

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

10 KELLY GARNER,) No. TAC 65-94
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Petitioner,)
vs.)
GILLAROOS, DAVID DELORENZO,)
DAVID GILLAROOS, CHRIS WOODS,)
Respondents.)

16 The above-captioned petition to determine controversy, filed
17 pursuant to Labor Code §1700.44 on September 21, 1994, alleges
18 that respondents acted as talent agents by procuring modeling
19 employment for petitioner in Australia; that respondents
20 misrepresented the conditions under which petitioner was
21 employed; that petitioner was subjected to unsafe conditions and
22 sexually harassed; and that petitioner was not properly
23 compensated for the work that she performed. On November 17,
24 1995, respondents GILLA ROOS WEST LTD. (a California corporation,
25 erroneously named as GILLAROOS), DAVID ROOS (an individual,
26 erroneously named as DAVID GILLAROOS), and DAVID DELORENZO filed
27 a motion to dismiss the petition to determine controversy on the
28 ground that petitioner failed to effect service of the petition

1 within one year of its filing as required by Title 8, California
2 Code of Regulations section 12024.1, which provides, in relevant
3 part:

4 "No petition to determine controversy
5 heretofore or hereafter commenced shall be
6 further prosecuted, and no further
7 proceedings shall be had herein, and all
8 petitions to determine controversies
9 heretofore or hereafter commenced must be
10 dismissed by the Labor Commissioner on his
11 own motion, or on the motion of any party
12 interested herein, whether named in the
13 petition as a party or not, unless petition
14 be served and return thereon made within one
15 year after the filing of said petition. . . .
16 provided that no dismissal shall be had under
17 this section as to any respondent because of
18 the failure to serve the petition on him
19 during his absence from the State. . . ."

20 There is no dispute that service of the petition was not
21 effected until October 30, 1995 - - more than one year after the
22 petition had been filed - - with personal service on DAVID
23 DELORENZO, individually and as an agent of GILLAROOS, at the
24 Beverly Hills, California, office of GILLA ROOS WEST LTD., a
25 California corporation. To date, neither CHRIS WOODS¹ nor DAVID

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27 ¹ The whereabouts of CHRIS WOODS have been unknown at all times since the
28 filing of the petition. He is not included among the moving parties in
the instant motion to dismiss.

1 ROOS have been served. Nonetheless, in her opposition to the
2 motion to dismiss, petitioner argues that dismissal is improper
3 under Title 8, Code of Regulations section 12024.1, because both
4 DAVID ROOS and an entity named GILLAROOS LTD., a New York
5 corporation doing business as GILLAROOS, are citizens of New York
6 State who have been absent from California since the filing of
7 the petition.

8 A hearing on the motion to dismiss was held on February 29,
9 1996 in Los Angeles, California, before the undersigned attorney
10 specially designated by the Labor Commissioner to hear this
11 matter. Petitioner KELLY GARNER did not attend the hearing
12 herself but was represented by her attorney, Martin Louis
13 Stanley. Respondents GILLA ROOS WEST LTD., a California
14 corporation (erroneously named as GILLAROOS), DAVID ROOS (an
15 individual erroneously named as DAVID GILLAROOS), and DAVID
16 DELORENZO were represented by attorney Robert Heller. Although
17 the notice of hearing had stated that "the parties should be
18 prepared to present evidence relevant to the determination of
19 [the motion]", neither side introduced any evidence (i.e.,
20 declarations or the testimony of witnesses) at the hearing, but
21 rather, merely presented legal argument.

22 Contending that dismissal is improper as to all respondents,
23 petitioner argues that GILLAROOS' "concealment" of its true
24 corporate identity made it "impossible, impracticable or futile
25 to serve it within the one year period" and thus, under Code of
26 Civil Procedure section 583.240(d), the period for effecting
27 service must be extended. Petitioner further contends that these
28 factors "establish that petitioner was not amenable to service"

1 within the meaning of CCP §583.240(a).

2 Initially, we note that petitioner has presented no evidence
3 whatsoever of any facts that would support these assertions.

4 Secondly, assuming that the provisions of Code of Civil Procedure
5 §583.240 apply to the service of petitions filed pursuant to the
6 Talent Agencies Act², our reading of section 583.240, and
7 controlling case law, makes it plain that respondents are not
8 entitled to any extension of time under that statute. Under
9 section 583.240(a), the time for serving a civil action shall be
10 extended if the defendant "was not amenable to the process of the
11 court". In Watts v. Crawford (1995) 10 Cal.4th 743, the
12 California Supreme Court held that a defendant is "amenable to
13 process of the court" as long as that defendant is subject to the
14 court's jurisdiction, that is, as long as there is personal
15 jurisdiction and some method whereby, with the exercise of
16 reasonable diligence, that defendant could be served.

17 Surely, petitioner does not contend that any of the
18 respondents named herein are not subject to personal
19 jurisdiction. And since the Title 8, Cal. Code of Regs. §12024
20 expressly allows for any method of service permitted under the
21 Code of Civil Procedure, petitioner can scarcely contend that
22 service could not have been effected with the exercise of
23 reasonable diligence. As for petitioner's argument that tolling
24 is required under CCP §583.240(d), we note that the statute

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26 ² Title 8, Cal. Code of Regs. section 12024 provides that "service of
27 the petition shall be made in the manner prescribed by the Code of
28 Civil Procedure for service of summons in a civil action". There
are no provisions in the Talent Agencies Act or the regulations
adopted under the Act that expressly make CCP §583.240 applicable to
these proceedings.

1 requires tolling if service was "impossible, impracticable or
2 futile due to causes beyond plaintiff's control", and that
3 "[f]ailure to discover relevant facts or evidence is not a cause
4 beyond plaintiff's control for the purpose of this subdivision".
5 Petitioner has failed to make any showing that there were any
6 "causes beyond [her] control", within the meaning of section
7 583.240(d), that prevented her from effecting service within one
8 year of the filing of the petition.

9 Turning first to the in-state respondents, we are unable to
10 perceive any reason why petitioner, with the exercise of
11 reasonable diligence, should not have been able to serve DAVID
12 DELORENZO and GILLA ROOS WEST LTD., within one year of the filing
13 of the petition. Petitioner did absolutely nothing during this
14 one-year period to even attempt service on these California
15 resident respondents. That fact alone establishes a lack of
16 reasonable diligence. It is undisputed that petitioner was
17 always aware of the Beverly Hills business address for DELORENZO
18 and GILLAROOS. There is no excuse for petitioner's failure to
19 have served these parties within one year of the filing of her
20 petition. Consequently, dismissal is proper as to in-state
21 respondents DAVID DELORENZO and GILLA ROOS WEST LTD.

22 Turning to the out-of-state respondents, there is no dispute
23 that both GILLAROOS LTD., a New York corporation doing business
24 as GILLAROOS, and DAVID ROOS, an individual, have been residents
25 of New York State at all times relevant herein. But a party's
26 out-of-state residence does not, in itself, make service
27 "impossible, impracticable or futile", nor, as discussed above,
28 does it mean that the party was "not amenable to service". We

1 cannot perceive why, with the exercise of reasonable diligence,
2 petitioner could not have timely effected service on these out-
3 of-state respondents. Petitioner argues, however, that under
4 Title 8, Cal. Code of Regs. §12024.1, the one-year period for
5 serving a petition is tolled as to any respondent while that
6 respondent is absent from the state. The application of this
7 tolling provision would mean that no dismissal could be had as to
8 these out-of-state respondents.

9 Respondents argue that the regulation's tolling provision
10 violates the Commerce Clause of the United States Constitution by
11 requiring non-residents engaged in interstate commerce to choose
12 between being present in California for a one-year period
13 following the filing of the petition or forfeiting the defense of
14 failure to timely serve the petition and thus remaining subject
15 to proceedings under Labor Code section 1700.44 in perpetuity.
16 In support of this contention, respondents point to Abramson v.
17 Brownstein (9th Cir. 1990) 897 F.2d 389, a case dealing with an
18 analogous tolling provision contained in Cal. Code of Civil
19 Procedure §351.³ In Abramson, the Ninth Circuit, relying on
20 Bendix Autolite Corp. v. Midwesco Enterprises (1988) 486 U.S.
21 888, held that CCP §351, when applied to a non-resident
22 individual engaged in interstate commerce, violates the Commerce
23 Clause of the U.S. Constitution by posing an impermissible burden
24 on interstate commerce.

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26 ³ CCP §351 provides: "If, when the cause of action accrues against a
27 person, he is out of the State, the action may be commenced within the
28 term herein limited, after his return to the State, and if, after the
cause of action accrues, he departs from the State, the time of his
absence is not part of the time limited for the commencement of the
action."

1 Subsequent California decisions have held that the tolling
2 provisions of CCP §351 are not unconstitutional per se, while
3 acknowledging that their application to a non-resident engaged in
4 interstate commerce may violate the commerce clause. See Mounts
5 v. Uyeda (1991) 227 Cal.App.3d 111 [tolling provisions applied to
6 extend time for filing action against resident defendant not
7 engaged in interstate commerce, based on his absence from the
8 state for a short time during limitations period], Pratali v.
9 Gates (1992)4 Cal.App.4th 632 [tolling provisions applied;
10 defendant not engaged in commerce]. These state cases involving
11 defendants not engaged in interstate commerce are distinguishable
12 from Abramson and Bendix, where "state tolling statutes ran afoul
13 of the commerce clause because the defendants were non-residents
14 who caused the breach and/or injury in conjunction with their
15 involvement in interstate commerce with local residents". Mounts
16 v. Uyeda, supra, at p. 122. The reasoning behind these state
17 cases leaves little doubt that Abramson is controlling and that a
18 state court would rule that the tolling provisions of CCP §351,
19 or Title 8, Cal. Code of Regs. §12024.1, cannot be applied to a
20 non-resident engaged in interstate commerce.


21 Petitioner does not contest that GILLAROOS LTD. and DAVID
22 ROOS have been engaged in interstate commerce. Indeed,
23 petitioner's claims against these respondents arise precisely
24 because of their alleged involvement in interstate commerce.
25 Consequently, the tolling provisions of Title 8, Cal. Code of
26 Regs. §12024.1, cannot be applied to extend the time for serving
27 these out-of-state respondents, and the petition must be
28 dismissed as to GILLAROOS LTD. and DAVID ROOS.

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ORDER

For the above reasons, IT IS HEREBY ORDERED that the above-captioned petition is DISMISSED as to respondents GILLA ROOS WEST LTD., a California corporation doing business as GILLAROOS; GILLA ROOS LTD., a New York corporation doing business as GILLAROOS; DAVID DELORENZO, and DAVID ROOS.

DATED: 5/28/96



MILES E. LOCKER
Attorney for the Labor Commissioner

