJ.

ERSIN KONKUR, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

UTICA ACADEMY OF SCIENCE CHARTER SCHOOL,
DEFENDANT,
TURKISH CULTURAL CENTER AND HIGHWAY
EDUCATION, INC., DEFENDANT-APPELLANT.

EVANS FOX LLP, ROCHESTER (MATTHEW M. PISTON OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAVID G. GOLDBAS, UTICA, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered October 17, 2018. The order, insofar as appealed from, denied in part the motion of defendant-appellant to dismiss the complaint against it.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion of High Way Education, Inc., doing business as Turkish Cultural Center, incorrectly sued herein as Turkish Cultural Center and Highway Education, Inc., is granted in its entirety and the complaint against that defendant is dismissed.

Memorandum: Plaintiff, a former teacher at defendant Utica Academy of Science Charter School (UASCS), commenced this action seeking to recover damages based upon allegations that there was a scheme between UASCS and defendant High Way Education, Inc., doing business as Turkish Cultural Center (High Way), incorrectly sued herein as Turkish Cultural Center and Highway Education, Inc., in which plaintiff was required to provide donations to High Way in the form of illegal kickbacks of his salary under threat of demotion or termination. In his third cause of action, plaintiff alleged that defendants' conduct violated Labor Law § 198-b, and plaintiff sought damages arising from that violation pursuant to Labor Law § 198. High Way appeals from an order that, inter alia, granted in part its motion to dismiss the complaint against it, and denied that part of its motion seeking to dismiss plaintiff's third cause of action against it. We reverse the order insofar as appealed from, grant the motion in its entirety, and dismiss the complaint against High Way.

Although we offer no opinion with respect to whether other

provisions within article 6 of the Labor Law afford private rights of action, we agree with High Way that the legislature did not intend to create a private right of action for violations of Labor Law § 198-b (*see Kloppel v HomeDeliveryLink, Inc.*, 2019 WL 6111523, *3 [WD NY, Nov. 18, 2019, No. 17-cv-6296-FPG-MJP]; *Chan v Big Geyser, Inc.*, 2018 WL 4168967, *5-8 [SD NY, Aug. 30, 2018, No. 1:17-CV-06473(ALC)]; *see also Stoganovic v Dinolfo*, 92 AD2d 729, 729-730 [4th Dept 1983], *affd* 61 NY2d 812 [1984]), inasmuch as " '[t]he [l]egislature specifically considered and expressly provided for enforcement mechanisms' in the statute itself" (*Cruz v TD Bank, N.A.*, 22 NY3d 61, 71 [2013], quoting *Mark G. v Sabol*, 93 NY2d 710, 720 [1999]). Indeed, by its express terms, a violation of section 198-b constitutes a misdemeanor offense (*see* § 198-b [5]).

We therefore conclude that plaintiff may not assert a cause of action based upon an alleged violation of Labor Law § 198-b. Thus, Supreme Court erred in denying that part of High Way's motion seeking to dismiss plaintiff's third cause of action against it. In reaching that conclusion, we note that plaintiff's claim for damages pursuant to Labor Law § 198 in the third cause of action is based solely upon the alleged violation of section 198-b (*see generally Gottlieb v Kenneth D. Laub & Co.*, 82 NY2d 457, 459 [1993], *rearg denied* 83 NY2d 801 [1994]).

Entered: March 13, 2020

Mark W. Bennett
Clerk of the Court