

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

11 THOMAS HADEN CHURCH,) Case No. TAC 52-92
12)
Petitioner,) DETERMINATION ON
13 v.) PETITION OF THOMAS
HADEN CHURCH
14 ROSS BROWN,)
15)
Respondent.)
16

17 This proceeding arose under the provisions of the Talent
18 Agencies Act (the "Act"), Labor Code §§ 1700 - 1700.47¹. On June
19 16, 1992, petitioner Thomas Haden Church ("Church") filed a
20 petition with the Labor Commissioner pursuant to §1700.44 seeking
21 determination of an alleged controversy with respondent Ross Brown
22 ("Brown"). Brown filed an answer, and on March 16, 1993, a full
23 evidentiary hearing was held before William A. Reich, attorney for
24 the Labor Commissioner assigned as a hearing officer. Due
25 consideration having been given to the testimony, documentary
26 evidence, briefs, and arguments submitted by the parties, the Labor
27 Commissioner now renders the following decision.

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

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PROCEDURAL AND FACTUAL BACKGROUND

The event which triggered the filing of the instant petition was Brown's initiation of an arbitration action against Church. In the arbitration, Brown asserted that, under the provisions of a "personal manager-artist" contract (the "contract") entered into with Church in November, 1988, Brown was entitled to 15% of the gross earnings from Church's artistic activities. Church, in turn, obtained a stay of the arbitration proceedings so that he could file a petition with the Labor Commissioner to establish that at the time that Brown entered into and performed under the contract he acted as a talent agent in violation of §1700.5, thereby rendering the contract void under the Act.

Church's petition seeks a declaration that the contract is void and that Church has no further monetary or other obligations to Brown under the contract. In addition, Church wants an order requiring Brown to repay all monies previously collected by Brown under the contract. Brown's answer to the petition sets up two basic defenses: first, that Church's claims for relief are barred by the applicable statutes of limitations, §1700.44(c), and second, that, even if not barred, the claims are legally and factually without merit. The following facts are pertinent to resolution of these issues.

Brown met Church in April, 1988 while lecturing at a seminar in Dallas, Texas. A few months later, Brown telephoned Church to ask Church to come to Los Angeles to try out for an acting part in a motion picture entitled "Stolen Moments."² At the

² The film was also at one time entitled "Lost Memories."

1 time of the call, Brown was employed as the casting director for
2 the film. Although this much of the conversation is undisputed,
3 the rest is not. According to Church, Brown also stated that he
4 was interested in being Church's manager and that in this capacity
5 he would be using his contacts in the industry. Brown denies
6 making these statements.

7 In September, 1988, Church moved to Los Angeles, and
8 almost immediately Brown arranged for Church to audition for a part
9 in Stolen Moments. Brown first auditioned Church himself,
10 privately; in this session, Brown went over some material with
11 Church and explained to Church what was expected of the character
12 Church was going to audition for. To insure the success of the
13 next audition, which would be with the director and producers,
14 Brown informed Church that he would create a resume for Church
15 which would be set up on the letterhead of the William Morris
16 Talent Agency. At that time, Church was not represented by William
17 Morris.

18 One week later, just before the audition, Brown handed
19 Church a resume on William Morris stationery containing a number of
20 false credits regarding Church's prior work. Brown insisted that
21 the factual distortions were necessary to give Church credibility,
22 and assured Church that he would control the audition to prevent
23 the inaccuracies from being exposed. Following the audition,
24 Church got the part.

25 In early November, 1988, after the shooting on Stolen
26 Moments had been completed, Brown presented Church with the
27 management contract that Church eventually signed. Church
28 testified that at this point Brown told Church that he would use

1 his contacts, influence, and expertise in the industry to get
2 Church acting jobs; Church stated that this was the reason he
3 signed the contract. Brown denied making such statements, and
4 testified that the only thing he told Church was that he would
5 advise him and assist him in getting representation.

6 The contract itself is in the form of a letter to Brown
7 from Church. The letter defines Brown's basic duties as to "advise
8 and counsel", and states that Brown is not a theatrical agent, and
9 that he is not authorized nor expected to act as one. The contract
10 further provides that for his services, Brown will be paid a
11 commission of 15% of the gross earnings generated by Church's
12 artistic activities.

13 After the contract was signed, Brown told Church that he
14 expected the 15% commission specified in the contract to be paid on
15 Church's gross earnings from Stolen Moments. Church eventually
16 paid Brown an \$850.00 commission on these earnings. The evidence
17 established that another actor on Stolen Moments, Colin Davis, also
18 paid Brown a commission from his earnings on the picture.

19 The evidence was in conflict as to what Brown did for
20 Church after the contract was signed. According to Church, Brown
21 (1) called people in the industry and arranged appointments for
22 Church, (2) sent out Church's resume and photographs to casting
23 directors, (3) called casting directors on behalf of Church, (4)
24 accessed the "breakdown service" which was available to him as a
25 casting director to find parts for Church, and (5) told Church he
26 would get him a part in movies Brown was working on. Church
27 complained to Brown about Brown's failure to do enough to get
28 Church more jobs. Although Brown acknowledged that Church made

1 these complaints, Brown indicated he could not understand why such
2 complaints were or would be directed at him. Brown denies that he
3 was engaged in any of the activities ascribed to him by Church.
4 Brown insists that, apart from counseling and advising Church, the
5 only thing he did to help Church get jobs was to talk to Church's
6 agent and encourage the agent to do more to get Church jobs.

7 After the contract was entered into, Church did obtain
8 work on several projects, and eventually he landed a recurring role
9 on the successful television series "Wings". Based on the earnings
10 derived from this and the earlier work, during the period April 19,
11 1989 through March 13, 1991 Church paid Brown a total of \$68,432.00
12 in commissions. Church refused to make any further payments under
13 the contract after March 13, 1991. The arbitration action, and
14 then this proceeding, followed.

15 DECISION

- 16 1. THE PETITION TO DECLARE THE CONTRACT VOID SO AS TO
17 PRECLUDE FUTURE COMMISSION CLAIMS IS NOT TIME BARRED.

18 The Act contains the following statute of limitations
19 provision, at Section 1700.44, subd. (c):

20 "No action or proceeding shall be brought
21 pursuant to this chapter with respect to any
22 violation which is alleged to have occurred
more than one year prior to commencement of
the action or proceeding."

23 The question presented is whether this provision bars Church's
24 petition to the Labor Commissioner for a declaration that the
25 contract is void so as to preclude further commission or other
26 claims by Brown under the contract. It does not.

27 It is now well settled that the statute of limitations
28 runs only against a cause of action which seeks affirmative relief

1 and does not operate to bar a pleading which sets up purely
2 defensive matter. (3 WITKIN, CALIFORNIA PROCEDURE, (3d.Ed. 1985),
3 *Actions* §324)

4 ". . . [P]urely defensive matter . . . which constitutes
5 a defense to the plaintiff's claim without calling for
6 affirmative relief . . . will not be barred by limita-
7 tions. This is so even though the defensive matter could
8 have been used as the basis of a cause of action for af-
9 firmative relief, and the statute has run on such cause
10 of action [Par.]...[D]efenses which render the contract
wholly unenforceable (such as...illegality...), need not
be made the basis for an action for restitution after
rescission. The injured party (promisor) may allow the
time for the bringing of such an action to expire, yet
still defend on those grounds in the action by the
plaintiff (promisee)." (*Id.*, pp. 354-355)

11 Under the foregoing principles there is no question that,
12 if Brown's contractual claim had arisen under the Act and therefore
13 been asserted before the Labor Commissioner pursuant to the
14 requirements of section 1700.44 subd.(a), Church would have been
15 entitled to set up the defense that the contract was illegal and
16 hence unenforceable. It would not have mattered that the
17 "violation" giving rise to the illegality occurred more than one
18 year prior to the commencement of the proceeding; section 1700.44,
19 subd.(c) would not have barred assertion of the defensive matter.

20 The result is no different here when the contractual
21 cause of action is not within the Act, and the avenue of
22 declaratory relief is used to invoke the primary jurisdiction of
23 the Labor Commissioner over an affirmative defense which does arise
24 under the Act. Clearly, this is a proper use of declaratory
25 relief: (a) there is an actual controversy; (b) the Labor
26 Commissioner is vested with primary authority and special
27 competence to adjudicate disputes under the Act; and (c) the statute
28 of limitations has not run on the defensive matter sought to be

1 adjudicated by means of the declaratory remedy. (3 WITKIN, *supra*,
2 *Actions*, §475; Code Civ. Pro. §1060; 5 WITKIN, CALIFORNIA PROCEDURE,
3 (3d Ed. 1985), *Pleading* §819) Moreover, such relief is
4 particularly appropriate here, where there indeed may be no
5 adequate alternative remedy for invoking the illegality defense.
6 (*Id.*; *Buchwald v. Superior Court*, 254 Cal.App.2d 347, 354-355, 357-
7 359 (1967))

8 In addition, the conclusion reached is in harmony with
9 the obvious legislative intent underlying section 1700.44,
10 subd.(c). As already noted, like other statutes of limitation
11 subd.(c) was designed to bar the untimely assertion of affirmative
12 claims for damages, and not to prevent the invocation of legitimate
13 defenses based on purely defensive matter. Plainly, the legisla-
14 ture did not intend to make the availability of defenses under the
15 Act turn on whether or not the party asserting the affirmative
16 claim was proceeding under the Act. That intent is effectuated by
17 the instant result, which prevents any such irrational disparate
18 treatment.

19 For the foregoing reasons, the petition for a declaration that
20 the contract is illegal so as to preclude Brown from making further
21 damage or other claims under the contract is determined not to be
22 time barred.

23 2. THE CONTRACT IS ILLEGAL UNDER THE ACT AND CHURCH IS NOT
24 OBLIGATED TO PAY ADDITIONAL COMMISSIONS OR OTHERWISE
25 PERFORM FURTHER UNDER THE CONTRACT.

26 Section 1700.5 of the Act provides in pertinent part as
27 follows:
28

1 "No person shall engage in or carry on the occupation of
2 a talent agency without first procuring a license there-
for from the Labor Commissioner."

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

5 "(a) 'Talent agency' means a person or corporation who
6 engages in the occupation of procuring, offering,
7 promising, or attempting to procure employment or
8 engagements for an artist or artists, Talent
9 agencies may, in addition, counsel or direct artists in
10 the development of their professional careers.

11 "(b) 'Artists' means actors and actresses rendering
12 services on the legitimate stage and in the production of
13 motion pictures, . . . and other artists and persons
14 rendering professional services in motion picture,
15 theatrical, radio, television and other entertainment
16 enterprises."

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

22 Church's status as an artist is undisputed. Therefore,
23 the sole question presented is whether Brown was engaged in the
24 occupation of a talent agent at the time he entered into and
25 performed the contract with Church. The answer is that he was.

26 The true contractual and business relationship between
27 Brown and Church was defined at the outset by the activities which
28 Brown undertook on behalf of Church in connection with the film
Stolen Moments. In that initial encounter between the two of them,
Brown used his position as casting director on the film to procure
employment for Church. In doing so, Brown displayed a willingness
to take whatever steps were necessary to accomplish his objectives,
including violating his primary duty to the producers, concealing

1 his conflict of interest, using his influence, and fabricating a
2 false list of credits for Church.

3 It was this behavior which constituted the prototype of
4 what was being offered to Church when he was presented with a
5 contract by Brown in November, 1988. In other words, by the
6 contract Brown was offering and promising to procure employment for
7 Church if he signed, ie.: "that was just a sample of what I can and
8 will do for you if you sign with me." This is further confirmed by
9 Brown's insistence, after the contract was signed, that he be paid
10 his 15% commission on the earnings generated from the employment he
11 had procured for Church in "Stolen Moments". In view of this con-
12 duct, Church's testimony that he was induced to sign the contract
13 by Brown's promises that Brown would use his influence and contacts
14 to secure employment for Church is entirely believable.

15 In view of the true relationship of the parties, as
16 evidenced by their conduct and words, the conclusory recitations in
17 the contract to the effect that Brown was merely being hired as a
18 "personal manager" carry no weight. In fact, in these circum-
19 stances, the recitations can only be considered a subterfuge
20 designed to conceal the true "talent agency - artist" relationship
21 which existed. (*Buchwald v. Superior Court, supra*, 254 Cal.App. 2d
22 at 355)

23 In addition, the more credible evidence establishes that
24 after the contract was entered into Brown performed his obligations
25 thereunder by engaging in continuous attempts to procure employment
26 for Church and by repeatedly promising that he would procure such
27 employment. These activities included arranging employment
28 interviews, sending out resumes and photographs, calling casting

1 directors, and representing to Church that he would be given a part
2 in a film Brown was working on. In sum, throughout the
3 relationship with Church, Brown was engaged in the business of
4 offering, promising, or attempting to procure employment for
5 Church.

6 Brown nevertheless contends that, under the recent
7 decision in *Wachs v. Curry* 13 Cal.App 4th 616 (1993), Brown was
8 still not a "talent agency" within the meaning of section 1700.4.
9 In particular, Brown asserts that Church failed to demonstrate that
10 Brown's procurement functions constituted a "significant part" of
11 his business as a whole. (*Id.* at 628) In this regard, Brown is
12 mistaken.

13 The holding in *Wachs v. Curry* sets forth when licensure
14 as a talent agent is required under the Act:

15 We conclude from the Act's obvious purpose to protect
16 artists seeking employment and from its legislative his-
17 tory, the "occupation" of procuring employment was in-
18 tended to be determined according to a standard that
19 measures the significance of the agent's employment
20 procurement function compared to the agent's counseling
21 function taken as a whole. If the agent's employment
22 procurement function constitutes a significant part of
23 the agent's business as a whole then he or she is subject
24 to the licensing requirement of the Act even if, with re-
25 spect to a particular client, procurement of employment
26 was only an incidental part of the agent's overall
27 duties. On the other hand, if counseling and directing
28 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)

26 The governing principles are clear. The *Wachs* court
27 intended to distinguish between the personal manager who, while
28 operating in good faith, inadvertently steps over the line in a

1 particular situation and engages in conduct which might be
2 classified as procurement. It clearly was not the court's
3 intention to encourage individuals to engage in activities which
4 the Legislature has determined require a license.

5 It is clear from a reading of the decision in *Wachs* that
6 the court intended that in determining whether the Act requires a
7 talent agency license, only the person's employment procurement
8 functions on behalf of talent compared to his talent counseling
9 functions are to be taken into account in establishing the person's
10 business for purposes of determining the significance of the
11 procurement activity. Other activities in which the person may
12 engage, even those related to the theater such as theatrical
13 exhibition, motion picture distribution, or being a casting
14 director, are not considered or counted as part of the person's
15 "business as a whole" in making the assessment. Were this not true
16 even non-related occupations such as operating a fast food outlet
17 could be counted. Such a result would encourage individuals to
18 dabble in procuring employment for artists as a sideline without
19 the need for licensure and would hardly be in keeping with
20 "the Act's obvious purpose to protect artists seeking employment."
21 *Wachs v. Curry, supra*, at 628.

22 The *Wachs* court declined to quantify the term "signifi-
23 cant", finding that it was not necessary in that case. Since the
24 term "significant" does not appear in the statute, adoption of
25 regulations designed to quantify the term would be impossible.
26 Mindful, however, of the teachings of the California Supreme Court
27 in the case of *Auto Equity Sales, Inc. v. Superior Court* 57 Cal.2d
28 450, 455 (1962), the Labor Commissioner recognizes that as an

1 inferior tribunal, her hearing officers are required to follow
2 decisions of courts exercising superior jurisdiction. The Labor
3 Commissioner, in exercising her mandated primary jurisdiction in
4 these cases on a day-to-day basis, finds that it is imperative that
5 definition be given to the term "significant" if that term is to be
6 applied in determining the need for licensing.

7 The word "significant" is defined in American Heritage
8 Dictionary, as follows:

9 "Having or expressing a meaning; meaningful."

10 This definition, coupled with the obvious purpose of the *Wachs*
11 court, seems to imply that conduct which constitutes an important
12 part of the relationship would be significant. The Commissioner
13 finds that procurement of employment constitutes a "significant"
14 portion of the activities of an agent if the procurement is not due
15 to inadvertence or mistake and if the activities of procurement
16 have some importance and are not simply a *de minimis* aspect of the
17 overall relationship between the parties when compared with the
18 agent's counseling functions on behalf of the artist. This meaning
19 would seem to be in line with the tenor of the court's decision in
20 *Wachs v. Curry*.

21 In the context of the foregoing principles, a petitioner
22 who asserts a licensing violation under the Act, satisfies his
23 burden if he establishes that the petitioner was involved in a
24 contractual relationship with the respondent and that that rela-
25 tionship was permeated and pervaded by employment procurement
26 activities undertaken by the respondent. Such a showing supports
27 an inference that these activities were a significant part of the
28 respondent's business as a whole, and suffices to establish a *prima*

1 facie case of violation of the Act. At that point, the burden
2 shifts to the respondent to come forward with sufficient evidence
3 to sustain a finding that the procurement functions were not a
4 significant part of the respondent's "business as a whole" as that
5 term is defined, above.

6 In the present case, Church clearly demonstrated that his
7 contract with Brown was permeated and pervaded by procurement ac-
8 tivities. Brown, on the other hand, failed to produce any evidence
9 that would show that such activities were not a significant part of
10 Brown's business, which included the representation of many other
11 actors in addition to Church. In these circumstances, Church's
12 evidence warranted a finding that at the time of entering into and
13 performing under the contract, Brown was engaged in and carrying on
14 the occupation of a talent agency. Consequently, the contract was
15 illegal and void, and Brown is precluded from obtaining any further
16 recovery of any kind under the contract.

17
18 3. THE PETITION TO RECOVER COMMISSIONS PREVIOUSLY PAID UNDER
THE CONTRACT IS BARRED BY THE STATUTE OF LIMITATIONS.

19 As previously noted, section 1700.44, subd.(c) explicitly
20 bars any claim for affirmative relief based on a violation which
21 occurred more than one year prior to the filing of the petition.
22 Here, the illegal acts as well as the final payment by Church under
23 the contract all occurred more than one year prior to the filing of
24 the petition on June 16, 1992. Consequently, any claim by Church
25 for rescission and restitution of amounts paid, based on
26 illegality, is time barred.

27 Church seeks to escape this result by invoking tolling
28 doctrines based on equitable estoppel, continuing violation, the

1 discovery rule, and fiduciary relationship. However, at the
2 hearing Church failed to produce any evidence which would support
3 application of any of these doctrines; consequently, they are not
4 applicable in the present case.

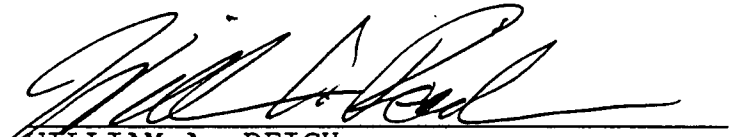
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6 DISPOSITION

7 Accordingly, it is hereby ordered as follows:

8 1. The contract between Brown and Church, is declared to
9 be illegal, void, and unenforceable, and it is declared that Church
10 shall have no further obligation to Brown under the contract for
11 commissions or otherwise.


12 2. The claim of Church for rescission of the contract
13 and restitution of commissions previously paid is held to be barred
14 by the statute of limitations.

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16 Dated: 5-12-94


WILLIAM A. REICH,
Attorney and Special Hearing
Officer for the Labor Commissioner

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

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24 Dated: 6-2-94


VICTORIA BRADSHAW,
State Labor Commissioner