STATE OF NEW YORK
COURT OF APPEALS

ERSIN KOKUR,

Plaintiff-Respondent,

AFFIRMATION

Index No. EFCA2018-000883
Docket No. CA19-00730

-vs.-

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

Defendant-Appellant.

MATTHEW M. PISTON, ESQ., under penalty of perjury, affirms as follows:

1. I am an attorney duly licensed to practice law in the State of New York and I am a partner in the law firm of Evans Fox LLP, the attorneys for the Defendant-Appellant, High Way Education, Inc. (d/b/a Turkish Cultural Center) (hereinafter "Defendant"). As such, I am fully familiar with the facts and proceedings had heretofore and herein.

2. I submit this Affirmation on behalf of the Defendant in opposition to the application made to this Court by Plaintiff-Respondent, Ersin Konkur (hereinafter "Plaintiff") for leave to appeal a decision of the New York State Supreme Court Appellate Division for the Fourth Department in the above

captioned matter pursuant to CPLR §5602.

Introduction

3. In short, this Court should deny the Plaintiff's motion, as granting the Plaintiff leave to appeal would not promote substantial justice.

4. To that end, in support of the Plaintiff's Notice of Motion dated April 27, 2020, the Plaintiff submitted the Affirmation of David G. Goldbas, Esq., dated April 27, 2020 (hereinafter "Goldbas Affirmation").

5. The Goldbas Affirmation cites significant law alleged to be in support of the Plaintiff's motion, but is, in large part, a regurgitation of the Plaintiff's Responding Brief to the Fourth Department. A copy of that Response Brief is annexed to the Goldbas Affirmation as Exhibit C.

6. As the law cited in the Goldbas Affirmation is the same and/or similar to that cited by the Plaintiff in the Respondent's Brief to the Fourth Department, the Defendant's contradicting arguments are likewise contained in the Defendant's Brief (annexed to the Goldbas Affirmation as Exhibit B) and the Defendant's Reply Brief (annexed to the Goldbas Affirmation as Exhibit D).

7. As such, rather than reciting and rearguing the appeal in this motion response, the Defendant incorporates its briefs herein and will rely upon that same legal authority cited in its briefs to the Fourth Department to oppose that portion of the Goldbas Affirmation which cites the Plaintiff's legal argument, which was not

adopted by the Fourth Department.

8. Furthermore, the Plaintiff in its moving papers has failed to provide a concise statement of questions presented for review, as required by Rule 500.22 of the Rules of Practice of this Court. This failure is in and of itself sufficient for this Court to deny the Plaintiff the relief sought in its motion.

9. With that said, it appears that the bulk of the Plaintiff's application to this Court is premised upon the fact that the Plaintiff disagrees with the decision of the Fourth Department; however, this disagreement does not merit a review of the Fourth Department's decision.

10. While no questions were provided by the Plaintiff, it seems as though the Plaintiff attempts to propose, in sum and substance, that this Court should review the Fourth Department's decision because there is either a novel question of law, it is of public importance, and/or it involves a conflict among the departments of the Appellate Division.

There is No Novel Question of Law

11. As is more fully detailed in the accompanying Memorandum of Law, this Court has repeatedly and routinely applied the legal doctrine of *expressio unius est exclusio alterius* to the interpretation of statutes.

12. In the matter at hand, the Plaintiff commenced a private action against the Defendant attempting to utilize Labor Law §198-b.

13. The language of Labor Law §198-b(5) expressly states that "A violation of the provisions of this section shall constitute a misdemeanor."

14. It is the doctrine of *expressio unius est exclusio alterius* that the Appellate Division appropriately relied upon when it decided "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, inasmuch as the legislature specifically considered and expressly provided for enforcement mechanisms in the statue itself. Indeed, by its express terms, a violation of section 198-b constitutes a misdemeanor offense." (See Exhibit A of the Goldbas Affirmation).

15. The Fourth Department's reliance upon this doctrine is anything but novel. In fact, the Fourth's Department's application of *expressio unius est exclusio alterius* is required by both the New York State Constitution and the precedent of this Court, which has existed for more than a century.

16. Thus, the interests of substantial justice would not be promoted by a review of the Fourth Department's decision.

There is no True Conflict Amongst the Appellate Divisions

17. Additionally, in its moving papers the Plaintiff suggests that because the New York State Supreme Court Appellate Division for the First Department expressly sustained a civil remedy under Labor Law § 198-b in its decision in *Martinez v. Alubon LTD*, 111 A.D. 3d 500 (1st Dept. 2013), the Fourth Department

created a conflict between Appellate Divisions.

18. This is not entirely accurate. As is more fully outlined in the accompanying Memorandum of Law, it appears that the court in *Martinez* did not undertake an assessment as to whether or not Labor Law § 198-b actually established a private cause of action, it appears that it simply assumed that there was such a private cause of action.

19. Perhaps the First Department did not undertake such an assessment because no argument was made that there is no private cause of action; we are simply left to speculate.

20. The Fourth Department's decision in the matter now before the Court, however, appears to be the first decision from an Appellate Division to undertake an assessment as to whether or not a private cause of action is actually afforded by Labor Law § 198-b.

21. This is the precedent that should and will likely be followed in the courts of New York State, and there is no confusion created by any perceived contradiction between the decision at hand and the First Department's decision in *Martinez*.

There is no Public Importance

22. For the reasons outlined in the accompanying Memorandum of law, there is no public importance in the subject matter of this action requiring the

review by this Court.

23. To that end, and as evidenced by the totality of the record on appeal, there is no real relationship between the Plaintiff and the Defendant which risks repetition of this issue.

24. Furthermore, this matter and *Martinez* appear to be the only two (2) published decisions from New York State courts involving the question of whether Labor Law § 198-b contains a private right of action. Those two (2) decisions were handed down nearly seven (7) years apart.

25. Thus, there is little likelihood that this is a matter that would reoccur amongst other members of the public, and it is certainly not a subject matter which has evaded review by this Court in the past.

26. Finally, and for the reasons stated above, this is not a novel issue for the Court to decide. It simply adopts this Court's controlling precedent and applies it to Labor Law § 198-b.

27. For these reasons, there is no public importance and a review of this decision by this Court would not promote the interests of substantial justice.

Conclusion

28. As such, it is respectfully submitted that granting the Plaintiff leave to appeal to this Court would not promote substantial justice.

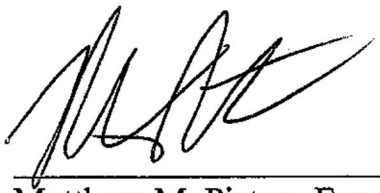
WHEREFORE, the Defendant respectfully requests that the Court award

the following relief:

a. An Order denying the application of the Plaintiff for leave to appeal; and

b. An Order granting such other and further relief as the Court deems to be just and proper.

Dated: May 8, 2020
Rochester, New York



Matthew M. Piston, Esq.

STATE OF NEW YORK
COURT OF APPEALS

ERSIN KONKUR,

Plaintiff,

Index No. EFCA2018-000883
Docket No. CA19-00730

-vs.-

UTICA ACADEMY OF SCIENCE CHARTER SCHOOL, TURKISH CULTURAL CENTER, AND HIGH WAY EDUCATION,

Defendants.

MEMORANDUM OF LAW

Submitted by:

Evans Fox LLP
Matthew M. Piston, Esq.
Attorneys for Defendants High Way Education
100 Meridian Centre Blvd.
Suite 300
Rochester, New York 14618
(585) 787-7000

PRELIMINARY STATEMENT

The Plaintiff, Ersin Konkur (hereinafter "Plaintiff") has made an application to this Court for leave to appeal after the New York State Supreme Court Appellate Division for the Fourth Department reversed the decision of the trial court and dismissed the complaint against the Defendant High Way Education (d/b/a Turkish Cultural Center) (hereinafter "Defendant").

The motion of the Plaintiff should be summarily denied, as the Plaintiff did not provide a concise statement of the questions presented for review, as required in Rule 500.22 of the Rules of Practice before this Court. Nonetheless, it could be deduced from the Plaintiff's moving papers that it is suggesting that the issue presented to this Court is either novel, of public importance, and/or involves a conflict among the departments of the Appellate Division.

The decision of the Fourth Department is not novel nor of public importance, and even if there does appear to be a conflict among the departments of the Appellate Division, such a conflict is insufficient to rise to the level of needing to promote the interests of substantial justice.

ARGUMENT

For the reasons stated below, the Court should deny the Plaintiff's motion for leave to appeal.

POINT I

THE PLAINTIFF'S MOTION SHOULD BE SUMMARILY DENIED FOR FAILING TO PROVIDE A CONCISE QUESTION PRESENTED

"Our rules require parties requesting leave to appeal to include:

> "[a] concise statement of the questions presented for review and why the questions presented merit review by this Court, such as that the issues are novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division. Movant shall identify the particular portions of the record where the questions sought to be reviewed are raised and preserved" (22 NYCRR 500.22[b][4]). *Wilson v. Dantas*, 29 N.Y.3d 1051, 1053 (2017).

Nowhere within the Plaintiff's moving papers does there appear a concise statement of the questions presented for review. Thus, both this Court and the Defendant are left to speculate the specific questions that the Plaintiff would like answered should leave for appeal be granted.

As the Rules of Practice of this Court are clear and unambiguous relative to the procedures for motions for leave to appeal, and the Plaintiff failed to abide by those rules, the Plaintiff's motion should be summarily denied.

POINT II

THE ISSUE DECIDED BY THE FOURTH DEPARTMENT IS NOT NOVEL

"The maxim ***expressio unius est exclusio alterius*** is applied in the construction of the statutes, so that where a law expressly describes a particular act,

thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded." N.Y. Stat. Law § 240 (McKinney).

"This Court's well-established rules of statutory construction direct that the analysis begins with the language of the statute. This is because the primary consideration is to ascertain the legislature's intent, of which the text itself is generally the best evidence. A court should construe unambiguous language to give effect to its plain meaning. Further, a statute must be construed as a whole and its various sections must be considered together and with reference to each other." *Colon v. Martin*, No. 26, 2020 WL 2200410, at *2 (N.Y. May 7, 2020). (Internal citations and quotations omitted).

"We have therefore declined to recognize a private right of action in instances where the Legislature specifically considered and expressly provided for enforcement mechanisms in the statute itself." *Cruz v. TD Bank, N.A.*, 22 N.Y.3d 61, 71 (2013).

Labor Law §198-b(2) states that:

> 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. N.Y. Lab. Law § 198-b (McKinney).

Labor Law §198-b(5), states "[a] violation of the provisions of this section shall constitute a misdemeanor." N.Y. Lab. Law § 198-b (McKinney).

When the doctrine of *expressio unius est exclusio alterius* is applied to Labor Law § 198-b, it is clear that the legislature intended for the enforcement mechanism of Labor Law § 198-b to be criminal prosecution, not a private cause of action, and while it is not believed that this Court has specifically decided on the issue as it relates to Labor Law § 198-b, the applicable legal doctrine has been consistently an continuously applied for well over a century.

Therefore, this is not a novel issue. The Fourth Department correctly applied the legal precedent set by this Court, and a review of the Fourth Department's decision would not promote the interests of substantial justice.

POINT III

THERE IS NO TRUE CONFLICT AMONGST THE APPELLATE DIVISIONS

In the matter at hand, the Fourth Department decided that "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 [W.D. N.Y., Nov. 18, 2019, No. 17–cv–6296–FPG–MJP]; *Chan v. Big Geyser, Inc.*, 2018 WL 4168967, *5–8 [S.D. N.Y., Aug. 30, 2018, No. 1:17–CV–06473(ALC)]; see also *Stoganovic v. Dinolfo*, 92 A.D.2d 729, 729–730, 461 N.Y.S.2d 121 [4th Dept. 1983], affd 61 N.Y.2d 812, 473 N.Y.S.2d 972, 462 N.E.2d 149 [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 N.Y.3d 61, 71, 979 N.Y.S.2d 257, 2 N.E.3d 221 [2013], quoting *Mark G. v. Sabol*, 93 N.Y.2d 710, 720, 695 N.Y.S.2d 730, 717 N.E.2d 1067 [1999]). Indeed, by its express terms, a violation of section 198–b constitutes a misdemeanor offense (see § 198–b[5])." *Konkur v. Utica Acad. of Sci. Charter Sch.*, 181 A.D.3d 1271 (4th Dept. 2020).

Meanwhile, in *Martinez v. Alubon*, the First Department simply stated "[t]aking these well pleaded allegations as true and granting plaintiffs the benefit of every favorable inference, we find that plaintiffs have stated a cause of action under Labor Law § 198–b, the anti-kickback statute." *Martinez v. Alubon*, LTD., 111 A.D.3d 500, 501 (1st Dept. 2013). (Internal quotations and citations omitted).

It is clear that the Fourth Department undertook an analysis of the statutory construction of Labor Law § 198–b in deciding the matter at hand, and the First Department in *Martinez* simply inferred a private cause of action without analyzing the statute itself.

Given the depth of the consideration in the decision from the Fourth Department, and the lack of depth in the decision of the First Department, it is likely that the precedent set by the Fourth Department will be controlling, and there will be no confusion between the legal community, the court system, or the public in general as to the enforcement mechanism of Labor Law § 198–b.

For these reasons, it is respectfully submitted that there is no true conflict between the Appellate Divisions, and a review of the Fourth Department's decision would not promote the interest of substantial justice; thus, the Plaintiff's motion must be denied.

POINT IV

A REVIEW BY THIS COURT IS NOT MANDATED BY PUBLIC IMPORTANCE

A review by this Court for public importance is typically an analysis undertaken as an exception to the mootness doctrine. To the extent, however, that there is consideration to apply that test to this matter, the analysis for the existence of a public importance has been concisely dictated by the Third Department:

> Since the parties' rights cannot be affected by a determination of this appeal, it is moot and must be dismissed unless it falls within the exception which permits the courts to preserve for review important and recurring issues which, by virtue of their relatively brief existence, would be rendered otherwise nonreviewable. There are three common factors in those cases where the exception has been applied: "(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues." *Duban v. State Bd. of Law Examiners*, 157 A.D.2d 946, 947 (3rd Dept. 1990). (Internal quotations and citations omitted).

This matter contains none of those factors. A review of the record on appeal as a whole evidences that there is no real relationship between the Plaintiff and the Defendant, thus, there will be no likelihood of repetition between the parties.

Additionally, there is relatively little precedent dealing with whether Labor Law § 198–b contains a private cause of action from the courts of New York State, including the Appellate Divisions. To be sure, it appears that this matter and *Martinez* are the only two (2) published decisions from the courts of New York State, and the *Martinez* decision is from 2013, being nearly seven (7) years before the decision on the matter before this Court.

Thus, this does not appear to be a subject matter that is either risks repetition from other members of the public, nor is it a subject matter that is a phenomenon

that typically evades review. In short, this is a rare occurrence, and a reoccurrence may be staved off by the decision of the Fourth Department.

Finally, for the reasons stated above, this is not a substantial and/or novel issue. This Court has set precedent to be followed in statutory construction, and that, coupled with the mandates of the New York State Constitution, significantly guides the public and the New York State Courts on the applicability of Labor Law § 198–b.

For these reasons, it is respectfully submitted that there is no true conflict between the Appellate Divisions, and a review of the Fourth Department's decision would not promote the interest of substantial justice; thus, the Plaintiff's motion must be denied.

CONCLUSION

Based upon the foregoing, it is respectfully requested that this Court deny the Plaintiff's motion for leave to appeal in its entirety, and to further award the Defendant such other and further relief as this Court deems just and proper.

Dated: May 8, 2020
Rochester, New York

EVANS FOX LLP

Matthew M. Piston, Esq.
Attorneys for Defendants High Way Education
Office and P. O. Address
100 Meridian Centre Blvd., Suite 300
Rochester, New York 14618
Telephone: (585) 787-7000