DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California
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BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

DWIGHT BRYAN and JENNIFER BRYAN, individually, jointly and as the parents and guardians ad litem of ZACHERY TY BRYAN; ZACHERY TY BRYAN, Petitioners, vs. LAX CORPORATION, a California Corporation , Respondents.	Case No. TAC 22-99 DETERMINATION OF CONTROVERSY

INTRODUCTION

The above-captioned petition was filed on June 10, 1999, by DWIGHT BRYAN and JENNIFER BRYAN as guardians ad litem of ZACHERY TY BRYAN (hereinafter Petitioner or "ZACH"), alleging that the LAX CORPORATION, (hereinafter Respondent or "LAXES"), acted as a talent agency without possessing the required California talent agency license pursuant to Labor Code §1700.5[1]. Petitioner seeks a determination voiding *ab initio* the management agreement between

[1] All statutory citations will refer to the California Labor Code unless otherwise specified.

the parties, and requests disgorgement of all commissions paid to the respondent.

Respondent filed his answer on April 24, 2000, asserting various affirmative defenses including, unclean hands, waiver, estoppel, and the petition was untimely filed and barred by the statute of limitation set out at Labor Code §1700.44(c). A hearing was scheduled before the undersigned attorney, specially designated by the Labor Commissioner to hear this matter. The hearing commenced on December 12 through December 19, 2000, in Los Angeles, California. Petitioner was represented by Donald S. Engel and William Archer of Engel & Engel; respondent appeared through his attorneys, Gregory E. Stone and Richard A Phillips of Stone, Rosenblatt & Cha. Due consideration having been given to the testimony, documentary evidence, arguments and briefs presented, the Labor Commissioner adopts the following Determination of Controversy.

FINDINGS OF FACT

1. In 1991, Zachery Ty Bryan found early success, cast as the eldest son on the wildly popular situation comedy "Home Improvement." Zach's parents were new to Los Angeles and unsophisticated in the entertainment industry, so they hired Judy Savage as Zach's first talent agent. And it was Ms. Savage who negotiated Zach's first contract for "Home Improvement".

2. While attending an entertainment industry party in 1992, the respondents first introduced themselves to the petitioners and expressed an interest in representing Zach.

According to Zach's father Dwight, the respondents stated that while developing Zach and guiding his career, they could also do anything a talent agent could do except close deals. The parties developed a relationship and on November 19, 1992, they entered into a management agreement where the respondents would manage Zach's entertainment career and be compensated by 15% of Zach's gross earnings.[2]

3. After several months of representation, Zach's parents terminated the contract with their existing talent agent. And between 1993 and 1996 the Laxes, and the Bryans, along with attorney Dennis Arti, acted as Zach's representatives for all purposes relating to the entertainment industry. It is predominately during this time period that petitioners allege respondents acted as an unlicenced talent agency.

4. In July of 1993, during the renegotiation of "Home Improvement's" third season, the respondents aided the Bryans by communicating the desired terms and conditions of employment to Disney representative Scottye Hedstrom. Negotiations became exacerbated and executive producer Tim Allen, along with petitioner's attorney Dennis Arti, assisted in negotiations. Arti then oversaw the legalities and finalized the deal.

5. Throughout the relationship, the Laxes admitted sending Zach's resumes to various production companies in attempts to obtain employment, but in defense testified it was done only at the request of the Bryans. The Laxes argued that the Bryans acted so pervasively in the development of their son, by choosing roles,

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[2] Earnings in connection with "Home Improvement" were calculated separately and with a different pay structure.

requesting solicitation for specific jobs, and seeking terms and conditions of employment, that by conducting themselves in this fashion the Bryans acted ostensibly as their son's talent agents. Consequently, the Laxes argued they were simply conduits of information to production companies and should be shielded from liability pursuant to §1700.44(d)[3].

6. The Laxes steadfastly maintained that they did not solicit engagements themselves. The evidence reflected in late 1993, the Laxes sent form letters to various advertisers of the 1994 World Cup, including Coca Cola and others, seeking a position for Zach as an advertiser's spokesperson. Mrs. Lax also sent a solicitation letter to Steve Leland seeking Zach's participation in the "Tournament of Roses Parade". When confronted with these documents, the respondents unconvincingly argued each solicitation was performed at the request of the Bryans and again suggested that as long as the Bryans requested the Laxes to perform these functions, the Laxes should be cloaked in protection.

7. The evidence established that the Laxes did more than solicit employment at the request of the Bryans. They negotiated terms and conditions of employment contracts. In February of 1993, the Laxes negotiated the terms and conditions of employment for Zach with a French production company, Marathon Productions, who filmed "A Week in the Life of a Young Television Star". The documentary evidence revealed that Mr. Lax made various

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[3] Labor Code §1700.44(d) states, "it is not unlawful for a person or corporation which is not licensed pursuant to this chapter to act in conjunction with and at the request of a licensed talent agency in the negotiation of an employment contract."

"demands" to the production company, including compensation, and revenue on U.S. exhibition of the film. And according to a fax from Mr. Lax to the Bryans, "they [Marathon Films] have now agreed to all my demands." Moreover, there was no talent agent or attorney involved in this deal. Again, respondents unconvincingly argued that any material terms sought and received, were not negotiations on their part, but instead requests by the Bryans. This testimony was not credible. The Laxes were sophisticated negotiators with decades of experience, while the Bryans were initially naive relying heavily on there chosen representatives.

8. Throughout 1994 and 1995, Zach participated as a celebrity guest at various car shows. The evidence disclosed that as his celebrity rose, his compensation exponentially increased and those increases in remuneration were at the request of Mrs. Lax. And similarly, in all rudimentary negotiations, i.e., mall appearances, it was the Laxes who negotiated Zach's appearance fees while no attorney or other licensed representatives were involved. The Laxes could not provide any documents or credible testimony which could refute petitioner's declarations, testimony and scores of documents referencing respondent's solicitation and negotiation efforts. When asked to explain these apparent contradictions between their testimony and petitioner's documents, the respondent again replied that all solicitations or negotiations were done only at the request of the Bryans; or alternatively, they just could not remember the document and had no explanation. On the other hand, when respondents were requested to authenticate supporting documents from the same time period during the presentation of their case in chief, their memory had regained full capacity.

Credibility was an issue.

9. Mrs. Lax vigorously argued that the Bryans transactional attorney, Dennis Arti, assisted by closing the deals and conducting all of the necessary legal work for "most of the deals for Zach". Mrs. Lax relied on this position to seemingly indemnify the corporation. It's respondent's position that if they assisted in procuring engagements in conjunction with a licensed attorney, those negotiations would be exempt from liability pursuant to the exemption found Labor Code §1700.44(d). Assuming, arguendo, that this was a legitimate defense, which it is not, the testimony was contradicted by mounds of evidence revealing scores of employment engagements with no Arti involvement.

10. But Dennis Arti was involved in several settings. In June of 1994 the evidence reflected that Mrs. Lax conducted most of the deal points for a film entitled "MAGIC ISLAND". But it was Dennis Arti who would oversee and finalize the agreement between Zach and Magic Island's production company Milenia Films. This is an example of several employment engagements, including the renegotiation of the "Home Improvement" contract, that required legal expertise from an experienced transactional attorney. During complex negotiations, Dennis Arti was routinely called upon.

11. Finally, respondents argued that because Zach was such a high profile actor, offers were abundant and solicitations therefore were not necessary. In fact, as argued, procurement was rarely necessary. Respondents argued, if the job came directly to Zach's management team they would field the offer. If it was a scale deal they would relay that information to Zach's parents and accept the offer if instructed. In the rare instance when

negotiation and/or procurement was necessary by the respondents, it was always done at the request and in conjunction with the Bryan's attorney, Dennis Arti. Again, this testimony was not supported by the evidence. In contrast, petitioners submitted damaging evidence, (see petitioner's exhibit No. 58[4]), which reflected solicitations, receipt of offers and negotiations of compensation by Mrs. Lax without Arti's or any other licensed agent's knowledge.

12. In 1996, the Bryans hired Sonjia Brandon as Zach's commercial agent and Jeff Morrone from Innovative Artists as Zach's primary film and television agent. On September 30, 1996 the Bryans terminated the relationship. And on or around February 16, 1999, the respondents filed a breach of contract lawsuit against petitioner in the Los Angeles County Superior Court Case No. BC205402, seeking commissions under the agreement. That action was stayed pending this determination of controversy.

CONCLUSIONS OF LAW

1. Petitioner is an "artist" within the meaning of Labor Code §1700.4(b). The Labor Commissioner has jurisdiction to determine this controversy pursuant to Labor Code §1700.44(a)

2. The issues are as follows:

a) Can petitioners plead violations of the Talent Agencies Act as to conduct prior to June 1998, or are those

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[4] Petitioner's exhibit No. 58 is a June 6, 1994 facsimile from Mrs. Lax to the Bryans setting forth current pending projects for Zach, including: "The movie 'Aliens for Breakfast' still have an interest in Zach, but I don't have an offer yet. I gave them tape last week"; and "I have him up for 'Burkes Law'-I gave them tape...it would probably be for three days at $10,000."

violations barred by the one-year statute of limitations at Labor Code §1700.44(c)[5].

b) Does the Waisbren or Wachs standard apply to alleged violations that occurred between these rulings?

c) Can a minor artist's parents who request the manager to negotiate and/or solicit, be construed as a talent agent, thus shielding a manager from liability under §1700.44(d).

d) Can a licenced attorney not separately licensed as a talent agent, stand in place of the agent and satisfy the exemption found under Labor Code §1700.44(d)

(a) Statute of Limitations

3. Labor Code §1700.44(c) provides that "no action or proceeding shall be brought pursuant to [the Talent Agencies Act] with respect to any violation which is alleged to have occurred more than one year prior to the commencement of this action or proceeding." Respondent argues that the petition was filed in June of 1999 and consequently, the petitioner's may only allege violations that occurred after June of 1998, and not as petitioner alleges in this petition, between 1993 and 1996.

4. The petitioner raises the issue of respondent's unlicensed status purely as a defense to the proceedings brought by respondent's action against the petitioner filed in superior court. A statute of limitations is procedural, that is it only affects the remedy, not the substantive right or obligation. It

[5] §1700.44(c) provides that "no action or proceeding shall be brought pursuant to [the Talent Agencies Act] with respect to any violation which is alleged to have occurred more than one year prior to the commencement of this action or proceeding.

runs only against causes of action and defenses seeking affirmative relief, and not against any other defenses to an action. The statute of limitations does not bar the defense of illegality of a contract, and in any action or proceeding where the plaintiff is seeking to enforce the terms of an illegal contract, the other party may allege and prove illegality as a defense without regard to whether the statute of limitations for bringing an action or proceeding has already expired. Sevano v. Artistic Production, Inc., (1997)TAC No. 8-93 pg.11. The Bryans brought this action in precisely that fashion. What other choice did the Bryans have? The Labor Commissioner has primary and exclusive jurisdiction in controversies arising between artists and agents. In short, the Bryan's are literally left with no alternative but to file this petition before the Labor Commissioner in defense of the superior court action.

5. Additionally, this issue was brought before the California Court of Appeals in Park v. Deftones 84 Cal.Rptr.2d 616, at 618, which agreed with the Labor Commissioners ruling in Moreno v. Park (1998) TAC No. 9-97, p.4, stating, "the attempt to collect commissions allegedly due under the agreement was itself a violation of the Act." Consequently, Parks held any petition filed within one year of the filing of the superior court is within the statute of limitations. In that case, as here, the petitioner has brought this case before the Labor Commissioner as a result of respondents superior court action filed in February of 1999. Therefore, following Park, the petitioner has through February 2000 to file his petitioner with the Labor Commissioner. The petition was filed in June of 1999 and thus timely. Park

adds, "it also assures that the party who has engaged in illegal activity may not avoid its consequences through the timing of his own collection action." Park, supra at 618. Respondent's argue Park should not be applied retroactively. We disagree in that the Labor Commissioner has always held that a petition may be filed to defend an action brought by a manager attempting to enforce an illegal contract. And the application of the Park decision does not deviate from this historical enforcement position. We conclude under either theory, §1700.44(c) does not bar petitioner from asserting the defense of illegality of the contract on the ground that respondent acted as an unlicensed talent agent. To hold otherwise, as described in Park, would allow a party to avoid its illegal activity through the timing of its own collection activity and thereby provide an unlicensed agent a disturbing means to avoid the requirements of the Talent Agencies Act.

(b) Waisbren or Wachs

6. The primary issue in this case is whether based on the evidence presented at this hearing, did the respondent operate as a "talent agency" within the meaning of Labor Code §1700.4(a). Labor Code §1700.4(a) defines "talent agency" as, "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."

7. In Waisbren v. Peppercorn Production, Inc (1995) 41 Cal.App.4th 246, the court held that any single act of procuring employment subjects the agent to the Talent Agencies

Act's licensing requirement, thereby upholding the Labor Commissioner's long standing interpretation that a license is required for any procurement activities, no matter how incidental such activities are to the agent's business as a whole. Applying Waisbren, it is clear respondent acted in the capacity of a talent agency within the meaning of Labor Code §1700.4(a).

8. Respondent's argue that the earlier holding in Wachs v. Curry (1993) 13 Cal.App4th 616, 628 should control. The Wachs court reasoned, "[T]he occupation of procuring employment was intended to be determined 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."

9. Many of the alleged violations occurred prior to the Waisbren ruling and after Wachs. Still, the Waisbren decision is well reasoned and persuasive on the issue of whether a license is required for incidental or occasional procurement activities. Its analysis of the dicta in Wachs leaves little doubt that the contrary views expressed by the [Wachs] court are in basic conflict with the Act's remedial purpose and legislative history. In cases where this question is presented, the Labor Commissioner will follow the holding of the Waisbren decision; the "significance" of the putative agents procurement function is not relevant to a determination of whether a license is required. Sevano supra., pg 19. Moreover, even had the Wachs view

controlled, the respondent's procurement activities were such a significant part of the managers business as a whole that licensure would be required.

(c) Can a Minor Artist's Parents be Construed a Talent Agent, if Negotiations by the Manager are Done at the Request of the Artist's Parents?

10. Conceivably, the parents may be considered an agent if they procured employment without a license and the minor artist files a petition to have a contract between the artist and the parents voided. Otherwise, this argument is red herring. Clearly, those facts are not at issue here. The Bryans were involved with Zach's career and undoubtedly made many requests to the Laxes. They desired to be in an integral position throughout the pursuit of Zach's success. That parental enthusiasm will not shield respondents from liability. It was the Laxes who solicited, and negotiated entertainment engagements and it was their responsibility to obtain a talent agency license or refrain from talent agency activities. To hold that any parent who makes suggestions to a minor artist's manager about jobs, and accordingly the manager follows that instruction, will somehow shield that artist's manager from liability would be an arbitrary, enforcement interpretation that would contravene the remedial purpose of the Act, which is to protect artists by punishing unlicensed players engaging with impunity in talent agency activity.

11. Additionally, the rule is well established in

this state that ... when the Legislature enacts a statute forbidding certain conduct for the purpose of protecting one class of persons from the activities of another, a member of the protected class may maintain an action notwithstanding the fact that he has shared in the illegal transaction. The protective purpose of the legislation is realized by allowing the plaintiff to maintain his action against a defendant within the class primarily to be deterred. In this situation it is said that the plaintiff is not in pari delicto.' Lewis & Queen v. N. M. Ball Sons, 48 Cal.2d 141, 308 P.2d 713, 720. Therefore, irrespective of the fact that the Bryans requested and/or even encouraged the Laxes to find work for Zach, these actions by the Bryans will not alter the Laxes' legal responsibilities under the Act and will not absolve the respondents of their illegalities.

(d) Can an Unlicensed Artist's Representative Utilize an Attorney in Place of a Licenced Talent Agency in the Application of Labor Code §1700.44(d)

12. Labor Code §1700.44(d) states, "it is not unlawful for a person or corporation which is not licensed pursuant to this chapter to act in conjunction with and at the request of a licensed talent agency in the negotiation of an employment contract."

13. The express language of the exemption provides that a "licensed talent agency" may invoke the exemption. An attorney is not specified in 1700.44(d), or anywhere else within

the Act that could be construed to extend the exemption to licensed attorneys.

14. In construing a statute, court[s] must consider consequences that might flow from particular construction and should construe the statute so as to promote rather than defeat the statute's purpose and policy. Escobedo v. Estate of Snider (1997) 60 Cal.Rptr.2d 722, 14 Cal.4th 1214, 930 P.2d 979. As discussed, the purpose of the statute is to protect artists from unscrupulous representatives. The Act provides a comprehensive licensing scheme that allows the Labor Commissioner to regulate agent activity through, *inter alia*, the approval of all contracts and commission structures. Expanding the exemption invites unregulated conduct that runs counter to the Act's remedial purpose.

15. In addition, an exception contained in a statute to the general rule laid down therein must be strictly construed. Thorpe v. Long Beach Community College Dist. (App. 2 Dist. 2000) 99 Cal.Rptr.2d 897, 83 Cal.App.4th 655. Consequently, the Labor Commissioner may not add words to a statute, particularly an exception to the general rule, that would essentially change the meaning of the statute. There may be considerable opposition that could argue an attorney's license involves far greater protections for an artist/client than a talent agency license. However, we cannot rewrite the statute. That is for the legislature. To hold otherwise would be counter to the remedial purpose of the Act and provide unregulated mangers the ability to avoid the Act's liability through a means possibly not contemplated by the drafter.

16. The application of 1700.44(d) has historically been construed very narrowly. All elements of the statute must be independently met. The exemption is not satisfied when a licensed talent agent magically appears to finalize a deal. The manager is only relieved of liability when he/she "negotiates an employment contract", not solicits one. And that negotiation must be "at the request of" and "in conjunction with" a licensed talent agent. Here, the burden of proof is on the respondent when invoking 1700.44(d). Even if Dennis Arti was a licensed talent agent, which he is not, the Laxes solicited engagements for Zach, which in and of itself loses the exemption. And these solicitations were not done at the request of Dennis Arti. Similarly, respondent's argument that the Bryans acted as their own talent agent and that respondents acted only as a conduit of information is nonsensical.

17. Labor Code 1700.5 requires a talent agent to procure a license from the Labor Commissioner. 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 artists' manager and an artist is void. Buchwald v. Superior Court, supra, 254 Cal.App.2d 347.

ORDER

For the above-stated reasons, IT IS HEREBY ORDERED that the 1992 agreement and all subsequent agreements between respondent LAX CORPORATION and petitioner DWIGHT BRYAN and JENNIFER BRYAN individually, jointly and as the parents and guardians ad litem of ZACHERY TY BRYAN is unlawful and void *ab*

initio. Respondent has no enforceable rights under these contracts.

Having made no showing that the respondent collected commissions within the one-year statute of limitations prescribed by Labor Code §1700.44(c), petitioner is not entitled to recoup commissions.

Dated: April 26, 2001

DAVID L. GURLEY
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

Dated: 4/26/01

TOM GROGAN
Deputy Chief