FILED: APPELLATE DIVISION - 4TH DEPT 06/24/2019 10:38 AM CA 19-00730
NYSCEF DOC. NO. 6 RECEIVED NYSCEF: 06/24/2019

TO BE ARGUED BY:
Matthew M. Piston, Esq.
(TIME REQUESTED: 15 MINUTES)

Appellate Division Docket No. CA 19-00730
Monroe County Clerk's Index No.: EFCA2018-000883

New York Supreme Court
Appellate Division-Fourth Department

ERSIN KONKUR,

Plaintiff-Respondent,

-against-

TURKISH CULTURAL CENTER AND
HIGHWAY EDUCATION.

Defendants-Appellants.

BRIEF FOR DEFENDANTS-APPELLANTS TURKISH CULTURAL CENTER AND HIGH WAY EDUCATION

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Question #1 Did the Supreme Court err when it denied the motion of the Defendant to dismiss the third cause of action alleged in the Complaint pursuant to CPLR §3211(a)(7), which seeks a judgment against the Defendant for alleged illegal kickbacks paid by the Plaintiff in violation of New York Labor Law §198-b?

Answer #1 Yes, New York Labor Law §198-b is criminal in nature and does not provide for a private cause of action.

Question #2 Did the Supreme Court err when it denied the motion of the Defendant to dismiss the third cause of action pursuant to CPLR §3211(a)(7), which seeks a judgment against the Defendant pursuant to Labor Law §198?

Answer #2 Yes, the relief afforded pursuant to New York Labor Law §198 is only available to employees against employers, after the employee has established a violation of another provision of Article 6 of the Labor Law. Plaintiff has not established a violation of any provision of Article 6 of the Labor Law, and Defendant has never been an employer of the Plaintiff; therefore, any relief afforded pursuant to New York Labor Law §198 is unavailable to the Plaintiff against the Defendant.

STATEMENT OF CASE

Ersin Konkur (hereinafter referred to as "Plaintiff") commenced this action against High Way Education, Inc., doing business as (d/b/a) Turkish Cultural Center (hereinafter referred to as "Defendant"), on March 29, 2018, by filing a Summons and Verified Complaint, sworn to March 26, 2018 (hereinafter referred to as the "Complaint"), wherein a total of six (6) causes of action were plead against Defendant, all involving allegations related to payment of wages by Plaintiff's employer to the Plaintiff. By way of Notice of Motion dated June 28, 2018, the Defendant moved the New York State Supreme Court for the County of Oneida (Hon. David A. Murad, J.S.C.), for an Order of Dismissal of all causes of action plead against the Defendant in the Complaint pursuant to CPLR §3211(a)(7), for failure to state a cause of action.

By way of decision from the bench on September 26, 2018, and order dated October 17, 2018 (hereinafter collectively referred to as the "Order"), Justice Murad granted the Defendant's Motion to Dismiss five (5) of the six (6) causes of action plead against the Defendant, but erroneously denied the Defendant's motion to dismiss the Third Cause of Action plead against the Defendant which alleged violations of New York Labor Law §198-b, and, apparently, sought a judgment pursuant to Labor Law §198.

The Defendant now moves this Court to reverse that part of the Order denying Defendant's motion relative to the Third Cause of Action, and to therefore dismiss the Complaint's Third Cause of Action plead against the Defendant, based upon the fact that the Plaintiff cannot sustain a cause of action against the Defendant pursuant to New York Labor Law §198-b.

PROCEEDINGS

The Plaintiff commenced this action by the Complaint on March 29, 2018. (The Record on Appeal shall be cited herein as "R.") (R. 36-43).

By way of Notice of Motion dated and filed June 28, 2018, the Defendant sought an order pursuant to CPLR §3211(a)(7), dismissing all six (6) causes of action alleged in the Complaint. (R. 44-45).

In support of that Notice of Motion, the Defendant submitted an Affidavit of Jafer Yasar, sworn to June 28, 2018, along with Exhibits A and B annexed thereto (R. 160-178), and the Attorney Affirmation of Matthew M. Piston, Esq., dated June 28, 2018, along with Exhibits A and B annexed thereto (R. 46-159).

In opposition to the relief sought in the Defendant's Notice of Motion, the Plaintiff submitted the Affidavit of Ersin Konkur, sworn to September 11, 2018, along with Exhibits 1-11 annexed thereto (R. 179-226), Exhibit 3 being the Affidavit of Jaklin Kornfilt, sworn to September 11, 2018, along with Exhibits 3A-3G-1

annexed thereto (R. 192-215), and the Attorney Affirmation of David Goldbas, Esq. dated September 11, 2018 (R. 227-230). Plaintiff later filed what he referred to as a "corrected Exhibit 11" to his affidavit. (R.231).

Finally, the Defendant submitted the Reply Attorney Affirmation of Matthew M. Piston, Esq., dated September 24, 2018 (R. 232-236), and the parties appeared in Supreme Court on September 26, 2018 for oral arguments (R. 10-35).

By way of decision from the bench on September 26, 2018, and Order dated October 17, 2018, Justice Murad granted the Defendant's motion to dismiss as to the First, Second, Fourth, Fifth and Sixth Causes of Action, but denied the Defendant's motion as to the Third Cause of Action. On October 19, 2018, the Defendant was served with the Notice of Entry of the Supreme Court's Order dated October 17, 2018 (R. 5-9).

On October 24, 2018, the Defendant filed and served its Notice of Appeal of the Order dated October 17, 2018 (R. 3-4).

FACTS

Defendant is a not for profit corporation formed under the laws of the State of New York (R. 37, 54, 61, 160, 168, 176, 179). Defendant does business as (d/b/a) the Turkish Cultural Center (hereinafter referred to as "TCC"), and TCC is not a separate entity from the Defendant (R. 161, 179). Defendant supports educational

programs in and around Rochester, New York by providing assistance to educational institutions, students, students' families, and a variety of other programs. As a not for profit corporation, Defendant is duly authorized to receive donations from individuals and entities, and Defendant regularly receives such donations from a large variety of individuals and entities. (R. 161).

Plaintiff is an individual who alleges to have been a teacher employed by Defendant Utica Academy of Science Charter School (hereinafter referred to as "UASCS") (R. 37, 38, 53, 61, 168, 169, 180). Plaintiff alleges, in sum and substance, that Defendant and UASCS acted in concert with one another in an effort to force the Plaintiff to kickback a portion of his wages to Defendant and/or UASCS (R. 38). Plaintiff alludes to the motivation for these alleged actions by the two (2) defendants to be an affiliation with the "Gulen Movement". (R. 37, 54, 168, 181). The Plaintiff alleges that the "Gulen Movement" is a "religious cult" that claims allegiance to Fetullah Gulen, a religious leader living in Saylorsburg, Pennsylvania. (R. 37, 54).

Plaintiff claims that these kickbacks were required during the course of his employment with UASCS, which occurred from September 1, 2013 to November 4, 2014. The Plaintiff has further alleged that these kickbacks came in the form of donations to the Defendant in the cumulative sum of Six Thousand Six Hundred Forty Six and 81/100 Dollars ($6,646.81). (R. 38, 57, 185). Plaintiff has claimed

that he was coerced into making these kickbacks under threat of termination or demotion in employment. (R. 38, 55-56, 182, 228).

Defendant has acknowledged that it received three (3) donations from Plaintiff in the cumulative sum of Two Thousand Seven Hundred Ninety Seven and 00/100 Dollars ($2,797.00). (R. 161, 177, 185, 228). However, Defendant denies any affiliation or business relationship, formal or informal, with UASCS, denies that it worked in concert with UASCS to force the Plaintiff to make donations to the Defendant, and there are no officers or board members of Defendant which are also officers or board members of UASCS. (R. 162).

The Defendant denies that it was ever an employer of the Plaintiff, and the Plaintiff has not provided any allegation of fact which rebuts that denial. (R. 161, 163). In other words, the Defendant is not, nor has it ever been, an employer of Plaintiff.

Defendant has denied all allegations of wrongdoing plead by the Plaintiff (160-178).

LEGAL STANDARD IN MOTIONS TO DISMISS

In considering a motion to dismiss for failing to state a cause of action under CPLR §3211(a)(7), the court should accept as true the facts alleged in the complaint, accord the plaintiff the benefit of every possible inference, and only determine

whether the facts, as alleged, fit within any cognizable legal theory. *Hurrell-Harring v. State of New York*, 15 N.Y.3d 8, 20 (2010).

ARGUMENT

POINT I: THE SUPREME COURT ERRED IN FAILING TO DISMISS THE THIRD CAUSE OF ACTION PREDICATED UPON NEW YORK LABOR LAW §198-b

"In the absence of an express private right of action, plaintiff can seek civil relief in a plenary action based on a violation of the statute only if a legislative intent to create such a right of action is fairly implied in the statutory provisions and their legislative history." *Cruz v. TD Bank, N.A.*, 22 N.Y.3d 61, 70 (2013).

The determination as to whether there was a legislative intent to create a private right of action is predicated upon three (3) factors: "(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether 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." *Id*

Finally, the Court of Appeals has ruled that it has "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." *Id*

This Court has already ruled that Labor Law §198-a does not provide for a private cause of action, when the Court ruled that it "agree[s] with the defendant that the complaint should be dismissed. We find nothing in section 198-a of the Labor Law, which provides only for penal sanctions against officers and agents of corporations, suggesting that the legislature intended that section should impose civil liability as well." *Stoganovic v. Dinolfo*, 92 A.D.2d 729, 730 (4th Dept. 1983).

This Court went on to opine that "[w]hether a private right of action should be implied from a statute which on its face provides only for penal sanctions depends upon the intent of the statute." *Id.* (Internal citations omitted).

Legislative history

Labor Law §198-b(2) provides 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).

The sole remedy for the violation of §198-b is outlined by Labor Law §198-b(5), which requires that "5. A violation of the provisions of this section shall constitute a misdemeanor." N.Y. Lab. Law § 198-b (McKinney). The legislature has also mandated that "[t]he 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).

In other words, Labor Law §198-b expressly states that the criminal penalty of a misdemeanor shall be applied to the violations of Labor Law §198-b, and states no other ramifications for violations of that statute. Under *expressio unius est exclusio alterius*, the inference must be drawn that the legislature intended to omit a private right of action.

When applying the doctrine of *expressio unius est exclusio alterius* to the Labor Law, specifically Labor Law §198-b, it is very telling that the legislature has, in other provisions of Article 6 of the Labor Law, expressly established a private cause of actions for certain violations of the Labor Law. By way of example, Labor Law §198(b-1) states:

> If any employee is not provided within ten business days of his or her first day of employment a notice as required by subdivision one of section one hundred ninety-five of this article, **he or she may recover in a civil action** damages of fifty dollars for each work day that the violations occurred or continue to occur, but not to exceed a total of five thousand dollars, together with costs and reasonable attorney's fees. The court may also award other relief, including injunctive and declaratory relief, that the court in its discretion deems necessary or appropriate. N.Y. Lab. Law § 198 (McKinney). (Emphasis added).

Thus, again, given that the legislature has expressly authorized private causes of action under certain provisions of the Labor Law, the only logical inference that can, and must, be drawn is that had the legislature intended to create a private right of action pursuant to Labor Law §198-b, it would have expressly done so as it did in Labor Law §198(b-1). There is no express private right of action within Labor Law §198-b, and thus, none exists.

Further as to the Legislative intent, Labor Law §198-b was first established in 1934 in the Penal Law as NY Penal Law §962. *See* Bill Jacket, L. 1934 Ch. 171, pp. 4-5. A review of the legislative history of NY Penal Law §962 evidences that this statute was purely intended to be an amendment to the Penal Law, and further to that point, there was no mention within legislative history of a private cause of action. *See* Bill Jacket, L. 1934 Ch. 171.

The first revision of Labor Law §198-b came in 1939, when §962 of the Penal Law was amended to broaden its application from applying only to the agreement

for the payment of prevailing wages on public works contracts, to the agreement for the payment of any wages. *See* Bill Jacket, L. 1939, ch. 851, p.7. Again, a review of the entirety of the legislative history evidences that it is devoid of any intention to create a private cause of action. *See* Bill Jacket, L. 1939, ch. 851.

In 1965, Penal Law §962 was migrated by the legislature to the Labor Law and appeared as Labor Law §199-c. This appeared to occur at a time when significant revisions were made to the then existing Penal Law. The legislative history tells us "[t]he bill was prepared by the Temporary Commission on Revision of the Penal Law, and distributes over 300 sections of the old Penal Law to more appropriate chapters of the Consolidated and Unconsolidated Laws." *See* Bill Jacket, L. 1965, ch. 1030, p.5.

In 1967 there was an administrative amendment to Labor Law §199-c, wherein the legislature moved this statute to Labor Law §198-b. There was no substantive change to this provision of the law in the 1967 revision. *See* Bill Jacket, L. 1967, ch. 390.

The final revision to Labor Law §198-b came in 1989, wherein the legislature clarified the statute as it related to the payment of prevailing wages under Articles 8 and 9 of the Labor Law. This 1989 revision also added Labor Law §198-b to the list of violations for which the **Department of Labor** could seek a civil penalty and order repayment of any wages unlawfully demanded by the employer. *See* Bill

Jacket, L. 1989, ch. 177. (Emphasis added). Yet again, nothing within the legislative history for this final revision of Labor Law §198-b evidences, let alone mentions, the availability of a private cause of action.

More specifically to this point, the legislative history for the 1989 amendment evidences that the revision was introduced by Senator James J. Lack, at the request of the Department of Labor, because the prior version of Labor Law §198-b simply contained criminal penalties, which were prosecuted by the Attorney General, and the Department of Labor requested that the Commissioner be permitted to impose civil penalties as a further deterrent to the violation of Labor Law §198-b. *See* Bill Jacket, L. 1989, ch. 177, pp 7-10.

Insufficient Litigation

This does not appear to be an issue which has been specifically litigated in the New York State Courts, at least at an appellate level. The federal court, specifically the Southern District of New York, previously ruled that a private cause of action did exist under Labor Law §198-b, but in doing so, the court recognized that there "are no cases that directly deal with the question whether...§198-b give[s] rise to a private right of action." *Chu Chung v. New Silver Palace Restaurants, Inc.*, 272 F. Supp.2d 314, 316 (S.N.D.Y. 2003).

The court in *Chu Chung* recognized this Court's decision in *Stoganovic v. Dinolfo*, but incorrectly determined that it only dealt with the narrow issue of whether a private right of action could be implied as available against corporate officers and agents under Labor Law §198-a and §198-c. Obviously, this Court has the ability to interpret its own precedent, but it is respectfully suggested that the Southern District of New York's interpretation of *Stoganovic*, as outlined in *Chu Chung*, missed the mark and ignores the **reasoning** utilized by this Court when it came to its decision; that reasoning is that a private right of action should only be implied from a statute, which on its face provides only for penal sanctions, when it is the legislative intent to so imply.

In *Martinez v. Alubon, LTD*, the First Department relied upon *Chu Chung* when it ruled that the plaintiffs had "stated a cause of action under Labor Law §198-b." *Martinez v. Alubon, LTD*, 111 A.D.3d. 500, 501 (1st Dept. 2013). In *Martinez*, the First Department did not appear to undertake any consideration as to whether a cause of action **actually** exists under Labor Law §198-b, but simply and summarily cited *Chu Chung* when it ruled a cause of action had been stated.

In *Chan v. Big Geyser, Inc.*, the Southern District of New York again ruled on the issue as to whether a private cause of action exists under Labor Law §198-b, and this time disagreed with both *Chu Chung* and *Martinez*. The Southern District of New York held that:

> As Defendants acknowledge, one court in this District inferred a private right of action under § 198-b. *Chu Chung*, 272 F. Supp. 2d at 316-17. Acknowledging that "no cases" directly addressed the question, the Court held that restaurant employees were in the class for whose benefit the statute was enacted; the remedies provided by Article VI "suggest a legislative intention in favor of a civil remedy against employers;" and "the New York Labor Law reflects a strong legislative policy aimed at redressing the power imbalance between employer and employee." *Id* at 316-17. Additionally, while not explicitly addressing this question, the First Department cited to the portion of *Chu Chung* that inferred a private cause of action as it allowed a § 198-b claim to proceed. *Martinez v. Alubon, Ltd.*, 111 A.D.3d 500, 500 (N.Y. 1st Dep't 2013).
>
> Defendants contend that *Chu Chung* was misguided. They provide an accounting of §198-b's legislative history, emphasizing that §198-b was originally part of the penal law and that "for almost 80 years after [the statute] was first enacted," no court inferred a state law cause of action. Defendants note that, since *Chu Chung*, the New York legislature explicitly created private rights of action for some, but not all, violations of the Labor Law.
>
> Whether § 198-b contains a private right of action is unclear. For the reasons articulated above, the Court declines to infer a private right of action here. *Chan v. Big Geyser, Inc.*, 2018 WL 4168967, at *7 (S.D.N.Y. 2018).

This analysis is especially important because Justice Murad relied upon *Martinez* in reaching his decision and handing down the Order. (R. 27-28). It is respectfully suggested to this Court, and with all due respect to the First Department and the lower court, that the First Department's ruling in *Martinez* is incorrect, and it reached its decision by simply assuming that a private cause of action existed under

Labor Law §198-b, without undertaking a review of that issue. For that reason, it is requested that this Court decline to follow the First Department's decision in *Martinez*, and to consider the argument laid forth above, which clearly and unequivocally establishes that the Plaintiff does not have a private right of action against the Defendant for a violation of Labor Law §198-b.

Based upon the plain language of New York Labor Law §198-b, and that statute's Leglislative history, the Plaintiff does not have a private right of action against the Defendant for a violation of that statute. As such, the Plaintiff has failed to state a cause of action against the Defendant for a violation of New York Labor Law §198-b, and the lower court erred in failing to dismiss that cause of action plead in the Complaint against the Defendant.

POINT II: THE SUPREME COURT ERRED IN FAILING TO DISMISS A CAUSE OF ACTION PREDICATED UPON LABOR LAW §198

To the extent that the Plaintiff has attempted to plead a cause of action against the Defendant pursuant to Labor Law §198, that cause of action must too be dismissed.

Labor Law §198(1-a) mandates that:

> In any action instituted in the courts upon a wage claim by an employee or the commissioner in which the employee prevails, the court shall allow such employee to recover the full amount of any underpayment, all reasonable attorney's fees, prejudgment interest as required under the civil practice law and rules, and, unless the employer proves a good faith basis to believe that its underpayment of wages was in compliance with the law, an additional amount as liquidated damages equal to one hundred

> percent of the total amount of the wages found to be due, except such liquidated damages may be up to three hundred percent of the total amount of the wages found to be due for a willful violation of section one hundred ninety-four of this article. N.Y. Lab. Law § 198 (McKinney).

"To the extent that plaintiff asserts his entitlement to [attorney's fees and statutory damages] pursuant to Labor Law §198(1-a), which affords such remedies against 'employers,' we note that Labor Law §190(3)'s definition of 'employer,' applicable to Labor Law §198(1-a), does not include governmental entities..." *Perry v. Town of Huntington*, 60 Misc.3d 45, 48 (App. Term 2018). While the Defendant is not a governmental entity, *Perry* is instructive in that it points towards Labor Law §190 for the definitions of those who are protected by, and liable under, Labor Law §198.

Labor Law §190 states that "[a]s used in this article:...(2) 'Employee' means any person employed for hire by an employer in any employment. (3) 'Employer' includes any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service." N.Y. Lab. Law § 190 (McKinney).

Additionally, Labor Law §198 "actually provides only a damage remedy for substantive violations of Article 6 of the Labor Law and depends upon pleading and proof of such substantive violations." *Slotnick v. RBL Agency Ltd.*, 271 A.D.2d 365

(1st Dept. 2000). "Accordingly, the statutory language and cumulative legislative history of Labor Law article 6 in general and section 198(1-a) in particular convince us that the statutory remedy of an award of attorney's fees to a prevailing **employee** as well as the liquidated damages remedy where a willful failure to pay wages has been established, are limited to actions for wage claims founded on the substantive provisions of Labor Law article 6. Moreover, any doubts on the true meaning of the statutory language or legislative intent in the enactment of the attorney's fees provision of Labor Law §198 should be resolved in favor of a narrow construction. New York has traditionally followed the common-law rule disfavoring any award of attorney's fees to the prevailing party in litigation. *Gottleb v. Kenneth D. Laub & Co., Inc.*, 82 N.Y2d 457, 464-465 (1993). (Emphasis added).

There has never been an allegation that Defendant was an employer of the Plaintiff, and, in fact, when this was put forth in the moving papers before the lower court that the Defendant was never an employer of the Plaintiff, the Plaintiff failed to respond to those statements of fact. (R. 162, 179-226).

Essentially, in order to obtain a judgment against the Defendant obtaining the remedies provided by Labor Law §198(1-a), the Plaintiff must first establish and prove substantive violations of Article 6 of the Labor Law, and also prove that the Plaintiff is and/or was an employee of Defendant. For the reasons stated herein, the cause of action plead against the Defendant pursuant to Labor Law §198-b must be

dismissed, and no other violations of Article 6 of the Labor Law have been plead and/or remain against the Defendant; thus, the Plaintiff cannot establish a violation of Article 6 of the Labor Law.

Furthermore, even if the Plaintiff could establish that the Defendant is liable for a violation of Labor Law §198-b (which it cannot), the Plaintiff cannot obtain a judgment against Defendant for the relief found in Labor Law §198, because the Defendant is not, and has never been, an employer of the Plaintiff.

CONCLUSION

For each and every reason stated herein, the Supreme Court erred in denying the Defendant's Motion to Dismiss the cause of action plead against the Defendant for a violation of New York Labor Law §§198-b and 198. It is respectfully requested that this Court reverse the Order of the Supreme Court (Hon. David A. Murad, J.S.C.) and grant the Defendant's motion by dismissing the remaining Third Cause of Action plead by the Plaintiff against the Defendant.

Dated: Rochester, New York
June 21, 2019

Respectfully Submitted,

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