DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California
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BEFORE THE STATE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

THOMAS HADEN CHURCH, Petitioner, v. ROSS BROWN, Respondent.	Case No. TAC 52-92 DETERMINATION ON PETITION OF THOMAS HADEN CHURCH

This proceeding arose under the provisions of the Talent Agencies Act (the "Act"), Labor Code §§ 1700 - 1700.47[1]. On June 16, 1992, petitioner Thomas Haden Church ("Church") filed a petition with the Labor Commissioner pursuant to §1700.44 seeking determination of an alleged controversy with respondent Ross Brown ("Brown"). Brown filed an answer, and on March 16, 1993, a full evidentiary hearing was held before William A. Reich, attorney for the Labor Commissioner assigned as a hearing officer. Due consideration having been given to the testimony, documentary evidence, briefs, and arguments submitted by the parties, the Labor Commissioner now renders the following decision.

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

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

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

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

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

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

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

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

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

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

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

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

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

DECISION

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

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

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

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

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

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

> ". . . [P]urely defensive matter . . . which constitutes a defense to the plaintiff's claim without calling for affirmative relief . . . will not be barred by limitations. This is so even though the defensive matter could have been used as the basis of a cause of action for affirmative relief, and the statute has run on such cause 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)

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

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

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

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

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

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

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

"No person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner."

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

"(a) 'Talent agency' means 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, ... Talent agencies may, in addition, counsel or direct artists in the development of their professional careers.
"(b) 'Artists' means actors and actresses rendering services on the legitimate stage and in the production of motion pictures, . . . and other artists and persons rendering professional services in motion picture, theatrical, radio, television and other entertainment enterprises."

"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 [talent agent] and an artist is void." (*Buchwald v. Superior Court* 254 Cal.App. 2d 347, 351 (1967))

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

The true contractual and business relationship between Brown and Church was defined at the outset by the activities which 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

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

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

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

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

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

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

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

> We conclude from the Act's obvious purpose to protect artists seeking employment and from its legislative history, the "occupation" of procuring employment was intended to be determined according to a standard that measures the significance of the agent's employment procurement function compared to the agent's counseling function taken as a whole. If the agent's employment procurement function constitutes a significant part of the agent's business as a whole then he or she is subject to the licensing requirement of the Act even if, with respect to a particular client, procurement of employment was only an incidental part of the agent's overall duties. On the other hand, if counseling and directing 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)

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

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

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

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

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

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

"Having or expressing a meaning; meaningful."

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

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

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

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

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

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

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

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

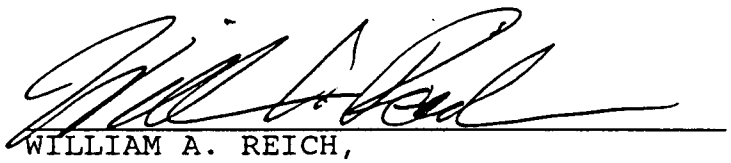
DISPOSITION

Accordingly, it is hereby ordered as follows:

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

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

Dated: 5-12-94



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

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

Dated: 6-2-94

VICTORIA BRADSHAW,
State Labor Commissioner