

1 DIVISION OF LABOR STANDARDS ENFORCEMENT
2 Department of Industrial Relations
3 State of California
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9
10 BEFORE THE LABOR COMMISSIONER

11 OF THE STATE OF CALIFORNIA

12 CHARLES LENHOFF, individually and) TAC 19-99
13 dba LENHOFF & LENHOFF,)
14)
15) Petitioners,)
16)
17 vs.) DETERMINATION OF
18) CONTROVERSY
19 RICHARD HISSONG, an individual,)
20)
21) Respondent.)
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27)

28 INTRODUCTION

29 The above-captioned petition was filed on May 21, 1999 by
30 CHARLES LENHOFF dba LENHOFF & LENHOFF (hereinafter "Petitioner" or
31 "LENHOFF") alleging that RICHARD HISSONG (hereinafter "Respondent")
32 failed to remit commissions after the petitioner negotiated and
33 procured work for the respondent as a director and cinematographer
34 in the entertainment industry. Petitioner seeks 10% commission for
35 various projects, interest and attorney fees.

36 Respondent filed his answer on July 20, 1999, alleging
37 petitioner breached the contract by his unprofessional and abusive
38 conduct and that petitioner lacks standing to bring this suit, as

1 the two employment engagements named in the petition were entered
2 into after the relationship between the parties was terminated.

3 The hearing was scheduled and held on November 30, 1999
4 in Los Angeles at the office of the Labor Commissioner before the
5 undersigned attorney specially designated to hear this matter. The
6 petitioner was represented by his attorney Candice S. Klein of
7 Carpenter and Zuckerman; respondent appeared through his counsel
8 Melissa F. Grossan of Spielberger & Grossan.

9 On the day of the hearing, petitioner amended his claim
10 by including two additional claims for non-payment of commissions.
11 Respondent objected, stating he would be prejudiced by these 11th
12 hour claims as he was not provided an opportunity to prepare an
13 adequate defense. We allowed the petitioner to present testimony
14 and documentary evidence with respect to the additional claims and
15 left for future determination whether the respondent would be
16 prejudiced by this amendment. Based upon the testimony, evidence
17 and briefs presented at this hearing, the Labor Commissioner adopts
18 the following Determination of Controversy.

19
20 FINDINGS OF FACT

21 1. On February 1, 1999, the parties entered into a one-
22 year written contract, whereby petitioner would act as respondent's
23 exclusive talent agent for all work performed as a director and/or
24 cinematographer in the entertainment industry. The contract
25 provided that petitioner would "use all reasonable efforts" to
26 obtain offers of employment and negotiate employment contracts. In
27 return, petitioner was to receive 10% of respondent's earnings,

1 excluding projects created or owned by respondent. The contract
2 also provided that should the artist enter into an employment
3 agreement within four months after termination of the contract
4 between the parties, the agent would be commissioned, so long as
5 the agent submitted the artist or commenced negotiations during the
6 contract's term.

7 2. The relationship did not begin on a successful note.
8 In March of 1998, respondent was contacted by Joel Hornstock of 20th
9 Century Fox. Mr Hornstock had previously worked with respondent on
10 various projects and was interested in retaining respondent's
11 services as director of photography for two upcoming pilots, "Paula
12 Poundstone" and "King of New York". Respondent turned over the
13 negotiations to LENHOFF with explicit instructions to negotiate
14 finances, credit, parking, and most importantly not to aggravate
15 Mr. Hornstock. Respondent testified that his [respondent's]
16 reputation in the entertainment community was that of a
17 cantankerous individual, difficult to negotiate with and he wanted
18 to change that reputation; so reliance on LENHOFF to achieve that
19 result was critical.

20 3. The negotiations quickly deteriorated. Testimony
21 reflected that a severe personality conflict rapidly developed
22 between petitioner and Hornstock. Between late March and early
23 April, 1998, a series of written communications transpired between
24 Hornstock and LENHOFF, reflecting various disagreements on material
25 terms of respondent's contract. In direct opposition to
26 respondent's instructions, negotiations quickly became a hostile
27 shouting match, culminating in Hornstock's absolute refusal to

1 negotiate with LENHOFF. Notwithstanding LENHOFF'S negotiating
2 tactics, which came perilously close to losing the employment
3 opportunities for respondent, Hornstock still desired to work with
4 respondent because the two had benefitted from working together on
5 six previous collaborations. Hornstock insisted on negotiating
6 directly with respondent, and as a result of direct discussions
7 between respondent and Hornstock, respondent's services were
8 ultimately secured for both "Paula Poundstone" and "King of New
9 York". Respondent failed to pay petitioner commissions for either
10 project.

11 4. Respondent, sensing petitioner did not possess the
12 temperament he was looking for in a negotiating representative,
13 desired to be released from the contract. Respondent testified
14 that on April 3, 1998, after a discussion about LENHOFF'S
15 negotiating style evolved into a fight between the parties,
16 respondent orally severed the contract. Testimony conflicted as to
17 the exact nature of the conversation, but LENHOFF considered this
18 conversation a simple disagreement and not a termination of the
19 contract.

20 5. On April 4, 1998, petitioner, via facsimile, sent
21 respondent a blank TAC packet¹, undoubtedly used by petitioner as
22 a tool to threaten litigation and coerce respondent into paying
23 commissions on "Paula Poundstone" and "King of New York".

24 6. Respondent did not respond and petitioner continued

25 _____
26 ¹ The Labor Commissioner provides upon request a packet of written material
27 used to assist agents and/or artists preparing to file a Talent Agent Controversy
Petition. This packet includes blank petitions, a notice to answer and
instructions.

1 to seek opportunities for the respondent. LENHOFF introduced into
2 evidence a series of correspondence reflecting preliminary
3 negotiation efforts on respondent's behalf, including an April 13,
4 1998 request for respondent to send demo reels to various producers
5 petitioner had contacted on respondent's behalf. Respondent, who
6 knew or should have known that petitioner was continuing to seek
7 employment on his behalf, again failed to respond.

8 7. On June 9, 1998, petitioner sent respondent a letter
9 citing current procurement efforts on respondent's behalf and
10 requested that respondent catch up on outstanding commissions,
11 ostensibly for "Paula Poundstone" and "King of New York". Finally,
12 respondent answered with a June 10, 1998, unequivocal termination
13 letter, stating in pertinent part, "[u]nder no circumstances are
14 you or your organization to continue to pursue any business on my
15 behalf. You know very well our relationship is damaged as of your
16 last attempted pilot negotiation." On July 9, 1998, LENHOFF
17 acknowledged respondent's termination letter, but again asserted
18 respondent needed to catch up on commissions.

19 8. Petitioner submitted evidence of communications dated
20 June 2, 1998 through June 5, 1998, with producers Mark Grossan and
21 James Widdoes of Axelrod-Widdoes Productions, establishing
22 negotiating attempts for the week preceding the June 10th
23 termination. Axelrod-Widdoes Productions was hiring below-the-
24 line talent for an upcoming project, "Brother's Keeper". Petitioner
25 testified it was through his efforts and communication with Grossan
26 and Widdoes that respondent ultimately secured this employment
27 project. Petitioner also claimed that discussions for another

1 project, "Movie Stars", performed between respondent and Axelrod-
2 Widdoes was secured by petitioner's efforts, but testimony
3 established this deal was not consummated until December 1998, and
4 there was no other evidence produced that petitioner was involved
5 with this project.

6 9. Respondent maintained he was hired for "Brother's
7 Keeper" because of an existing relationship with Grossan, James
8 Widdoes and Jonathon Axelrod and petitioner played no part in
9 facilitating this deal. Grossan's testimony was vague and
10 unavailing as to petitioner's exact role in the negotiations, but
11 Grossan did confirm that LENHOFF did have an early role, albeit in
12 a limited capacity.

13 10. Respondent was eventually hired for "Brother's
14 Keeper" and the contract was executed and production began in
15 August of 1998, two months after termination of the parties'
16 contract. Respondent was also hired for "Movie Stars" which began
17 shooting in December of 1998.

18 11. Respondent insists any acts performed by petitioner
19 in furtherance of procuring "Brother's Keeper" and "Movie Stars",
20 were conducted outside of the contractual agreement and
21 consequently without authorization. In any event, respondent
22 maintains he was hired solely as a result of his previous working
23 relationship with Axelrod-Widdoes, and LENHOFF should not be
24 entitled to those commissions. Commissions have not been paid for
25 any project to date.

26 12. By the petition and amended claim, petitioner seeks
27 10% commission for all four aforementioned projects.

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CONCLUSIONS OF LAW

The issues are as follows:

A. Is the petitioner entitled to commissions from "Paula Poundstone" and "King of New York", notwithstanding his beleaguered negotiation efforts?

B. Is the petitioner entitled to commissions on "Brother's Keeper" and "Movie Stars", if the execution of the employment contract and the start of production began after termination of the contract?

1. Petitioner is a licensed "talent agency" within the meaning of Labor Code §1700.4(a).

2. Respondent, as a director of photography and a cinematographer, is an "artist" within the meaning of Labor Code §1700.4(b).

3. Labor Code §1700.23 provides that the Labor Commissioner is vested with jurisdiction over "any controversy between the artist and the talent agency relating to the terms of the contract," and the Labor Commissioner's jurisdiction has been held to include the resolution of contract claims brought by artists or agents seeking damages for breach of a talent agency contract. Garson v. Div. Of Labor Law Enforcement (1949) 33 Cal.2d 861, Robinson v. Superior Court (1950) 35 Cal.2d 379. Thus, the Labor Commissioner has jurisdiction to determine this controversy pursuant to Labor Code §1700.44(a).

1 **"Paula Poundstone" and "King of New York"**

2 4. While it is true that LENHOFF did expend time and
3 energy for the benefit of his client, and respondent ultimately
4 performed the services initially negotiated by LENHOFF, the
5 question of whether LENHOFF is entitled to these commissions does
6 not rest solely upon those factors.

7 5. An agency relationship is created for the benefit of
8 the principle and by creating this fiduciary relationship and
9 securing petitioner's expertise, respondent should have been free
10 to concentrate on the creative aspects of the production. At the
11 very least, respondent should have felt confident that petitioner
12 would handle the negotiations in a forthright, albeit, professional
13 manner. The express terms of this contract created a specific
14 duty for the agent to use "reasonable efforts" in creating
15 employment opportunities and negotiating employment contracts on
16 his client's behalf. LENHOFF did not perform his part of the
17 bargain. LENHOFF was given explicit instructions to handle the
18 contract terms delicately. His combative style completely
19 contravened his directive.

20 6. Mr. Hornstock sought respondent's services as a
21 result of a long working history. LENHOFF did not have to
22 manufacture the lead, it came to him. Petitioner was given the
23 simple task of handling, finances, credit, and parking, but most
24 important, delicately. His sole job was to tie up the loose ends.
25 When this did not occur, respondent was left with cleaning up the
26 mess himself, which he did. LENHOFF is not entitled to commissions
27 for "Paula Poundstone" and King of New York" and case law agrees.

1 *Wilck v. Herbert* 78 Cal.App.2d 392, 412 states, "the mere
2 appointment of an exclusive agent to sell certain property does not
3 prevent the owner from making the sale himself without being liable
4 for the agent's commissions. C.J.S. 71; 2 C.J. 777. In Restatement,
5 Agency, page 1058, section 449, comment b, it is said: 'A contract
6 to give an "exclusive agency" to deal with specified property is
7 ordinarily interpreted as not precluding competition by the
8 principle personally but only as precluding him from appointing
9 another agent to accomplish the result.'" *Wilck*, involves an
10 exclusive literary agent attempting to sell his client's product
11 which is clearly analogous. There was no evidence of another
12 agent's involvement in this transaction. The testimony established
13 it was respondent who produced the lead, handled negotiations, and
14 secured the deal himself. Therefore, respondent having conducted
15 all the agent's duties himself, precludes the petitioner from
16 receiving commissions, for which LENHOFF'S only contribution was to
17 create more work for the respondent. It cannot be said that
18 petitioner used "reasonable efforts".

19
20 **"Brother's Keeper" and "Movie Stars"**

21 7. The sole issue is whether petitioner is entitled to
22 commissions for "Brother's Keeper". Petitioner established through
23 documentary evidence he was involved in discussions with the
24 production company and unlike the aforementioned projects,
25 petitioner did not sabotage negotiations. Respondent did perform
26 and monies were earned for this project. Courts have long held,
27 "he who shakes the tree is the one to gather the fruit." *Willison*

1 v. *Turner Resilient Floors*, 89 Cal.App.2d 589 (1949) Respondent
2 argues that it was not until August of 1998 that the execution and
3 production of the project occurred, and consequently petitioner
4 should be precluded from these commissions as termination of the
5 contract expired two months earlier. Section 5 of the General
6 Services Agreement², clearly provides that the petitioner is
7 entitled to collect commissions for any employment entered into by
8 respondent, so long as petitioner commenced negotiations and the
9 employment contract was entered into within four months of
10 termination. The contract was terminated on June 10, 1998, and
11 respondent's employment contract was executed in August 1998. This
12 time period falls within the provision of section 5 and
13 consequently petitioner is entitled to 10% commission for
14 "Brother's Keeper." Petitioner is only entitled to commissions on
15 monies earned by respondent for the initial contract and not for
16 any renewals, extensions or options, as future commissions are
17 subject to petitioner's continued performance of his contractual
18 obligations.

19 8. Petitioner failed to present testimony or other
20 evidence that respondent entered into an agreement for "Movie Stars"
21 within four months of termination, conversely, the evidence
22 established the contract for "Movie Stars" was entered into in
23 December 1998, six months after termination, and therefore

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25 ² "If I enter into an agreement which would have been otherwise covered
26 by this General Services Agreement within four (4) months after termination
27 hereof, . . . , with any person or business entity as to whom a submission has been
made and/or negotiations commenced on my behalf during the term of this Agreement
then in said event any such employment contract entered into shall be deemed to
have been entered into during the term hereof."

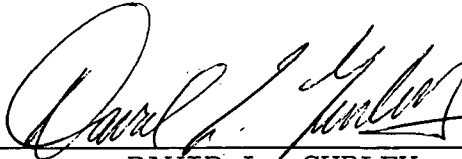
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petitioner is not entitled to commission this project.

ORDER

For the above-stated reasons, IT IS HEREBY ORDERED that: respondent, within thirty days, shall provide an accounting of his earnings for "Brother's Keeper", and pay 10% of these earnings, plus interest at the rate of 10% per year from the dates that the earnings upon which these commissions are based were received by respondent. Petitioner is not entitled to commissions on earnings for "Paula Poundstone"; King of New York"; or "Move Stars".


Dated: 2/17/00



DAVID L. GURLEY
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

Dated: 2/18/00



MARCY SAUNDERS
State Labor Commissioner

