TO BE
ARGUED BY:
David G. Goldbas
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Appellate Division Docket No. CA 19-00730
Oneida 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 PLAINTIFF-RESPONDENT ERSIN KONKUR

DAVID G. GOLDBAS
Attorney for Plaintiff-Respondent Ersin Konkur
185 Genesee Street, Suite 905
Utica, NY 13501
315-724-2248

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QUESTIONS PRESENTED

Question #1: Should Supreme Court have dismissed on a CPLR 3211 motion Plaintiff's claim against Appellant for illegal kickbacks under Labor Law §198-b on grounds that the statute allows no civil recovery?

Supreme Court answered this question in the negative.

Question #2: Should Supreme Court have dismissed on a CPLR 3211 motion Plaintiff's claim for Labor Law §198 remedies on grounds that the Appellant was not the Plaintiff's employer?

Supreme Court answered this question in the negative.

STATEMENT OF THE CASE

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

Plaintiff- Respondent Ersin Konkur (hereinafter "Plaintiff") commenced an action in 2017 against his former employer, the Utica Academy of Science Charter School (hereinafter "UASCS") and the Appellant High Way Education (hereinafter "Appellant") 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).

Both Defendants moved to dismiss all of Plaintiff's causes of action pursuant to CPLR § 3211. The Court declined to consider either Defendant's motion as a motion for summary judgment (R8).

The Court then dismissed with prejudice Plaintiff's first, second and sixth causes of action which were asserted against UASCS (R8) but sustained the third, fourth and fifth causes against that Defendant (R8).

The Court also dismissed "with prejudice and the merits" the Plaintiff's first, second, fourth, fifth and sixth causes of action but sustained the third cause of action asserted against Appellant and UASCS based on an illegal kick-back scheme in violation of Labor Law § 198-b (R9).

The Appellant appeals the Court's order which sustained the kick-back cause of action (R3).

Defendant UASCS has not appealed the Court's ruling sustaining certain causes of action against it.

STANDARD OF REVIEW

On a motion to dismiss, a court must accept the plaintiff's allegations as true and determine whether they fit into any cognizable legal theory. See *Lawrence v. Grauburd Miller,* 11 N.Y. 3rd 588, 595 (2008); *Matter of Machado v. Tanoury,*

142 A.D. 3rd 1322, 1323 (4th Dept. 2016). Affidavits submitted by a plaintiff may also be considered to remedy any defects in the complaint, *Leon v. Martinez*, 84 N.Y. 2nd 83, 88 (1994). Affidavits submitted by the defendant, however, rarely warrant dismissal of the complaint unless they conclusively establish that the Plaintiff has no cause of action, *Rovello v. Orofino Reality Co.*, 40 N.Y. 2nd 633, 636 (1976).

Because a court "must accept Plaintiff's allegations as true" the facts which follow are taken from the Record on Appeal 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 Appellant's motion to dismiss.

STATEMENT OF FACTS

For the school years 2013-2014 and 2014-2015, Plaintiff was employed by UASCS 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 UASCS students on Saturdays for extra pay (R181).

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

During the Plaintiff's employment, UASCS was closely affiliated with the Appellant. The Turkish nationals at UASCS and within the Appellant's organization were followers of the Gulen Movement which claims authority from and exclusive allegiance to Fetullah Gulen, a Muslim cleric. Turks from the UASCS and from the Appellant 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).

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

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

In his Verified Complaint in the instant case, the Plaintiff alleged 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 Appellant'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 Appellant or by UASCS administrators who collected or insisted on behalf of the Appellant.

On February 1, 2014, Kadir Yavuz, the UASCS School Director texted the Plaintiff demanding money on behalf of the Appellant. 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 Appellant conducted a meeting at the UASCS 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 Appellant'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, UASCS's Superintendent, Tolga Hayali directed the Plaintiff to pick him up in Syracuse and drive with him to the Appellant's offices in Rochester (R 184). Mr. Hayali explained that the Plaintiff would meet with Serif Meral and Mohammed Dogan, the Appellant'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 Appellant (R 184). The Plaintiff involuntarily paid the Appellant $2,000.00 at this time (R184).

On September 27, 2014 (a Saturday), the Plaintiff was directed by UASCS's School Director to drive to Rochester to meet with Mr. Meral. En route, he was redirected to the home of the Appellant'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 Appellant. This note, in Turkish, was translated and submitted to Supreme Court to reveal a formula of forced contributions to the Appellant based on the Plaintiff's wages at UASCS. In effect, he was required to pay "the Service" (a nickname for the Gulen Movement, as represented by the Appellant) 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 Appellant totaling $6,274.91. The Appellant 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 Appellant. (R 185).

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

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

DISCUSSION

POINT I. LABOR LAW 198-B PROVIDES A PRIVATE RIGHT OF ACTION TO THE PLAINTIFF AND SUPREME COURT CORRECTLY SUSTAINED THE PLAINTIFF'S THIRD CAUSE OF ACTION PLEADING AN ILLEGAL KICKBACK SCHEME BY APPELLANT

Appellant argues that the Plaintiff has no cause of action under New York's Anti- Kickback Statute, Labor Law 198-b, because the statute is exclusively criminal and has no legislative history allowing a private remedy. See for example Appellant's Brief at page 15.

The argument is erroneous for several reasons.

First, the statute is not exclusively criminal. The statute specifically states:

> **"§ 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]

Thus, a plain reading of the statue reveals *first* a declaration that the practice of taking kickbacks is unlawful *and second*, that the practice is criminal. The Legislature's use of the word "further" to begin the last sentence of subsection 2 indicates a clear intent to supplement the original declaration of unlawfulness and

to create a separate-- but not necessarily exclusive-- remedy in the criminal justice system.

In other words, the Legislature has stated that any person forcing kickbacks is committing an unlawful act subjecting himself or herself to damages *and* that person can also be criminally prosecuted.

The dual remedy infused into the anti kick-back statute matches the entire statutory scheme of Labor Law Article 6 which is entitled "Payment of Wages." That Article allows a wage earner to seek unpaid wages by his (or her) own civil action or by administrative or judicial proceedings commenced by the Commissioner of Labor. *See* Labor Law § 198. The statute also provides for double damages in an unexcused case and an award of attorney's fees in any case. *See* Labor Law § 198. The remedies are cumulative, reflecting a strong public policy to protect the working person. *See Gottlieb v. Laub & Co.*, 82 N.Y. 2d 457, 461 (1993) ("the overall objective of the Legislation [creating Article 6] was to strengthen and clarify the substantive laws protecting the rights of employees to the payment of wages").

The public policy of protecting the wage earner was expressed repeatedly in the legislative history of Labor Law 198-b. The statute began as a section of the Penal Code, but was ultimately transferred out of it and into the Labor Law. 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 unscrupulous 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]

In support of Chapter 171 of the Laws of 1934, the New York State Federation of Labor wrote the Governor with this endorsement:

" This bill amends the Penal Law by prohibiting and establishing a penalty for the practice of compelling employees to refund to their employers part of their wages as a condition of employment. This bill is aimed at the so called 'kick-back' system which has become prevalent on public work in some sections of the state and we believe will be effective in preventing and punishing this form of extortion." [Bill Jacket to Ch. 171, Laws of 1934, page 6].

The law was amended by Chapter 851 of the Laws of 1939 to include others besides workers entitled to the prevailing wage. 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].

The criminal sanction in Labor Law 198-b did not create a new right. Rather it only codified and strengthened existing criminal protections against extortion, blackmail and robbery, but the private right to sue for extortion of wages was already in place under the common law, *Sciasscia v. Fredburn Constr. Corp.*, 248 A.D. 608 (1st Dept. 1936).

Accordingly, Labor Law § 198-b should be interpreted here to allow the private cause of action because the statute has continued a right that was already in existence. To do so would harmonize this case with the state of decisional law in New York. See *Salazar- Maritnez v. Fowler Brothers*, 781 F. Supp. 2d 183 (W.D. N.Y. 2011); *Martinez v. Alubon, LTD*, 111 A. D. 3rd 500 (1st Dept. 2013); and *Chu Chung v. New Silver Alice Rest. Inc.* 272 F. 2nd 314, 317 (S.D.N.Y 2003); but cf. *Chan v Big Geyser, Inc.* 2018 WL 4168967 (S.D.N.Y. 2018) .

Even if the statute were unequivocally criminal in nature (and Plaintiff does not concede the point) it would still allow the private right of action under the legislative scheme of Labor Law Article 6. The entire Article is designed for and operates as a protection for the wage earner. It should 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 *Cruz*, the 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*, 88 N.Y. 2d at 402, *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 it provide restitution to the wage earner for the wages he lost by the defendant's unlawful conduct. Third, there is nothing in this or any in private action which would interfere with the efforts of the Commissioner of Labor or the local prosecutor to combat the practice of illegal kickbacks. To the contrary, the private suits will enhance the fight.

It should be noted that the Legislature never expressly **prohibited** the private remedy. The lack of prohibition is far more significant than the lack of an unambiguous grant. The Legislature did not forbid it, so the Courts are authorized

to allow the right of action as an extension to or a fortification of existing civil remedies such as breach of contract or extortion or conversion.

To allow Appellant's argument would be to condone criminal behavior because it would leave a victimized wage earner with the criminal justice system as his only option. Using that option, he would have to face an already overburdened system. He would have to face innumerable delays, some statutory, some from oversize caseloads. He would have to provide proof beyond a reasonable doubt. He would if the prosecutor is ultimately successful, have to wait for restitution, but there is no guarantee that restitution would ever come. Under such a nightmarish scheme, the wage earner's chances for a swift recovery are slim and none. The Appellant's interpretation of Labor Law §198-b would eviscerate crucial worker protections, and should not be allowed here.

POINT II. SUPREME COURT CORRECTLY SUSTAINED PLAINTIFF'S CLAIM FOR REMEDIES UNDER LABOR LAW §198.

Appellant argues that Plaintiff should be denied all relief under Labor Law §198 because the Appellant was never the Plaintiff's employer. This argument should be overruled.

Labor Law §198-b, the anti-kickback statute, expressly makes it "unlawful" for "any person" to "request, demand or receive" any part of a worker's wages on threat to that worker's employment. Liability under the statute is not limited to employers.

Plaintiff's pleadings and his Affidavit clearly state a cause of action against the Appellant for forcing the kickback of his wages, either on its own or as an agent or co-conspirator of the employer, UASCS.

The key component is that the Plaintiff's wages were seized.

As discussed above, the clear intent of the Legislator in passing Article 6 of the Labor Law was to protect the ***wages*** of the working person. *Gottlieb v. Laub & Co., supra* 82 N.Y. 2d 457, 461 (1993). For the Legislature, wages are a particular form of property which need greater protection than the common law, the penal statutes and other legislation allow to property in general.

Accordingly, the Legislature has granted special protection to wages in civil proceedings. Labor Law §198 provides these remedies as follows:

"**§198. Costs, remedies**

***

"1-a...In any action instituted in the courts upon a ***wage claim*** by an employee...in which the employee prevails, the court shall allow such employee to recover the full amount of any underpayment, all reasonable attorney's fees, pre-judgment interest...and unless the employer provides 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 [.]" [emphasis supplied]

Again, the legislative emphasis is on a "wage claim", that is on the nature of the claim, not on the status of the defendant.

It is clear that the special protection to wages, including extra costs, attorney's fees, pre-judgment interest and double damages, have been enacted to protect the wage earner from losing the wages that he or she crucially needs. Without these remedies, wages could be withheld, diverted or stolen and the worker would face devastating delays, loss of use of funds and attorney's fees while the collection process takes place. The legislation seeks to make the victimized wage earner whole and give all others a strong incentive to pay promptly.

The lack of employment relationship should not give an unlawful perpetrator of kickbacks an escape. That perpetrator has seized wages and he should have no less liability than an employer. To take Appellant's argument to its logical conclusion, a hoodlum could commit the most egregious force or threat of force against a worker in order to seize wages and then await the outcome of protracted litigation after which he simply gives the money back, scot free, with no other liability, arguing that he was not the employer . By then, the wage earner gains only a Pyrrhic victory because he or she has had to suffer long delays, has received no interest, and has had to pay attorneys fees.

Appellant's reliance on *Gottlieb v. Laub & Co.*, 82 N.Y. 2d 457 (1993) is misplaced because that holding is specifically allows the remedies provided in §198(1-a) to wage earners' claims such as the Plaintiff's here. ("[W]e conclude that ... the intent of the statute is that the attorneys fees provided [by Labor Law §198(1-a)] is limited to wage claims based on one or more violations of the substantive provisions of Labor Law Article 6." 82 N.Y.2d at 459)

CONCLUSION

For all of the foregoing reasons, the appeal should be denied in its entirety.

Respectfully submitted,

David G. Goldbas
Attorney for Respondent-Plaintiff
185 Genesee Street, suite 905
Utica New York 13501
Tel 315 724-2248

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