DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California (LB0665)
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BEFORE THE STATE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

SHAWN ANTIONE IVY, p.k.a. "Domino", Petitioner, v. JEROME HOWARD, an individual, Respondent.	Case No. TAC 18-94 DETERMINATION ON PETITION OF SHAWN ANTIONE IVY, p.k.a. "DOMINO"

This proceeding arose under the provisions of the Talent Agencies Act (the "Act"), Labor Code §§ 1700 through 1700.47[1]. On February 7, 1994, petitioner Shawn Antione Ivy, p.k.a. "Domino" ("IVY") filed a petition with the Labor Commissioner pursuant to California Labor Code Section 1700.44 seeking determination of an alleged controversy with respondent Jerome Howard ("HOWARD"). Howard filed an answer, and on June 6, 1994, a full evidentiary hearing was held before Michael S. Villeneuve, attorney for the

[1] Unless otherwise specified, all subsequent statutory references are to the Labor Code.

Labor Commissioner assigned as a hearing officer. Due consideration having been given to the testimony, documentary evidence, briefs, and arguments submitted by the parties, the Labor Commissioner now renders the following decision.

PROCEDURAL AND FACTUAL BACKGROUND

The event which triggered the filing of the instant petition was a lawsuit filed by Respondent Howard to enforce the terms of a "Personal Management Agreement" signed by the parties in February 1992. The court action is stayed pending the resolution of this matter.

By all accounts, the parties met around the beginning of 1992, and, at the behest of Cherie Kirkwood, Howard was persuaded to attempt to use his contacts in the recording industry to obtain a recording contract. It is disputed whether Howard or Kirkwood was to perform those portions of the contract which called for Howard and Kirkwood, as joint managers, to also attempt to obtain personal engagements to advance the career. Kirkwood claims there was no such division of duties. Howard claims that there was a separate oral agreement to that effect. The contract on its face, however, contains at paragraph 9, a clause stating that the written agreement supersedes all other agreements relating to the subject matter of the agreement.

It was also undisputed that Howard did nothing to attempt to obtain personal bookings for Ivy, other than respond to, and later reject, a possible offer from the Montel Williams show to book Ivy to perform on the show in exchange for Howard's appearance on the show to discuss matters related to his knowledge of the Jackson family.

DECISION

1. THE CONTRACT IS ILLEGAL UNDER THE ACT AND IVY IS NOT OBLIGATED TO PAY ADDITIONAL COMMISSIONS OR OTHERWISE PERFORM FURTHER UNDER THE CONTRACT.

Section 1700.5 of the Act provides in pertinent part as follows:

> "No person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner."

Section 1700.4 of the Act defines the terms "talent agency" and "artist" in pertinent part as follows:

> "(a) 'Talent agency' means a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists, ... Talent agencies may, in addition, counsel or direct artists in the development of their professional careers.
>
> "(b) 'Artists' means . . . musical artists, . . . writers . . . composers, . . . and other artists and persons rendering professional services in motion picture, theatrical, radio, television and other entertainment enterprises."

"Since the clear object of the Act is to prevent improper persons from becoming [talent agents] and to regulate such activity for the protection of the public, a contract between an unlicensed [talent agent] and an artist is void." *[Buchwald v. Superior Court 254 Cal.App.2d 347, 351 (1967)]*

Ivy's status as an artist is undisputed. Therefore, the sole question presented is whether Howard contracted in writing to engage in the occupation of a talent agent on behalf of Ivy. The answer is that he did.

Howard argues that since his understanding of his obligations under the contract was limited solely to the procurement of a recording contract, for which an agent need not be licensed, those

provisions of the contract which called for him to perform activities requiring a license are surplusage. Under Civil Code Section 1667, however, contracts that are contrary to express statutes or public policy as set forth in statutes are illegal contracts; the illegality voids the entire contract. Thus, absent a savings clause, the entire contract must fall if it purports to bind the parties to an arrangement expressly forbidden by statute. No savings clause can be found in the contract, express or implied. Nor can such a savings clause be inferred, since the contract by its express terms supersedes all prior contracts, and any oral side agreements would be negated by the Statute of Frauds, since they would relate to the two-year period of the written contract, and thus could not be performed within one year.

Howard further argues that he is not required to have a license since he was not engaged in the occupation of a talent agent. But that is what he expressly promised in writing to do. The true contractual and business relationship between Howard and Ivy was defined at the outset by the agreement drafted by Howard. It is elemental that ambiguities in contracts are construed against the person who drafted them. But in this case, there was no ambiguity. Howard expressly warranted that he would undertake on a professional basis the duties of a talent agent with respect to matters not subject to the recording industry exclusion of the Labor Code. It was this contractually promised behavior which constituted the prototype of what was being offered to Ivy when he was presented with a contract by Howard in February 17, 1992.

Howard nevertheless contends that, under the recent decision of *Wachs v. Curry, 13 Cal.App. 4th 616 (1993)*, Howard was still not a "talent

agent" within the meaning of section 1700.4. In particular, Howard asserts that Ivy failed to demonstrate that Howard's procurement functions constituted a "significant part" of his business as a whole. (Id. at 628) In this regard, Howard is mistaken

As we have explained in precedent decision Thomas Church v. Ross Brown, TAC 52-92, adopted June 2, 1994, the holding in *Wachs v. Curry* sets forth when licensure as a talent agent is required under the Act:

> "We conclude from the Act's obvious purpose to protect artists seeking employment and from its legislative history, the "occupation" of procuring employment was intended to be determined according to a standard that measures the significance of the agent's employment procurement function compared to the agent's counseling function taken as a whole. If the agent's employment procurement function constitutes a significant part of the agent's business as a whole then he or she is subject to the licensing requirement of the Act even if, with respect to a particular client, procurement of employment was only an incidental part of the agent's overall duties. On the other hand, if counseling and directing the clients' careers constitutes the significant part of the agent's business then he or she is not subject to the licensing requirement of the Act, even if, with respect to a particular client, counseling and directing the client's career was only an incidental part of the agent's overall duties. *(Wachs v. Curry, supra, 13 Cal.App.4th at 628)*"

The governing principles are clear. The Wachs court intended to distinguish between the personal manager who, while operating in good faith, inadvertently steps over the line in a particular situation and engages in conduct which might be classified as procurement. It clearly was not the court's intention to encourage individuals to engage in activities which the Legislature has determined require a license.

It is clear from a reading of the decision in Wachs that the court intended that in determining whether the Act requires a

talent agency license, only the person's employment procurement functions on behalf of talent compared to his talent counseling functions are to be taken into account in establishing the person's business for purposes of determining the significance of the procurement activity. Other activities in which the person may engage, even those related to investment counseling, motion picture distribution, or being a casting director, are not considered or counted as part of the person's "business as a whole" in making the assessment. Were this not true even non-related occupations such as operating a fast food outlet could be counted. Such a result would encourage individuals to dabble in procuring employment for artists as a sideline without the need for licensure and would hardly be in keeping with "the Act's obvious purpose to protect artists seeking employment." *Wachs v. Curry, supra,* at 628.

The Wachs court declined to quantify the term "significant", finding that it was not necessary in that case. Since the term "significant" does not appear in the statute, adoption of regulations designed to quantify the term would be impossible. Mindful, however, of the teachings of the California Supreme Court in the case of *Auto Equity Sales, Inc. v. Superior Court* 57 Cal.2d 450, 455 (1962), the Labor Commissioner recognizes that as an inferior tribunal, her hearing officers are required to follow decisions of courts exercising superior jurisdiction. The Labor Commissioner, in exercising her mandated primary jurisdiction in these cases on a day-to-day basis, finds that it is imperative that definition be given to the term "significant" if that term is to be applied in determining the need for licensing.

The word "significant" is defined in American Heritage

Dictionary, as follows: "Having or expressing a meaning; meaningful." This definition, coupled with the obvious purpose of the Wachs court, seems to imply that conduct which constitutes an important part of the relationship would be significant. The Commissioner finds that procurement of employment constitutes a "significant" portion of the activities of an agent if the procurement is not due to inadvertence or mistake and if the activities of procurement have some importance and are not simply a *de minimis* aspect of the overall relationship between the parties when compared with the agent's counseling functions on behalf of the artist. This meaning would seem to be in line with the tenor of the court's decision in *Wachs v. Curry.*

In the context of the foregoing principles, a petitioner who asserts a licensing violation under the Act satisfies his burden if he establishes that the petitioner was involved in a contractual relationship with the respondent and that relationship was permeated and pervaded by employment procurement activities undertaken by the respondent. Such a showing supports an inference that these activities were a significant part of the respondent's business as a whole, and suffices to establish a *prima facie* case of violation of the Act. At that point, the burden shifts to the respondent to come forward with sufficient evidence to sustain a finding that the procurement functions were not a significant part of the respondent's "business as a whole" as that term is defined above.

In the present case, Ivy clearly demonstrated that the contract with Howard was permeated and pervaded by promises to procure personal appearances and like activities not connected with

procurement of recording contracts. The contract which requires Howard to procure personal appearances speaks for itself. Such activity requires one to be licensed in the State of California. The argument that simply because there has been no such procurement there is no violation of the licensing statute defies logic.

Since the contract was illegal it was void. As the California Supreme Court stated in *Buchwald, supra*, "to regulate such activity for the protection of the public, a contract between an unlicensed [talent agent] and an artist is void." It is not simply the illegal terms which are void, the whole of the contract is void. Howard is precluded from obtaining any further recovery of any kind under the contract.

DISPOSITION

Accordingly, it is hereby ordered as follows:

The contract between Howard and Ivy is declared to be illegal, void, and unenforceable, and it is declared that Ivy shall have no further obligation to Howard under the contract for commissions or otherwise.

DATED: Oct. 27, 1994

Michael S. Villeneuve

MICHAEL S. VILLENEUVE
Attorney and Special Hearing Officer for the Labor Commissioner

The above Determination is adopted in its entirety by the Labor Commissioner.

DATED: 11/7/94

Victoria L. Bradshaw

VICTORIA L. BRADSHAW
State Labor Commissioner