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

AMERICAN FIRST RUN dba AMERICAN FIRST RUN STUDIOS, MAX KELLER, MICHELINE KELLER, Petitioners, vs. OMNI ENTERTAINMENT GROUP, a corporation; SHERYL HARDY, STEVEN MAIER, Respondents.	No. TAC 32-95 CERTIFICATION OF LACK OF CONTROVERSY WITHIN THE MEANING OF LABOR CODE §1700.44; ORDER DISMISSING PETITION TO DETERMINE CONTROVERSY

The above-captioned petition to determine controversy, filed on September 29, 1995, alleges that petitioners AMERICAN FIRST RUN dba AMERICAN FIRST RUN STUDIOS ("AFRS"), MAX KELLER and MICHELINE KELLER sought to produce a television series based on the story of Tarzan, having had obtained a license from the estate of the late Edgar Rice Burroughs to produce such a series; that as producers, petitioners are "artists" within the meaning of Labor Code §1700.4; that petitioners entered into a contract with respondents OMNI ENTERTAINMENT GROUP ("OMNI"), SHERYL HARDY, and later, STEVE MAIER, under which respondents were to raise money for petitioners by locating investors for the production of this television

series, for which respondents were to receive a percentage of the amounts paid to AFRS for its production services; that in performing these services, OMNI, HARDY and MAIER acted as "talent agents" within the meaning of Labor Code §1700.4; that none of the respondents have been licensed by the State Labor Commissioner as talent agents at any time relevant herein; and that a dispute subsequently arose between the parties that led to the filing of a lawsuit by HARDY and MAIER against AFRS and the KELLERS for amounts allegedly owed pursuant to the parties' agreement. Petitioners contend, as a defense to the lawsuit and in these proceedings, that by acting as talent agents without having been licensed, respondents violated Labor Code §1700.5 and hence, are not entitled to payment of any amounts purportedly due under the agreement. In this proceeding, petitioners seek a determination that respondents violated Labor Code §1700.5, and an order (1) declaring the agreement to be void ab initio; (2) denying respondents the right to recover any amounts purportedly owed thereunder, and (3) requiring respondents to reimburse petitioners for any amounts that have been paid to respondents under this agreement.

Respondents filed an answer along with a motion to dismiss the petition for lack of jurisdiction, contending that as a matter of law, the allegations set forth in the petition do not establish any violation of Labor Code §1700.5. Specifically, respondents contend that petitioners, as potential producers of a television series, are not "artists" within the meaning of Labor Code §1700.4; that respondents, by attempting to locate sources of funding for the proposed television series, are not "talent

agents" within the meaning of Labor Code §1700.4; that the parties' agreement is therefore not subject to the provisions of the Talent Agencies Act (Labor Code sections 1700, et seq.); and that since there is no controversy arising under the Talent Agencies Act, the petition must be dismissed by the Labor Commissioner for lack of jurisdiction.

Petitioners filed responsive papers in opposition to the motion to dismiss, arguing that a production company was found to be an "artist" under Labor Code §1700.4 in the recent case of Waisbren v. Peppercorn Productions, Inc. (1995) 41 Cal.App.4th 246; that since the purpose of respondents' fund raising efforts was to enable petitioners to obtain work as the producers of the Tarzan television series, respondents were acting as talent agents within the meaning of Labor Code §1700.4; and therefore, that the parties' agreement is subject to the Talent Agencies Act and that this controversy is properly before the Labor Commissioner.

Labor Code section 1700.44 vests the Labor Commissioner with exclusive primary jurisdiction "in cases of controversy arising under [the Talent Agencies Act]". The Act governs the relationship between artists and talent agencies. The term "talent agency" is defined at Labor Code §1700.4(a) 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". The term "artists" is defined at section 1700.4(b) as:

> "actors or actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organizations, directors of legitimate stage, motion pictures, and radio

> productions, musical directors, writers, cinematographers, composers, lyricists, arrangers, models, and other artists and persons rendering professional services in motion picture, theatrical, radio, television, and other entertainment enterprises."

Labor Code §1700.5 provides that "no person shall engage in or carry on the occupation of a talent agency without first procuring a license thereof from the Labor Commissioner". A person engages in the occupation of a talent agency by "procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists". Any agreement between an unlicensed talent agent and an artist is unlawful and void ab initio, and the unlicensed talent agent has no right to recover compensation purportedly due under such an agreement. Buchwald v. Superior Court (1967) 254 Cal.App.2d 347.

The question of whether the instant controversy "arises under" the Talent Agencies Act turns both on (1) whether petitioners, as the aspiring producers of the Tarzan television series, come within the definition of "artists" at Labor Code §1700.4, and (2) whether respondents, in connection with the fund raising services they were to provide to the petitioners under the parties' agreement, come within the Act's definition of "talent agents". In order for this controversy to "arise under" the Act, both of these questions must be answered affirmatively.

Although Labor Code §1700.4(b) does not expressly list producers or production companies as a category within the definition of "artist", the broadly worded definition includes "other artists and persons rendering professional services in ... television and other entertainment enterprises". Despite this

seemingly open ended formulation, we believe the Legislature intended to limit the term "artists" to those individuals who perform creative services in connection with an entertainment enterprise. Without such a limitation, virtually every "person rendering professional services" connected with an entertainment project - - including the production company's accountants, lawyers and studio teachers - - would fall within the definition of "artists". We do not believe the Legislature intended such a radically far reaching result. This is not to say, of course, that a producer or production company can never be an "artist" under the Act; but only that in order to qualify as an "artist", there must be some showing that the producer's services are artistic or creative in nature, as opposed to services of an exclusively business or managerial nature. Here, petitioners have failed to establish or even allege that as producers they performed any creative services.

Waisbren v. Peppercorn Productions did not hold that a producer or production company must qualify as "artist" under the Act. Defendants therein, in addition to producing various television projects, also specialized in the design and creation of puppets for use in the entertainment industry and advertising media. The decision is silent as to whether, in their capacity as television producers, defendants were engaged in providing creative services beyond any role as business persons and managers. In short, there is no explanation of the basis upon which the court reached the conclusion that Peppercorn was an "artist" under the Act, nor does it appear that this was even raised as an issue before the court. (At footnote 5 in the

decision, the court notes "in this case, there is no dispute that defendants qualify as artists under the Act.") Thus, Peppercorn is not dispositive on this issue.

We are unaware of any Labor Commissioner determination or ruling that production companies or producers engaged in fund raising and other business operations of a non-creative, managerial nature are "artists" within the meaning of the Act. That is not surprising, as the purpose of the Act is to protect those seeking artistic and creative employment, not the protection of the business executive or business enterprise that does the hiring.

Once it is determined that petitioners were not "artists" within the meaning of the Act, it follows that respondents could not be "talent agents" since a talent agency is defined by its role in procuring employment or engagements "for an artist or artists". Moreover, there is absolutely no evidence that respondents were engaged to procure or attempt to procure any sort of employment for petitioners. AFRS and the KELLERS were not seeking employment with a studio or other production company; they were looking for outside investors to invest in their production company so that they could produce a television series for which they already owned the production rights. The purpose of respondents' efforts to locate "co-producers" was not to obtain "employment" for petitioners, but rather to obtain funds so as to allow a business enterprise and its executives to realize their goal of producing a television series. It is simply ludicrous to suggest that in order for respondents to engage in fund raising activities on behalf of a production company, they must be

licensed as a talent agency by the State Labor Commissioner. We do not believe the Legislature intended to revolutionize the entertainment industry by requiring the licensing of all individuals engaged in raising funds for entertainment productions, or to dramatically expand the role of the Labor Commissioner to function as the arbiter of all business disputes that might arise in the course of financing entertainment deals.

We therefore find that the parties' agreement is not subject to the provisions of the Talent Agencies Act, and that the controversy as to amounts purportedly due under this agreement does not "arise under" the Act. Consequently, the Labor Commissioner is without jurisdiction to hear or decide the merits of this controversy, and this petition is hereby DISMISSED.

DATE: 4/8/96

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