Does NY Labor Law §193 Have "Anything to Do with the Failure to Pay Wages?"

November 2, 2017
New York Law Journal

New York provides teeth to its wage laws, codified at Article 6 of the New York Labor Law, by, among other things, requiring employers to pay the employee: (1) the full amount of any underpayment (2) all reasonable attorney fees; (3) prejudgment interest; and (4) an additional 100 percent of the wages due unless the employer proves it had a good faith basis to believe its underpayment complied with the law. N.Y. Labor Law §198(1-a). (Effective Jan. 19, 2018, penalties will increase to "up to" 300 percent of the wages due in some circumstances.) However, the "teeth" only apply to the limited wage claims specifically provided for under Article 6. They do not apply to all claims an employee might bring against his or her employer. *Gottlieb v. Kenneth D. Laub & Co.*, 82 N.Y.2d 457, 462-64 (1993).

Article 6 does not contain any express obligation to pay wages nor any express penalty for failing to pay wages. The closest it comes is §193, labeled "Deduction for Wages." Under §193, employers may not make any "deduction" from "wages" other than those specified, such as health and welfare benefits. (Some courts have suggested that N.Y. Labor Law §191, titled "Frequency of payments," prohibits the wholesale withholding of wages for certain non-executive employees. However, §191, as its title suggests, dictates the frequency of payments for certain employees. It contains no express language prohibiting the wholesale nonpayment of wages. It is an unclear source of the employer's obligation to pay wages.)

It might seem counterintuitive that the legislature intended a section prohibiting wage deductions to prohibit the wholesale non-payment of wages. Yet, for at least the last decade courts have wrestled with whether the "no deduction" language of §193 prohibits the complete failure to pay wages or more narrowly prohibits only more limited subtractions from wages other than those specified in the statute. Because of the statutory remedies available under the Labor Law, the resolution of this issue is not academic and has been heavily litigated.

In 2012, the New York Court of Appeals cursorily addressed the issue in *Ryan v. Kellog Partners Institutional Servs*. 19 N.Y.3d 1 (2012). It held that an employer's "neglect to pay [the employee] the bonus violated §193." But, courts in New York, both federal and state, have not consistently construed *Ryan* to be directly on point.

Most recent state court decisions concluded that *Ryan* meant that an employee could bring a claim for non-payment of wages under §193. At least some federal courts held the opposite. Their rationale, when one was given, was that *Ryan* did not address the issue at all because it focused on the word "wage" under the statute and not the word "deduction."

An important First Department case, *Perella Weinberg Partners v. Kramer*, 2017 N.Y. App. LEXIS 6322 (1st Dep't Aug. 29, 2017), adopted the reasoning of these federal court decisions and very well could mean the end to non-payment cases under §193. However, until the Court of Appeals or legislature addresses the issue directly, the law in New York remains uncertain. The origin of the conflict and the recent trend is described below.

Origin of a Conflict

The genesis of the judicial conflict appears to be a difference of opinion between the judges in the Third Department and the judges in the First Department (at least until *Perella Weinberg* was decided) over whether the non-payment of wages constitutes a claim under the Labor Law.

In *Kletter v. Fleming*, 32 A.D.3d 566 (3d Dep't 2006), the Third Department considered the claim of a dentist for the underpayment of wages. No specific deduction from a gross wage was at issue. The court upheld dismissal of the dentist's claim under the Labor Law:

"The statutory remedies [under Article 6 of the Labor Law] are unavailable where, as here, the claim for unpaid work is 'a common-law contractual remuneration claim' and no substantive violation of article 6 is alleged … . [D]efendant [does not] allege any specific deduction in violation of section 193."

Id. at 567 (internal quotations and citations omitted).

Five years after *Kletter*, the First Department weighed in with its own apparently contrary decision. In *Wachter v. Kim*, 82 A.D.3d 658 (1st Dep't 2011), the court held that the failure to pay earned wages set forth a claim under §193.

The dispute in *Wachter* was over the non-payment of $2 million in non-discretionary guaranteed compensation by a start-up hedge fund. Without detailed analysis, the court held that because the employer had no discretion not to pay, the "compensation is 'wages' that are protected by Labor Law §193." The First Department did not cite the Third Department's apparently contrary decision in *Kletter*.

A conflict was born. Subsequent decisions could cite to *Kletter* for a narrow construction of the statute or to *Wachter* for a broad one.

Did Court of Appeals Resolve the Conflict?

The conflict at first appeared to be short-lived.

The year after the First Department decided *Wachter*, the Court of Appeals, in *Ryan v. Kellog Partners Institutional Servs.*, appeared to confirm that the failure to pay wages raised a viable claim under §193. But, the court did not cite either *Wachter* or *Kletter*. There, the court considered Ryan's claim under §193 for a guaranteed bonus of $175,000. The court held that because the bonus was "guaranteed and non-discretionary," it constitutes "wages" under the Labor Law and the employer's "neglect to pay [Ryan] the bonus violated Labor Law §193."

Ryan had been construed by most subsequent lower New York state courts as resolving the *Kletter*/*Wachter* conflict in favor of finding a cause of action. Thus, New York state cases, prior to *Perella Weinberg*, were fairly uniform in holding that the failure of an employer to pay wages constitutes a claim under Labor Law §193. See, e.g., *Friedman v. Arenson Office Furnishings*, 129

A.D.3d 525, 525 (the failure to pay an earned bonus constitutes a claim under the Labor Law); *Ackerman v. New York Hosp. Med. Cetr. of Queens*, 127 A.D.3d 794, 795 (2d Dep't 2015) (plaintiff adequately stated claim for unpaid wages and overtime compensation under §193); *Doolittle v. Nixon Peabody*, 126 A.D.3d 1519, 1519-22 (4th Dep't 2015) (failure to pay non-discretionary bonus sets forth claim under the Labor Law).

Does the Conflict Live?

Despite that uniformity in state court decisions, the *Kletter/Wachter* conflict did not die when the Court of Appeals decided *Ryan*. That is in part because federal courts began citing *Kletter* before *Wachter* was decided and, without much analysis, appear to have viewed *Kletter* as a better rule even after *Wachter* and *Ryan* were decided. For example, in *Monagle v. Scholastic*, 2007 U.S. Dist. LEXIS 19788, *5 (S.D.N.Y. March 9, 2007), decided after *Kletter* but before *Wachter*, Judge Lynch relied on *Kletter* for now much-quoted language, "Section 193 has nothing to do with the failure to pay wages … governing instead the specific subject of making deductions from wages."

The rule articulated in *Monagle* and *Kletter* became the rule in many, but not all, of the lower federal courts that have considered the issue. See, e.g., *Malinowski v. Wall St. Source*, 2012 U.S. Dist. LEXIS 11575 (S.D.N.Y. Jan. 31, 2012) (citing *Monagle* and expressly following *Kletter* over *Wachter*) (Engelmayer, J.); *Moras v. Marcho Polo Network*, 2012 U.S. Dist. LEXIS 181110 (S.D.N.Y. Dec. 20, 2012) (citing *Monagle* and *Kletter*; not citing *Wachter* or the Court of Appeals then recent decision in *Ryan*) (Engelmayer, J.); *O'Grady v. BlueCrest Capital Mgmt.*, 111 F. Supp. 3d 494 (S.D.N.Y. 2015) (citing *Monagle* and *Kletter*; not citing *Ryan* or *Wachter*) (Stein, J.); *Goldberg v. Jacquet*, 2015 U.S. Dist. LEXIS 117860 (S.D.N.Y. Sept. 3, 2015) (citing *Monagle* and *Kletter*; not citing *Ryan* or *Wachter*) (Crotty, J.); *Kone v. Joy Constr.*, 2016 U.S. Dist. LEXIS 26981 (S.D.N.Y. 2016) (citing *Monagle* and *Kletter*; not citing *Ryan*or *Wachter*) (Swain, J.); but see *Rosa v. TCC Communs*, 2016 U.S. Dist. LEXIS 575 (S.D.N.Y. Jan. 5, 2016) (relying on *Wachter*; not citing *Kletter*) (Pauley, J.); *Quinones v. PRC Mgmt. Co.*, 2015 U.S. Dist. LEXIS 88029 (S.D.N.Y. July 7, 2015) (relying on *Ryan*) (Caproni, J.).

One federal court squarely addressed the *Kletter*/*Wachter* conflict. In *Gold v. Am. Med. Alert*, 2015 U.S. Dist. LEXIS 108122 (S.D.N.Y. Aug. 17, 2015), Gold asserted a breach of contract claim for non-payment of compensation and a claim under the Labor Law for the same non-payment. Judge Keenan, following *Kletter* over *Wachter*, dismissed the Labor Law claim, but, unlike most other courts, explained his rationale. The court explained that in *Ryan* and *Wachter*, the courts were focused on whether particular compensation was a "wage" under the Labor Law, not on the appropriate meaning of "deduction" under the statute. That issue, Judge Keenan found, had not yet been decided by any court.

Judge Keenan addressed the meaning of "deduction" as one of first impression. He concluded that the rule in *Kletter*—that §193 does not have anything to do with unpaid wages—was more consistent with the statutory language, prevented a "windfall" for plaintiff where he already has a contract claim, and avoided a statutory claim that duplicates a common law contract claim for non-payment of wages.

Within weeks after Judge Keenan's decision in *Gold*, Judge Crotty cited *Gold* with approval in *Goldberg v. Jacquet*, 2015 U.S. Dist. LEXIS 117860 (S.D.N.Y. Sept. 3, 2015). The Second Circuit affirmed. *Goldberg v. Jacquet*, 667 Fed. Appx. 313 (2d Cir. June 30, 2016). It cited the Third Department's decision in *Kletter* and Judge Keenan's decision in *Gold* to find that a "deduction" under §193 is more "targeted and direct" than the wholesale withholding of wages. The Second Circuit did not cite or distinguish the Court of Appeals' decision in *Ryan* or the First Department's decision in *Wachter*. Although Goldberg did not receive wages to which he was entitled, the Second Circuit found that §193 offered him no relief.

The Conflict Is Dead

After the Second Circuit's decision in *Goldberg*, a reasonable person may have believed there was a split between courts that followed *Kletter*, including most federal courts, and those that followed *Wachter*. They would have been wrong.

To the extent courts had construed *Wachter* to mean that §193 prohibits the wholesale non-payment of wages, that construction was effectively rejected by the First Department's more recent decision in *Perella Weinberg.*There, the court considered a Labor Law claim for unpaid deferred compensation. The court expressly held that "a wholesale withholding of payment is not a 'deduction' with the meaning of Labor Law §193." *Perella Weinberg*, 2017 N.Y. App. Div. LEXIS 6322, at *11-12. The employees had relied on *Ryan* and the First Department's own decision in *Wachter* to argue for the opposite result, but the First Department held that in those decisions the "issue was not addressed."

Conclusion

The *Kletter/Wachter* conflict is dead. Both the First Department and Third Department agree that §193 does not prohibit the wholesale nonpayment of wages, the same rule that also applies in federal courts.

There remains the nettlesome decision by the Court of Appeals in *Ryan* that "neglect to pay" a bonus violates §193. While the recent trend suggests that most courts will distinguish *Ryan* as a case that focused on the word "wage," not "deduction," until the Court of Appeals or legislature speaks with greater clarity, resolution of this issue will remain uncertain.