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

TOOL DISSECTIONAL LLC, ADAM THOMAS JONES, DANIEL EDWIN CAREY, JUSTIN CHANCELLOR, and MAYNARD JAMES KEENAN, p/k/a/ TOOL, Petitioner, vs. ROBERT TED GARDNER d/b/a LARRIKIN MANAGEMENT, Respondent.	Case No. TAC 35-01 DETERMINATION OF CONTROVERSY

INTRODUCTION

The above-captioned petition was filed on November 21, 2001, by TOOL DISSECTIONAL LLC, ADAM THOMAS JONES, DANIEL EDWIN CAREY, JUSTIN CHANCELLOR, and MAYNARD JAMES KEENAN, p/k/a/ TOOL, (hereinafter "TOOL" or "Petitioner"), alleging the respondent acted as an unlicensed talent agent in violation of Labor Code §1700.5. Tool asks the Labor Commissioner to void several agreements between the parties, and requests disgorgement of all commissions received by the respondent stemming from the parties relationship, and attorney's fees.

The respondent ROBERT TED GARDNER d/b/a LARRIKIN MANAGEMENT, (hereinafter "GARDNER" OR "RESPONDENT") filed his response on January 17, 2002, arguing petitioner's claims are barred by the applicable statute of limitations and alleges several affirmative defenses including, estoppel, unclean hands, and waiver. Finally, the respondent claims any procurement activity undertaken by the respondent on petitioner's behalf was conducted at the request of and in conjunction with Tool's licensed talent agent and consequently, that activity is exempt from licensure under Labor Code §1700.44(d). Respondent requests the petitioner take nothing and that he be awarded attorney's fees.

A hearing was scheduled before the undersigned attorney, specially designated by the Labor Commissioner to hear this matter on April 4, 2002, in Los Angeles, California. Petitioner was represented by Edwin F. McPherson of McPherson & Kalmansohn; respondent appeared through his attorney, Allen B. Grodsky. Due consideration having been given to the testimony, documentary evidence, arguments presented, and briefs submitted, the Labor Commissioner adopts the following determination of controversy.

FINDINGS OF FACT

1. The petitioners are a successful rock band performing all over the world. On March 30, 1992, the parties entered into a three (3) year, written agreement whereby Gardner would act as Tool's exclusive personal manager. The agreement contained two (2), two-year options which were exercised by the respondent. On or about March 31, 1999, the parties entered into a second agreement. The parties performed under the terms of the second

agreement, which was not executed until December 1999. Under the terms of the new agreement, either party could terminate the relationship on an "at-will" basis. The parties continued the relationship until May of 2000, when petitioners terminated the agreement.

2. Throughout the relationship, Tool maintained an exclusive booking and licensed talent agent. Tool's booking and talent agent, John Branigan of the William Morris Agency, was always responsible for negotiating and booking Tool's performances. According to Branigan, Gardner acted as the band's conduit and worked closely with all of the bands representatives, including, Tool's publicist, attorneys and agents. Offers to perform often were directed through Gardner's office. When that occurred, Gardner would discuss the offer with Tool. If Tool was interested, Gardner would then turn over the performance opportunity to Branigan and William Morris for negotiation. Branigan and Gardner always worked closely together on behalf of their mutual client in this fashion, which did not violate the Talent Agencies Act. Branigan's credible testimony supports the conclusion that after the engagement was turned over to Branigan, he never requested Gardner to assist him in the negotiation of an employment contract and Gardner never conducted employment negotiations on behalf of Tool.

3. During the summer of 1999, Gardner began discussions with longtime Tool promoter, Rick Van Santen. Van Santen had hired Tool to perform more than fifty times over the last decade and was organizing a large concert event, "*The Coachella Concert*", that he wanted Tool to headline. Van Santen had always negotiated Tool's

performance engagements with Branigan, but because Gardner apparently knew the venue well, he initiated contact with Gardner. Gardner discussed playing *Coachella* with Tool, who expressed an interest. Soon thereafter, Gardner instructed Van Santen not to discuss the deal with Branigan. Van Santen, not wanting to be involved in an internal dispute between Tool and their representatives faxed the original *Coachella* contract to both Branigan and Gardner. Upon realization that Gardner was attempting to circumvent Branigan and William Morris, Branigan telephoned Gardner. Branigan testified that during that conversation Gardner told him and William Morris to stay out of the deal and that he (Gardner) would negotiate the deal himself. Consequently, Branigan on behalf of William Morris retreated from the *Coachella* deal. Gardner finished negotiations and ultimately completed the deal with Tool and Van Santen.

4. In defense of Tool's accusation that Gardner conducted these contract negotiations without a license as required under the California Labor Code, Gardner claims that William Morris head of music affairs, Matthew Burrows, negotiated the deal. And therefore Gardner's negotiation activity on behalf of Tool is protected under the narrow licensing exemption found at Labor Code §1700.44(d)[1]. Burrows testified that he was contacted by Gardner, and on August 31, 1999, he did look over the deal points and made several notations to the original contract. But upon examination of the documents and Burrows evasive and questionable testimony,

[1] 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."

it was clear that Burrows was not working with Gardner as a William Morris representative.

5. During the late summer of 1999, Burrows was contemplating starting his own dot com business reflected by Burrows facsimile letterhead listed on the documents, which referenced a company titled lawyers.com, notably, not William Morris. Moreover, Burrows conducted his portion of the negotiations from his personal residence; did not utilize the William Morris letterhead, computers or fax machines; did not utilize standard William Morris protocol; did not receive payment on behalf of William Morris; did not inform William Morris of his actions; and appeared to be positioning himself for self-serving future benefits. It was clear Burrows was working for himself and not working as a William Morris representative.

6. Burrows was not the only one to act in a self-serving manner. Gardner also sought William Morris expertise on Tool's behalf knowing William Morris would not be commissioned on the deal. Essentially, Gardner sought free contract interpretation and negotiation, normally commissionable agent activity. Moreover, in a signed declaration Gardner indicated that it was his understanding that Burrows was not working with William Morris during Burrows involvement. When directly asked, Burrows evaded the question whether he was working as a William Morris employee during his involvement. The evidence conclusively established that he was not.

7. Gardner argues that he was instructed by the band not to commission William Morris on this deal because the band expressed that 10% of the receipts was too much money for the

agent. The band did not testify on their own behalf. But, even if we accept Gardner's claim to be entirely factual, 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. In short, Tool may still bring this action irrespective of whether or not they directly requested the violation to be conducted for their benefit.

8. Eventually, relations deteriorated between the parties and Tool terminated the relationship and ceased commission payments. Gardner then filed a breach of contract against Tool in L.A. Superior Court seeking unpaid commissions. That case is stayed pending the results of this Labor Commissioner controversy.

CONCLUSIONS OF LAW

The issues to be determined are as follows:

(a) Does Labor Code §1700.40(d) apply to relieve the respondent's liability for failing to secure a talent agency license?

(b) If not, must the Labor Commissioner void all of the agreements or just the one that existed during the illegal

procurement activity?

(c) What effect will Gardner's statute of limitations defense have on Tool's claim for complete disgorgement of all commissions earned during the length of the relationship?

1. Labor Code §1700.4(b) includes "musical artists" in the definition of "artist" and respondent is therefore an "artist" within the meaning of §1700.4(b).

2. 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."

3. Labor Code section 1700.5 provides that "no person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner."

4. Labor Code §1700.44(a) provides the Labor Commissioner with the power and jurisdiction to hear and determine matters falling under the Talent Agencies Act (§§1700.00 *et seq.*), therefore the Labor Commissioner has jurisdiction to hear and determine this matter.

5. 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 requirements, 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 that petitioner's negotiation of the *Coachella* performance

constitutes the procurement of employment within the meaning of §1700.4(a).

6. The primary issue in this case is whether petitioner's actions on behalf of the respondent fall within the activities described at Labor Code §1700.44(d), exempting persons conducting certain traditional talent agency functions from the licensing requirement.

7. 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."

8. This exemption requires a two-part analysis and both parts must be satisfied for Gardner's defense to apply. First, we must determine whether Gardner's acts of negotiating the *Coachella* concert were done "in conjunction with" and two, whether that negotiation was done "at the request of a licensed talent agency".

9. In determining legislative intent we look to legislative history of the Talent Agencies Act. In 1982, AB 997 established the California Entertainment Commission. Pursuant to statutory mandate the Commission studied and analyzed the Talent Agencies Act in minute detail. All recommendations were reported to the Governor, accepted and subsequently signed into law. The Commission concluded:

> "[I]n searching for the permissible limits to activities in which an unlicensed personal manger or anyone could engage in procuring employment for an artist without being license as a talent agent,... there is no such activity, there are no such permissible limits, and that the prohibitions of the Act over the activities of anyone procuring employment for an artist without being licensed as a talent agent must remain, as they are today, total.

> Exceptions in the nature of incidental, occasional or infrequent activities relating in any way to procuring employment for an artist cannot be permitted: one either is, or is not, licensed as a talent agent, and, if not so licensed, one cannot expect to engage, with impunity, in any activity relating to the service which a talent agent is licensed to render. There can be no `sometimes' talent agent, just as there can be no `sometimes' doctor or lawyer or any other licensed professional." (Commission Report p. 19-20)

10. The Commission was very clear in their conclusion that a personal manager may not negotiate an employment contract unless that negotiation is done "at the request" of a licensed talent agent. In this case that did not occur.

11. Even if we conclude that Burrows was working for William Morris when he modified the *Coachella* contract - which he was not - the testimony was clear that William Morris did not request Gardner's involvement. Conversely, it was Gardner who sought a William Morris employee for assistance in the *Coachella* negotiation, and therefore this negotiation conducted by Gardner was not "at the request of" respondent's licensed talent agent within the meaning of §1700.44(d).

12. Respondent asserts that Labor Commissioner Determination, Snipes v. Dolores Robinson Ent., TAC 36-96 expands §1700.44(d), by allowing a manager to submit the artist, "as long as the activities were done as part of a cooperative effort with a licensed agent." The Snipes case is distinguishable on several fronts. First, here the evidence established that Burrows was not working for William Morris and therefore the *Coachella* negotiation was not done as part of a cooperative effort with a licensed talent agent. Secondly, the hearing officer in Snipes expressly stated, "it is clear that she [the manager] acted at the request of and in

conjunction with a licensed talent agency within the meaning of Labor Code section 1700.44(d) **at all times**." Snipes, supra p.7 Further, because the Snipes Determination is expressly limited to that set of facts based on "undisputed evidence presented, which was well documented by the correspondence and other exhibits", and the Determination does not consider the legislative intent behind §1700.44(d), or the remedial purpose behind the Act, we decline to follow it to the extent that it expands Labor Code §1700.44(d) beyond our discussion here. In our case, there was no evidence that William Morris or any representative of Tool's talent agency requested Gardner to negotiate the *Coachella* employment contract.

13. The second issue is whether Gardner's illegal procurement activity in the summer of 1999, voids the first written agreement (March 1992 through March 1999), the oral/implied agreement (March 31, 1999 through December 1999), the second written executed agreement (December 1999 through May 2000), or all three? The answer is all three.

14. The Act is a remedial statute...Such statutes are enacted for the protection of those seeking employment [i.e. the artists]. (Citation omitted). Consequently, the act should be liberally construed to promote the general object sough to be accomplished. Waisbren v. Peppercorn 41 Cal.App.4th 246, 254. Applying Waisbren's general rule, that the statutory goal is to protect the artist, we refuse to believe the legislature intended that an agency who annually enters into new agreements with their artists, would only be liable for their illegal procurement during that year in which the illegal procurement took place. This would provide and incentive for agents to frequently renew agreements,

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allowing well timed violations to go unremedied. Such an interpretation would undermine the purpose of the Act. Waisbren, supra. p. 254. The overwhelming historical application of the Labor Commissioner has been to void all closely related personal management agreements between the parties when illegal procurement is established. (See Robi v. Wolf, TAC 29-00; Rogers v. Minds, TAC 28-00; Blanks v. Greenfield, TAC 27-00; Cher v. Sammeth, TAC 17-99; and Bridgforth v. BNB Associates, TAC 12-96.)

15. Finally, Tool seeks disgorgement of all commissions paid to the respondent during the entire relationship of the parties. Gardner argues that the statute of limitation applies to limit Tool's affirmative request for commissions. He is correct. 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." The recent California Supreme Court case of Styne v. Stevens 26 Cal.4th 42, held, "that statutes of limitations do not apply to defenses..... Under well-established authority, a defense may be raised at any time, even if the matter alleged would be barred by a statute of limitations if asserted as the basis for **affirmative relief** [emphasis added]. The rule applies in particular to contract actions. One sued on a contract may urge defenses that render the contract unenforceable, even if the same matters, alleged as grounds for restitution after rescission, would be untimely. Styne, supra at p. 51; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 423, p. 532. Therefore, Tool's defensive application of an Act-based violation will not preclude maintenance

of the controversy, but will preclude Tool from collecting on a request for affirmative relief beyond the one-year statutory period.

16. Having made no clear showing that Tool paid commissions to the petitioner during the period of November 22, 2000 through November 21, 2001, Tool's request for disgorgement is denied.

ORDER

For the above-stated reasons, IT IS HEREBY ORDERED that the 1992, and 1999 contracts between petitioner, TOOL DISSECTIONAL LLC, ADAM THOMAS JONES, DANIEL EDWIN CAREY, JUSTIN CHANCELLOR, and MAYNARD JAMES KEENAN, p/k/a TOOL, and respondent, ROBERT TED GARDNER d/b/a LARRIKIN MANAGEMENT, are unlawful and void *ab initio*. Respondent has no enforceable rights under those contracts.

Having made no clear 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 a monetary recovery.

The parties will bear the expense of their own attorneys' fees.

Dated: June 5, 2002

DAVID L. GURLEY
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

Dated: June 5, 2002

ARTHUR S. LUJAN
State Labor Commissioner