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7
8 BEFORE THE LABOR COMMISSIONER

9 STATE OF CALIFORNIA

10
11 LINDSEY HIGGINBOTHAM,) No. TAC 4-03

12)
Petitioner,)

13 vs.)

14 CMT TALENT AGENCY, COLOURS MODEL &) DETERMINATION OF
TALENT MANAGEMENT AGENCY, ALBERTA) CONTROVERSY

15 SELLERS, BYRON GARRETT, PHILIP JOHNSON,)

16)
Respondents.)
17

18 The above-captioned matter, a petition to determine
19 controversy under Labor Code §1700.44, came on regularly for
20 hearing on June 18, 2003, in Los Angeles, California, before the
21 Labor Commissioner's undersigned hearing officer. Petitioner was
22 represented by attorney J. Michael Higginbotham; respondents
23 failed to appear. Based on the evidence presented at this
24 hearing and on the other papers on file in this matter, the Labor
25 Commissioner hereby adopts the following decision.

26 FINDINGS OF FACT

27 1. CMT TALENT AGENCY (hereinafter "CMT") was most recently
28 licensed as a talent agency by the State Labor Commissioner from

1 July 25, 2001 to July 24, 2002. It was licensed as a
2 partnership, owned by ALBERTA SELLERS and BYRON GARRETT, with a
3 business address at 8344 ½ W. 3rd Street, Los Angeles,
4 California.

5 2. COLOURS MODEL & TALENT MANAGEMENT AGENCY, INC.,
6 (hereinafter "COLOURS") was most recently licensed by the Labor
7 Commissioner as a talent agency from June 9, 2000 to March 26,
8 2001. It was licensed as a corporation, and ALBERTA SELLERS and
9 BYRON GARRETT were listed on the license application form as
10 corporate officers, with a business address at 8344 ½ W. 3rd
11 Street, Los Angeles, California.

12 3. In January 2001, petitioner LINDSEY HIGGINBOTHAM
13 executed a written contract with COLOURS under which she engaged
14 the services of COLOURS as a talent agency for a period of one
15 year. On April 5, 2002, she executed a "General Contract and
16 Representation Agreement" with CMT, under which she engaged the
17 services of CMT as a talent agency for a period of one year, to
18 negotiate contracts for the petitioner in the rendition of
19 professional services as a model and in all other fields in the
20 entertainment industry, for which CMT would be entitled to
21 commissions.

22 4. In mid-2002, petitioner noticed that anticipated checks
23 from CMT for residual payments for her acting services in a
24 Wrigley television commercial were not arriving as expected. The
25 commercial was shot in August 2001, and this work had been
26 procured for the petitioner by CMT or COLOURS. The residual
27 payments for her services on this commercial were to be made by a
28 production company, Talent Partners, to CMT on behalf of the

1 petitioner. After cashing these checks from Talent Partners, CMT
2 was responsible for sending petitioner her payment, less CMT's
3 commission. Petitioner contacted CMT with her concern about
4 delayed payments, and CMT responded by sending her two checks in
5 June 2002 which were not negotiable due to insufficient funds in
6 CMT's account. Petitioner was charged \$30 by her bank for
7 charges resulting from these non-negotiable checks. CMT
8 subsequently re-issued these checks, and petitioner was able to
9 negotiate them.

10 5. Still concerned that CMT was holding money that she was
11 owed, petitioner contacted Talent Partners to get a complete
12 earnings report for her residuals for this commercial. Talent
13 Partners provided petitioner with an earnings report that showed
14 that from February 14 to November 22, 2002, it had sent 17
15 separate checks to CMT on behalf of petitioner. Each of these
16 checks covered her net residuals, after taxes were withheld by
17 Talent Partners. As to four of these checks, CMT never paid
18 anything to the petitioner. These checks were sent by Talent
19 Partners to CMT in the following net amounts and on the following
20 dates: April 18, 2002 -- \$1,289.09, May 14, 2002 -- \$393.77,
21 November 4, 2002 -- \$162.86, and November 22, 2002 -- \$580.86.
22 After learning of these four checks from Talent Partners,
23 petitioner contacted CMT through its agent and accountant, Philip
24 Johnson, requesting payment. CMT never disputed that it owed
25 petitioner for these checks, but never paid petitioner any
26 portion of the \$2,426.58 that it had received from Talent
27 Partners through these checks.

28 6. Petitioner also alleges that she is entitled to

1 reimbursement of certain amounts that CMT withheld from her
2 earnings as commissions. She contends that she is entitled to a
3 refund of \$39.38, the commission that CMT retained on a residual
4 check that Talent Partners sent to CMT on February 14, 2002, and
5 which CMT subsequently paid to petitioner less this 10%
6 commission. Petitioner alleges that she is entitled to
7 reimbursement of this amount because she was then "between
8 written agreements" with CMT or COLOURS, and that without such a
9 written agreement, CMT was not entitled to retain any
10 commissions. Petitioner also seeks reimbursement of \$326.96
11 retained by CMT for commissions on amounts received from Talent
12 Partners after July 24, 2002, the date that CMT's talent agency
13 license expired. All of these commissions stem from the
14 residuals petitioner earned by acting in the Wrigley commercial
15 in August 2001, at which time CMT was licensed and its
16 relationship with petitioner was governed by the first written
17 contract. Although this contract was not placed in evidence, we
18 note that the second written contract, which petitioner testified
19 was similar to the first, contained a provision that CMT would be
20 entitled to payment of commissions on residuals received after
21 expiration of the contract as long as the work upon which the
22 residuals are paid was performed during the term of the contract.
23 The second contract also provided that after termination of the
24 contract between petitioner and CMT, CMT "shall remain obligated
25 to ... perform obligations with respect to ... any employment ...
26 on which such compensation is based."

27 7. We take judicial notice of other cases we have decided
28 against CMT, wherein we found that at all times during 2002, CMT

1 agent and accountant Philip Johnson handled CMT's funds -- both
2 receipts and disbursements -- through a bank in Santa Barbara
3 under an account for "California Commercial Theatrical
4 Accounting" or "CCTA".

5 8. This petition was filed on January 22, 2003, and a first
6 amended petition was filed on April 24, 2003. Service was
7 effected on all respondents. Notices of the hearing were sent to
8 the parties on April 18, 2003.

9 LEGAL ANALYSIS

10 1. Petitioner is an "artist" within the meaning of Labor
11 Code section 1700.4(b). CMT is a "talent agency" within the
12 meaning of Labor Code section 1700.4(a), as are CMT's owners,
13 ALBERTA SELLERS and BYRON GARRETT. The Labor Commissioner has
14 jurisdiction to issue this determination pursuant to Labor Code
15 section 1700.44. By virtue of his role as a CMT agent and
16 accountant, and in view of his control over CMT's receipts and
17 disbursements, coupled with his failure to pay petitioner for
18 amounts that he knew she was owed, we conclude that PHILIP
19 JOHNSON, individually and dba California Commercial Theatrical
20 Accounting or CCTA, is jointly and severally liable for the
21 amounts we find are owed to petitioner by CMT and its owners.

22 2. Labor Code section 1700.25 provides that a licensed
23 talent agency that receives any payment of funds on behalf of an
24 artist shall immediately deposit that amount in a trust fund
25 account maintained by him or her in a bank, and shall disburse
26 those funds, less the agent's commission, to the artist within 30
27 days after receipt. Section 1700.25 further provides that if, in
28 a hearing before the Labor Commissioner on a petition to

1 determine controversy, the Commissioner finds that the talent
2 agency willfully failed to disburse these amounts within the
3 required time, the Commissioner may award interest on the
4 wrongfully withheld funds at the rate of 10% per annum, and
5 reasonable attorney's fees.

6 3. Respondents' failure to disburse the amounts paid by
7 Talent Partners on behalf of petitioner with respect to the four
8 checks received by respondent during the period from April 18,
9 2002 to November 22, 2002 constitutes a willful violation of
10 Labor Code section 1700.25. Moreover, we conclude that by
11 failing to remit these amounts to the petitioner without any
12 justification, Respondent breached its representation agreement
13 and violated its fiduciary duty thereunder, thereby losing the
14 right to retain any commissions on these amounts paid by Talent
15 Partners. We therefore conclude that petitioner is entitled to
16 payment of \$2,426.62 plus interest at 10% per annum on this
17 amount from the date each payment became due, resulting in
18 interest in the amount of \$298.37 as of the date of this decision
19 (with interest accruing at the rate of 66 cents per day
20 thereafter).

21 4. Petitioner is entitled to reimbursement for the \$30 in
22 fees imposed by her bank as a result of the respondents' attempt
23 to pay her through non-negotiable NSF checks.

24 5. Turning to petitioner's request for reimbursement of
25 certain commissions retained by CMT, we conclude that so long as
26 it performed its contractual and statutory duties by forwarding
27 amounts received on petitioner's behalf to the petitioner, it had
28 a right to retain commissions on petitioner's earnings for work

1 that petitioner performed during the period of her first contract
2 with CMT. Thus, we conclude that petitioner is not entitled to
3 reimbursement of \$39.38, the commission that CMT retained on the
4 residual check that Talent Partners sent to CMT on February 14,
5 2002. As to the \$326.96 in commissions retained by CMT on
6 payments that were made by Talent Partners after CMT's license
7 expired on July 24, 2002, we conclude that without a license, CMT
8 could not lawfully function as petitioner's talent agency.
9 Consequently, CMT could not lawfully continue to collect
10 petitioner's earnings from Talent Partners after CMT's talent
11 agency license expired. We therefore conclude that petitioner is
12 entitled to reimbursement of the \$326.96 in commissions retained
13 by respondents on payments that were made by Talent Partners on
14 petitioner's behalf following the expiration of CMT's talent
15 agency license.

16 6. Based on the conclusion that respondent willfully
17 violated Labor Code section 1700.25, petitioner is also entitled
18 to reasonable attorney's fees. Petitioner's counsel seeks an
19 award of attorney's fees in the amount of \$1700. We find that
20 amount to be well within the range of reasonable attorney's fees
21 for the amount of time required for this matter.

22 7. As a result of respondents' failure to pay amounts due
23 to petitioner, she was forced to file this petition to determine
24 controversy, and in order to prosecute this petition, she was
25 forced to incur costs in the amount of \$165 in order to have a
26 process server serve the petition on respondents. Petitioner is
27 entitled to reimbursement for these necessarily incurred costs.

28 //


1 ORDER

2 For the reasons set forth above, IT IS HEREBY ORDERED that
3 Respondents CMT TALENT AGENCY, a partnership; ALBERTA SELLERS, a
4 partner of CMT TALENT AGENCY; BYRON GARRETT, a partner of CMT
5 TALENT AGENCY; and PHILIP JOHNSON, an individual dba CALIFORNIA
6 COMMERCIAL THEATRICAL ACCOUNTING or CCTA, are jointly and
7 severally liable for the following amounts, which shall be paid
8 to petitioner VANESA PECHI:

- 9 1. \$2,426.62 for unlawfully withheld earnings;
- 10 2. \$298.37 for interest on these unlawfully withheld
11 earnings, as of the date of this decision (with further interest
12 accruing at the rate of 66 cents per day thereafter);
- 13 3. \$326.96 for unlawfully retained commissions;
- 14 4. \$30.00 for reimbursement of bank charges;
- 15 5. \$165.00 for costs incurred in serving the petition; and
16 6. \$1,700.00 for attorney's fees;
- 17 for a total, as of the date of this decision, of \$4,946.95.

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20 Dated:

9/24/03

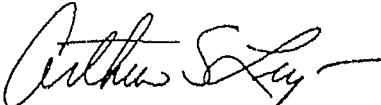


MILES E. LOCKER
Attorney for the Labor Commissioner

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23 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

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26 Dated:

9-24-03



ARTHUR S. LUJAN
State Labor Commissioner

