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BEFORE THE LABOR COMMISSIONER

STATE OF CALIFORNIA

HERNAN DE BEKY, Petitioner, vs. PIEDAD BONILLA, an individual dba Pinata Productions and Management, Respondent.	No. TAC 11-02 DETERMINATION OF CONTROVERSY

The above-captioned matter, a petition to determine controversy under Labor Code §1700.44, came on regularly for hearing on October 29, 2002, in Los Angeles, California, before the Labor Commissioner's undersigned hearing officer. Hernan de Beky (hereinafter "Petitioner") was represented by Ronald G. Rosenberg; Piedad Bonilla, an individual dba Pinata Productions and Management (hereinafter "Respondent") appeared in propria persona. Based on the evidence presented at this hearing and on the other papers on file in this mater, the Labor Commissioner hereby adopts the following decision.

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FINDINGS OF FACT

1. Petitioner performs as an actor and a Spanish language voice-over artist in radio and television commercials and movie trailers.

2. On September 5, 2000, Petitioner entered into a written "personal management agreement" with Respondent for a period of one and one-half years, commencing May 2, 2000, whereby Respondent was to provide advice and counsel "with respect to decisions concerning employment ... and all other matters pertaining to [Petitioner's] professional activities and career in entertainment, amusement, music, recording, literary fields and in any and all media." Under the terms of this contract, petitioner agreed to pay commissions to respondent in the amount of 15% of his gross earnings in these fields during the term of the agreement, and his earnings following expiration of the agreement as to any agreements entered into or substantially negotiated during the term of the contract. The contract specified that respondent is not a theatrical agent, and is not licensed to obtain, seek or procure employment for the petitioner. The contract also provided that "in any arbitration or litigation under this agreement, the prevailing party shall be entitled to recover from the other party any and all costs reasonably incurred by the prevailing party in such arbitration or litigation, including without limitation, reasonable attorney's fees."

3. Respondent has never been licensed by the State Labor Commissioner as a talent agency.

4. Prior to May 3, 2000, petitioner was not represented by

a licensed talent agency. Since May 3, 2000, petitioner has been represented by Larry Hummel, an agent employed by ICM (International Creative Management, Inc.), a licensed talent agency.

5. On March 9, 2000, petitioner performed work as an extra in the movie "Blow". Petitioner learned of this job from respondent, who telephoned the petitioner to advise him of the opportunity. According to respondent, she was employed by the production company that produced "Blow" as an assistant to the casting director, and her call to petitioner was to secure his services for the film in her capacity as an assistant to the film's casting director. No evidence was presented that would indicate that respondent collected or attempted to collect any commission from petitioner for this job.

6. On September 13, 2000, petitioner sent an e-mail to respondent inquiring about the progress of obtaining work doing the Spanish language voice-over for the trailer for the movie "Woman on Top". Respondent responded by e-mail, stating "I have to talk to the owner. . . I'll keep you informed." Larry Hummel, the ICM agent, credibly testified that ICM had no role whatsoever in attempting to procure or in procuring work for the petitioner in connection with this film. Nonetheless, petitioner did get the job doing the voice-over for the trailer for this film. The production company paid petitioner $825 for his work on the trailer, and paid an additional check for $100 made out to the respondent. Respondent's testimony that she did not procure this job for petitioner was not credible, as it is contradicted by all of the other evidence on this issue. The weight of this evidence

compels the finding that respondent attempted to procure, and did procure, this employment for petitioner.

7. On December 7, 2000, petitioner performed work doing the Spanish language voice-over for a trailer for the movie "Quills". Larry Hummel credibly testified that ICM had no role whatsoever in attempting to procure or in procuring work for the petitioner in connection with this film, and furthermore, that prior to this hearing, ICM wasn't even aware that petitioner performed any work in connection with that film . Petitioner credibly testified that he found out that he got the "Quills" job through respondent, and that until the respondent told him about this job, he had not had any sort of contact with any production company regarding the job. Respondent's testimony that this job was procured by ICM is not believable, as it is contradicted by all of the other evidence on this issue. From this evidence, we draw the inference that this job was procured by the respondent.

8. On December 19, 2000, the respondent invoiced the production company that produced the Spanish language trailer for "Quills", in the amount of $2,000, payable to the respondent. The production company paid this amount to the respondent the next day. On January 16, 2001, respondent sent a check to petitioner in the amount of $1,800, retaining $200 as a commission.

9. In November 2001, petitioner notified respondent of his intent to terminate the personal management agreement. On December 31, 2001, respondent filed a small claims action against petitioner for payment of $1,500 allegedly owed under the personal management agreement.

10. By letter dated January 4, 2002, the law firm Holguin & Garfield, acting on behalf of the petitioner, advised respondent that because she procured employment for the petitioner without having been licensed as a talent agent by the State Labor Commissioner, the "personal management agreement" is unenforceable and void from its inception, and demanded that respondent not pursue the small claims action.

11. Despite the letter from petitioner's attorney, respondent proceeded with her small claims action against the petitioner. The small claims court entered a judgment in favor of respondent, from which petitioner filed a de novo appeal. A judgment was ultimately entered in favor of the respondent in the amount of $1,620.42. On June 5, 2002, respondent executed on this judgment by levying on petitioner's bank account. As a result of the levy, $1,670.42 (the amount of the judgment plus a $50 bank fee) was removed from petitioner's account.

12. On March 21, 2002, petitioner filed this petition to determine controversy with the Labor Commissioner, seeking a determination that the "personal management agreement" is unenforceable and void from its inception, with reimbursement for all amounts paid to the respondent pursuant to this agreement, and payment of petitioner's attorney's fees incurred in this proceeding.

13. On May 23, 2002, respondent filed a second small claims action against the petitioner, seeking payment of $2,000 in commissions allegedly owed under the personal management contract. As of the date of the hearing before the Labor Commissioner, this small claims action was still pending.

LEGAL ANALYSIS

Petitioner is an artist within the meaning of Labor Code section 1700.4(b). Labor Code section 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." Labor Code §1700.5 provides that "[n]o person shall engage in or carry on the occupation of a talent agency without first procuring a license . . . from the Labor Commissioner." The Talent Agencies Act is a remedial statute; its purpose is to protect artists seeking professional employment from the abuses of talent agencies. For that reason, "even the incidental or occasional provision of such [procurement] services requires licensure." *Styne v. Stevens* (2001) 26 Cal.4th 42, 51.

Here, within one week of execution of the personal management agreement, respondent engaged in activities to procure employment for the petitioner in connection with the film "Woman On Top". Shortly thereafter, respondent procured employment for the petitioner in connection with the film "Quills". By attempting to procure and by procuring such employment for the petitioner, Respondent acted as a "talent agency" within the meaning of Labor Code §1700.4(a)[1], and by doing so without having

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[1] In contrast, respondent's role in procuring employment for petitioner as an extra in the movie "Blow" does not fall within the provisions of the Talent Agencies Act because as to that employment, respondent was not acting as a third-party intermediary between the artist and the purchaser of the artist's services. Instead, respondent was a bona fide employee of the production company that produced the film, and in that capacity, hired the petitioner to perform services in connection with the film. A production company and its bona fide employees responsible for casting do not require a talent agency license in

obtained a talent agency license from the Labor Commissioner, respondent violated Labor Code §1700.5.

An agreement that violates the licensing requirement of the Talent Agencies Act is illegal and unenforceable. "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 [agent] and an artist is void." *Buchwald v. Superior Court* (1967) 254 Cal.App.2d 347, 351. Having determined that a person or business entity procured, promised or attempted to procure employment for an artist without the requisite talent agency license, "the [Labor] Commissioner may declare the contract [between the unlicensed agent and the artist] void and unenforceable as involving the services of an unlicensed person in violation of the Act." *Styne v. Stevens, supra*, 26 Cal.4th at 55. "[A]n agreement that violates the licensing requirement is illegal and unenforceable . . . ." *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.4th 246, 262. Moreover, the artist that is party to such an agreement may seek disgorgement of amounts paid pursuant to the agreement, and "may . . . [be] entitle[d] . . . to restitution of all fees paid the agent." *Wachs v. Curry* (1993) 13 Cal.App.4th 616, 626. This remedy of restitution is, of course, subject to the one year limitations period set out at Labor Code §1700.44(c), so that the Labor Commissioner will not, absent extraordinary circumstances, order

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order to employ artists for work on the film or project that the production company is producing. See *Chinn v. Tobin* (TAC No. 17-96).

the reimbursement of amounts paid to an unlicensed agent prior to one year before the filing of the petition to determine controversy.

The primary legal question presented herein is whether the Labor Commissioner has the authority to reimburse petitioner for the amount that petitioner was required to pay to the respondent pursuant to the superior court's judgment after trial de novo on appeal from the small claims court on respondent's claim that petitioner owed this amount under the "personal management agreement." The question that we must address is whether the court judgment can now be attacked through this proceeding before the Labor Commissioner.

Our analysis begins with the observation that the Labor Commissioner has exclusive primary jurisdiction to determine all controversies arising under the Talent Agencies Act. The Act specifies that "[i]n cases of controversy arising under this chapter, the parties involved shall refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same, subject to an appeal . . . to the superior court where the same shall be heard de novo.' (Labor Code §1700.44(a).) Courts cannot encroach upon the Labor Commissioner's exclusive original jurisdiction to hear matters (including defenses) arising under the Talent Agencies Act.

"The Commissioner has the authority to hear and determine various disputes, *including the validity of artists' manager-artist contracts and the liability of parties thereunder.* ([*Buchwald v. Superior Court, supra,* 254 Cal.App.2d 347,] 357.) The reference of disputes involving the [A]ct to the Commissioner

is *mandatory*. (*Id.* at p. 358.) Disputes *must* be heard by the Commissioner, and all remedies before the Commissioner *must* be exhausted before the parties can proceed to the superior court. (*Ibid.*)" (*REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 494-495, italics in original.)

Therefore, "[w]hen the Talent Agencies Act is invoked in the course of a contract dispute, the Commissioner has exclusive jurisdiction to determine his jurisdiction in the matter, including whether the contract involved the services of a talent agency." *Styne v. Stevens, supra,* 26 Cal.4th 42, 54. This means the Commissioner, not the court, has "the exclusive right to decide in the first instance *all the legal and factual issues on which an Act-based defense depends.*" *Ibid.* at fn. 6, italics in original. Here, the court's failure to defer to the Labor Commissioner's jurisdiction compels the conclusion that the court acted in excess of its own jurisdiction. "Our conclusion that section 1700.44, by its terms, gives the Commissioner exclusive original jurisdiction over controversies arising under the Talent Agencies Act comports with, and applies, the general doctrine of exhaustion of administrative remedies. With limited exceptions, the cases state that where an adequate administrative remedy is provided by statute, resort to that forum is a "jurisdictional" prerequisite to judicial consideration of the claim." *Ibid.* at 56. Even when the Talent Agencies Act is only being raised as a defense to an action for commissions purportedly due under a "personal management contract", there is no concurrent original jurisdiction: "[T]he plain meaning of section 1700.44, subdivision (a), and the relevant case law, negate any inference

that courts share original jurisdiction with the Commissioner in controversies arising under the Act. On the contrary, the Commissioner's original jurisdiction of such matters is exclusive." *Ibid.* at 58.

Here we are confronted by a final judgment -- albeit a judgment was issued by a court that lacked subject matter jurisdiction. After a final judgment has been rendered in an action, a new action or proceeding based on the same cause of action or defense, ignoring the normal effect of judgment as a merger or bar, is a collateral attack. *Woulridge v. Burns* (1968) 265 Cal.App.2d 82, 84. This petition to determine controversy constitutes a collateral attack on the superior court judgment. In a collateral attack, a judgment may be effectively challenged only if it is so completely invalid as to require no ordinary review to annul it. *Ibid.* The grounds for collateral attack include lack of subject matter jurisdiction. Witkin, 8 *Cal. Proc.* (4th), *Attack on Judgment in Trial Court*, §6.

When a collateral attack is made against a California judgment, including a judgment issued by a court of limited or special jurisdiction (such as small claims court or a superior court hearing an appeal de novo of a small claims judgment), there is a presumption of that the court acted in the lawful exercise of its jurisdiction, and the judgment is presumed valid. Evidence Code §666. In a collateral attack made against a California judgment, jurisdiction is *conclusive* if the jurisdictional defect does not appear on the face of the record. *Superior Motels v. Rinn Motor Hotels* (1987) 195 Cal.App.3d 1032, 1049. Extrinsic evidence is inadmissible even though it might

show that jurisdiction did not in fact exist. *Hogan v. Superior Court* (1925) 74 Cal.App. 704, 708. A judgment "void on its face" may be collaterally attacked when the defect may be shown without going outside the record or judgment roll. *Becker v. S.P.V. Const. Co.* (1980) 27 Cal.3d 489, 493. Here, as we are dealing with a judgment stemming from a small claims proceeding, the record does not appear to reveal any jurisdictional defect. Nonetheless, there are exceptions to the rule that collateral attack against a California judgment will fail unless the judgment is void on its face. Of significance here, a party relying on a judgment may waive the benefit of this rule excluding extrinsic evidence by failure to object to the extrinsic evidence when offered. See Witkin, 8 *Cal. Proc.* (4th), *Attack on Judgment in Trial Court*, §13, and various cases cited therein.

In the hearing of this controversy, the petitioner presented extrinsic evidence to which no objection was raised that the respondent had engaged in unlawful procurement activities in violation of the Talent Agency Act, so as to constitute a defense to respondent's small claims action for payment of commissions owed under the personal management agreement. This evidence establishes that the judgment based on the small claims proceeding was void, as it was issued by a court that lacked subject matter jurisdiction.

Having found that this proceeding to determine controversy under the Talent Agencies Act is not barred by the judgment on the small claims proceeding, and having found that respondent engaged in unlawful procurement activities, we necessarily

conclude that the personal management contract was unlawful and void from its inception, and that respondent has no enforceable rights thereunder. We find that in order to effectuate the purposes of the Act, the petitioner must be reimbursed for all amounts paid to respondent pursuant to this contract from one year prior to the date of the filing of this petition to the present. The total amount that must be reimbursed consists of the $1,620.42 obtained by respondent pursuant to a levy on petitioner's bank account on June 5,2002, as that amount was levied pursuant to the void judgment awarding damages to respondent for breach of the void personal management contract.

Turning to petitioner's request for attorneys' fees incurred in connection with this proceeding, the contract between the parties did provide for an award of reasonable attorney's fees to the prevailing party "in the event of litigation or arbitration arising out of this agreement or the relationship of the parties created hereby." But an administrative proceeding before the Labor Commissioner pursuant to Labor Code §1700.44 neither constitutes "litigation" nor "arbitration". Litigation is commonly understood as "the act or process of carrying out a lawsuit." (Webster's New World Dictionary, Third College Edition (1988)) Lawsuits take place in courts, not before administrative agencies. Black's Law Dictionary defines "litigation" as a "contest in a court of justice for the purpose of enforcing a right." And an "arbitration", obviously, takes place before an arbitrator, not an administrative agency authorized to hear disputes pursuant to statute. Consequently, we conclude that the contract does not provide for an award of attorneys' fees

incurred in a proceeding to determine controversy before the Labor Commissioner. Therefore, even though the petitioner prevailed before the Labor Commissioner, he is not entitled to attorneys' fees in this proceeding.

We take this opportunity, however, to caution the respondent that failure to pay the full amount awarded herein to the petitioner within ten days of the date of service of this determination may result in liability for petitioner's attorneys fees in any subsequent judicial proceedings. Such subsequent proceedings could either be initiated by the respondent through the filing of a de novo appeal from this determination, pursuant to Labor Code §1700.44(a), or by the petitioner through the filing of a petition to confirm the determination and enter judgment thereon. See *Buchwald v. Katz* (1972) 8 Cal.3d 493. Of course, the respondent can prevent any subsequent judicial proceedings by expeditiously paying the petitioner the full amount found due herein.

ORDER

For the reasons set forth above, IT IS HEREBY ORDERED that:

1. The personal management contract between petitioner and respondent is illegal and void from its inception, and respondent has no enforceable rights thereunder;

2. The judgment that was entered on the small claims court action is void for lack of subject matter jurisdiction;

3. Respondent reimburse petitioner for the commissions paid to respondent from March 21, 2001 to the present, in the amount of $1,620.42;

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4. All parties shall bear their own costs and attorney's fees incurred in this proceeding.

Dated: 1/22/03

MILES E. LOCKER
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

Dated: 1/22/03

ARTHUR S. LUJAN
State Labor Commissioner