TO BE
ARGUED BY:
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(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.

REPLY **BRIEF FOR PLAINTIFF-APPELLANT ERSIN KONKUR**

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THE PRIVATE RIGHT OF ACTION SHOULD BE FAIRLY IMPLIED FROM THE WORDING AND THE PURPOSE OF LABOR LAW ARTICLE 6, ESPECIALLY § 198-b

Defendants-Respondents Turkish Cultural Education and High Way Education (hereinafter "Defendant") argue that by the canon of statutory construction known as *epressio unis est exclusio alterius* [expression of one thing is the exclusion of others], this Court should prohibit any private cause of action under Labor Law § 198-b to recover wages illegally taken by kickback. *See* Defendant's Brief at pages 11-12.

Defendant is incorrect in asserting that a rule of construction is a "mandate" from the Legislature. *See* Defendant's Brief at page 11. There is no such mandate in the legislation. In general, the canons of statutory construction are more aptly characterized as guidelines rather than rules of law. *See* Frankfurter, Felix, "Some Reflections on the Reading of Statutes", 47 Columbia Law Rev. 527, 544 ("Nor can canons of constructions save us from the anguish of judgement. Such canons give an error of abstract intellectual compulsion to what is in fact a delicate judgment, concluding a complicated process of balancing subtle and elusive elements").

To the contrary, New York courts have consistently held that the rule of *epressio unis est exclusio alterius* "is designed to give meaning to the intent of the statute, never to defeat it." *In Re Engel*, 155 App. Div. 467, *rearg. den.* 155 App. Div. 121 (2nd Dept. 1911); *Dept. of Housing Preservation and Development of the City of New York v. Chestnut,* 119 Misc. 2d 865, 868-69 (Civ. Ct. 1983). The maxim of *epressio,* "although a useful tool of statutory construction, must not be utilized to defeat the purpose of an enactment or to override the manifest legislative intent." *Crane Neck Ass'n, Inc. v. New York City/Long Island Cty. Servs. Grp.,* 61 N.Y.2d 154, 166 (1984); *Matter of John P. v. Whalen*, 54 N.Y.2d 89, 96 (1981); *Erie County v. Whalen,* 57 A.D. 2d 281 , 284 (3rd Dept. 1977).

New York courts have also consistently held that the manifest legislative intent of Labor Law Article 6, which contains § 198-b, is to protect the wage earner from loss of wages. *See, for example, P & L Group Inc. v. Garfinkel,* 150 A.D. 2d 663, 664 ("Labor Law §§ 197 and 198 reflect a strong legislative policy aimed at protecting an employee's right to wages earned"). The policy is so strong that the criminal sanction should be interpreted as an extension of the civil remedy rather than a cancellation of it, *P & L Group, supra,* 150 A.D.2d at 664 ("The importance of this policy is underlined by the Legislature's decision to make its violation a misdemeanor punishable by a fine, jail, or both").

The interpretation of §198-b advanced by Defendant and by the Appellate Division below, would violate this manifest legislative purpose because it would deprive the wage earner of his/ her right to sue privately and would require him/her instead to seek recovery only in the criminal justice system. Such a result, in an already overburdened and cumbersome system, is both impractical and unfair.

It is noteworthy that Defendant concedes that the legislative history includes an endorsement by the Department of Labor of the civil remedy . *See* Defendant's Brief at pages 16-17, *quoting* Department of Labor Memorandum, Bill Jacket, L. 1989, Ch. 177, pp. 9-10, reprinted here:

> " The provisions contained in this section [§198-b] inadequately deter employers from violating the law, particularly in the public work area... The **civil penalty** authorized by this legislation, assessed after giving due consideration to the size of the employer's business, the good faith of the employer, the gravity of the violation and the history of previous violations, will additionally serve as a significant deterrent." [emphasis supplied]

If it is conceded that §198-b is not strictly criminal in nature, and that the enforcement of its protections can occur civilly by the Commissioner of Labor, (who acts on assignment from the wage earner), then it should likewise be conceded that the wage earner himself or herself should be able to pursue the remedy, since §198 of Labor Law Article 6 provides enforcement interchangeably

to the wage earner individually or to the Commissioner acting on behalf of that wage earner.

In its brief, Defendant, along with the Appellate Division, relies on *Stoganovic v. Dinolfo*, 92 A.D. 2nd 729 (4th Dept. 1983). The reliance is misplaced.

The law in New York is clear that a private right of action should be implied from a purely criminal statute if that right is consistent with the legislative scheme. *Cruz v. T.D. Bank, N.A.,* 22 N.Y. 3rd 61, 70 (2013); *Ferris v Lustgarten Foundation,* 189 A.D.3d 1002, 2020 NY Slip Op. 07357 at *2 (2d Dept. 2020).

Stoganovic stood for the converse: if there is an inconsistency between the private right and any legislative enactment, then the right will not be implied. In *Stoganovic*, the plaintiffs in a Labor Law suit had sought to impose personal liability against their employer's corporate officers for unpaid wages. The Appellate Division denied the relief on grounds that the right to pierce the corporate veil will not to be implied under the Labor Law because the Legislature had already provided for that right in a separate act, namely Business Corporation Law (BCL) §630.

The difference between *Stoganovic* and the instant case could not be clearer. *Stoganovic* held that the plaintiffs could recover wages from the defendant

corporation and against that corporation they could also recover attorneys' fees, costs and, in a proper case, double damages under Labor Law § 198, but against the corporate officers they could only recover wages under BCL § 630.

Contrast this case in which there are *no other* legislative remedies in New York against the forcible or extortionate taking of wages besides Labor Law 198-b. *Stoganovic* would not leave the wage earners without a remedy; the Appellate Division decision here would.

Labor Law Article 6 simultaneously grants civil enforcement of wages to the Commissioner of Labor and to the wage earner, Labor Law§§ 197, 198. Where both the administrative agency and the individual are empowered to act, there is no legislative inconsistency and the private right will be allowed. *Negrin v. Norwest Mortgage Inc.* 263 A.D. 2nd 39, 48 (2d Dept. 1999).

The Defendant also argues that the allowance of a private cause of action against the kickback schemer is "unduly harsh." Defendant's Brief at p. 19. The argument turns any notion of fairness on its head and it would put the protection of a defendant who has committed what the Legislature has characterized as "a vicious practice," Bill Jacket to Ch. 171, Laws of 1934, page 5, before the protection of the wage earner. To the contrary, fairness requires the private remedy to address "the imbalance of power" that weighs against the wage earner.

See Chu Chung v. New Silver Palace Restaurant, Inc., 272 F. Supp 2d 314, 317 S.D. N.Y. 2013) and *Saunders v. Big Bros., Inc.,* 115 Misc. 2d 845, 848 (Sup. Ct 1982). To allow the private remedy is to reinforce a fundamental precept of any well regulated economy, which is that the wage earner must be able to collect the full wage that he or she has been promised. It should be allowed here.

Respectfully submitted,

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