

1 DIVISION OF LABOR STANDARDS ENFORCEMENT
2 Department of Industrial Relations
3 State of California
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12 BEFORE THE STATE LABOR COMMISSIONER
13 OF THE STATE OF CALIFORNIA

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MICKEY ROONEY, aka JOE YULE, JR.,)	Case No. TAC 66-92
)	
Petitioner,)	DETERMINATION ON
)	PETITION OF MICKEY
v.)	ROONEY
)	
HAROLD J. LEVY,)	
)	
Respondent.)	

17 This proceeding arose under the provisions of the Talent
18 Agencies Act (the "Act"), Labor Code §§ 1700 - 1700.47¹. On August
19 4, 1992, petitioner Mickey Rooney also known as Joe Yule, Jr.
20 ("Rooney") filed a petition with the Labor Commissioner pursuant to
21 §1700.44 seeking determination of an alleged controversy with
22 respondent Harold J. Levy ("Levy"). Rooney filed an answer, and on
23 July 20, 1993, a full evidentiary hearing was held before William
24 A. Reich, attorney for the Labor Commissioner assigned as a hearing
25 officer. Due consideration having been given to the testimony,
26 documentary evidence, briefs, and arguments submitted by the
27 parties, the Labor Commissioner now renders the following decision.

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

1 PROCEDURAL AND FACTUAL BACKGROUND

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3 The event which triggered the filing of the instant

4 petition was Levy's commencement of an action against Rooney² in

5 the Los Angeles Superior Court. In the action, Levy asserted that,

6 under the terms of an oral contract which was entered into in or

7 about December, 1988 and which provided for Levy to act as Rooney's

8 general counsel and personal manager, Levy was entitled to 10% of

9 the gross receipts from any contracts entered into by Rooney which

10 had been negotiated by Levy on Rooney's behalf. In response,

11 Rooney filed a petition with the Labor Commissioner seeking to

12 establish that at the time Levy entered into and performed under

13 the contract he acted as a talent agent in violation of §1700.5,

14 thereby rendering the contract void under the Act; further

15 proceedings in the Superior Court action were deferred pending

16 resolution of the petition.

17 Rooney's petition seeks a declaration that the contract

18 is void and that Rooney has no further monetary or other

19 obligations to Levy under the contract. In addition, Rooney, wants

20 an order requiring Levy to repay all monies previously collected by

21 Levy under the contract. Levy's answer to the petition sets up two

22 basic defenses: first, that Rooney's claims for relief are barred

23 by the applicable statute of limitations, §1700.44(c), and second,

24 that, even if not barred, the claims are legally and factually

25 without merit. The facts and evidence pertinent to resolution of

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27 ² The complaint also named Red Sail Corporation, apparently

28 the corporate conduit for Rooney's business operations, as a

defendant in the action.

1 these issues were presented at the hearing held in this matter and
2 are set forth below. Only two witnesses testified: Levy and
3 Rooney's attorney, Richard M. Hoefflin; Rooney did not appear nor
4 testify.

5 In July 1993, pursuant to an oral agreement, Rooney
6 retained Levy to act as his general counsel; in particular, the
7 terms of the agreement called for Levy to negotiate and draft the
8 terms of the contracts Rooney wished to enter into, advise Rooney
9 with respect to business and personal matters, and, where
10 necessary, conduct litigation on Rooney's behalf. The compensation
11 was a monthly retainer fee of \$4,000.00, later increased to
12 \$6,000.00, applied against an hourly rate of \$140.00.

13 In or about December, 1988, the terms of the contract
14 were modified to provide for a different compensation arrangement.
15 Instead of Levy being paid on a retainer and hourly basis, the
16 parties agreed that in the future Levy would be paid 10% of the
17 gross receipts on each contractual project undertaken by Rooney,
18 the terms of which had been negotiated by Levy on Rooney's behalf.

19 During the course of the business relationship between
20 Levy and Rooney, the functions performed by Levy changed; gradually
21 Levy's role evolved from that of being purely a general counsel to
22 that of being a combination general counsel and personal manager at
23 the same time. More particularly, over time Levy was called upon
24 to (1) counsel Rooney with respect to his career and the roles he
25 should take, (2) act as a daily sounding board for Rooney, and (3)
26 act as a crucial intermediary in avoiding or resolving conflicts
27 between Rooney and third persons, which included attempting to
28 persuade interested but reluctant employers not to refrain from

1 contracting with Rooney because of his temperament and smoothing
2 over problems with current employers created by Rooney's
3 inappropriate behavior. Levy retained his general counsel role,
4 however, and whenever Levy was called upon to negotiate a contract
5 for Rooney, he always collaborated and acted in conjunction with
6 one of Rooney's many agents.

7 The foregoing facts were undisputed. In addition, Levy
8 testified that, although he and Rooney discussed potential
9 employment, projects, and business opportunities presented to
10 Rooney, Levy never endeavored to find work for Rooney, Levy was
11 never asked by Rooney to help him find work, and Levy did not go on
12 interviews or to meetings with Rooney to help him get work;
13 Rooney's expectation was that Levy would negotiate the terms of the
14 contractual arrangements Rooney elected to enter into.

15 The contract between Levy and Rooney terminated in the
16 latter part of 1990, after negotiations and discussions between
17 Levy and Hoefflin, acting as Rooney's attorney, were unsuccessful
18 in resolving the problems ascribed to the relationship by Rooney
19 and his attorney. At the hearing in this matter, Hoefflin
20 testified that during the course of his discussions with Levy
21 concerning the perceived problems, Levy made statements to the
22 effect that he, Levy, was the "deal maker", that he was the
23 procuring cause of employment for Rooney, including the "Black
24 Stallion" project which Rooney entered into, and that he spent a
25 great deal of time and energy finding work for Rooney, picking up
26 the ball dropped by Rooney's agents.

27 Levy, as part of his testimony, presented several
28 documents consisting of correspondence pertaining to the "Black

1 Stallion" transaction. The testimony and documents showed that the
2 employment offer for the project was obtained by Rooney's agent,
3 Charles H. Stern, that Levy, on behalf of Rooney, acted through and
4 in collaboration with Rooney's talent agent, and that Levy's role
5 was limited to negotiating the terms of the contract under which
6 Rooney would enter into the project.

7 After termination of the contract, Rooney refused to pay
8 any further commissions to Levy. The civil action, and then this
9 proceeding, followed.

10 DECISION

- 11
12 1. THE PETITION TO DECLARE THE CONTRACT VOID SO AS TO
PRECLUDE FUTURE COMMISSION CLAIMS IS NOT TIME BARRED.

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

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

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

25 It is now well settled that the statute of limitations
26 runs only against a cause of action which seeks affirmative relief
27 and does not operate to bar a pleading which sets up purely
28 defensive matter. (3 Witkin, California Procedure, (3d.Ed. 1985),
Actions .§324)

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

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

26 The result is no different here when the contractual
27 cause of action is not within the Act, and the avenue of
28 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 statute
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
3 Procedure, (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
14 legislature did not intend to make the availability of defenses
15 under the Act turn on whether or not the party asserting the
16 affirmative claim was proceeding under the Act. That intent is
17 effectuated by the instant result, which prevents any such
18 irrational disparate treatment.

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

23 Of course, as previously noted, section 1700.44, subd.(c)
24 explicitly bars any claim for affirmative relief based on a
25 violation which occurred more than one year prior to the filing of
26 the petition. Here, the illegal acts as well as the final payment
27 by Rooney under the contract all occurred more than one year prior
28 to the filing of the petition on August 4, 1992. Consequently, any

1 claim by Rooney for rescission and restitution of amounts paid,
2 based on illegality, is time barred.

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4 2. THE CONTRACT IS NOT ILLEGAL UNDER THE ACT AND LEVY IS NOT
5 PRECLUDED FROM SEEKING ADDITIONAL COMMISSIONS OR OTHER
6 DAMAGES UNDER THE CONTRACT.

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

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

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

14 "(a) 'Talent agency' means a person or corporation who
15 engages in the occupation of procuring, offering,
16 promising, or attempting to procure employment or
17 engagements for an artist or artists, . . . Talent
18 agencies may, in addition, counsel or direct artists in
19 the development of their professional careers.

20 "(b) 'Artists' means actors and actresses rendering
21 services on the legitimate stage and in the production of
22 motion pictures, . . . and other artists and persons
23 rendering professional services in motion picture,
24 theatrical, radio, television and other entertainment
25 enterprises."

26 "Since the clear object of the Act is to prevent improper
27 persons from becoming [talent agents] and to regulate such activity
28 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))

29 Rooney's status as an artist is undisputed. Therefore,
30 the sole question presented is whether Levy was engaged in the
31 occupation of a talent agent at the time he entered into and
32 performed the contract with Rooney. The answer is that he was not.

1 Before a person can be considered to be acting as a
2 "talent agent" within the meaning of the Act, it must be proven
3 either that he procured employment or engagements or that he
4 offered, promised, or attempted to procure employment or
5 engagements. If this threshold element is not established, then
6 the Act's licensing requirements do not apply.

7
8 "To 'procure' means 'to get
9 possession of: obtain, acquire, to
10 cause to happen or be done: bring
11 about.' (Webster's New Internat.
12 Dict., [(3d ed. 1981], at p. 1809)"
13 (Wachs v. Curry (1993) 13 Cal.App.
14 4th 616, 628)

15 In the context of the Act, "procure" means to actively
16 solicit, find, and generate offers of employment or engagements
17 which are accepted by the artist. Moreover, the term must be
18 construed and applied against the backdrop of the qualifying
19 language in §1700.44, which provides in relevant part as follows:

20 "It shall not be unlawful for a
21 person or corporation who is not
22 licensed under this chapter to act
23 in conjunction with, and at the
24 request of, a duly licensed and
25 franchised talent agency in the
26 negotiations of an employment
27 contract."

28 In the present case, there was no evidence introduced
which showed or even purported to show that Levy actively
solicited, found or generated offers of employment or engagements
accepted by Rooney. Instead, the evidence clearly showed that Levy
was not actively involved in trying to find or get work for Rooney,
and that, as typified by the "Black Stallion" project, Levy was

1 brought into the picture only after an offer or expression of
2 interest had been elicited by one of Rooney's talent agents, and
3 solely for the purpose of negotiating the terms of the employment
4 contract. As exemplified by the "Black Stallion" deal, Levy's
5 negotiation activity was undertaken in conjunction with and at the
6 request of the involved agent and clearly fell within the
7 qualifying language of §1700.44. In short, under the evidence,
8 Levy was not engaged in "procuring" employment within the meaning
9 of the Act; nor was he engaged in offering, promising, or
10 attempting to procure employment.

11 As to Levy's alleged admissions, the statements ascribed
12 to Levy must be viewed with extreme caution since the source for
13 the statements was adverse counsel and since the statements were
14 made in the context of settlement negotiations and discussions. In
15 any case, an examination of the statements makes it plain that they
16 were nothing more than "puffing", with Levy simply emphasizing his
17 powers at smoothing over rough edges, keeping deals together, and
18 getting favorable terms despite representing an apparently
19 temperamental client. Levy's statements plainly do not convey or
20 constitute admissions of procuring or of offering, promising, or
21 attempting to procure employment.

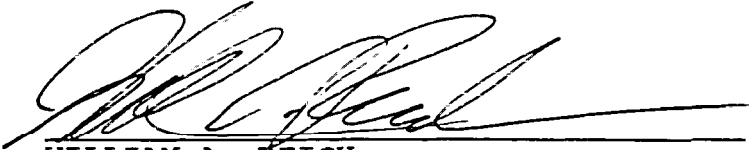
22 It follows that in the instant case there was no
23 violation of the requirements of the Act, licensure was not
24 required, and the contract between Levy and Rooney was not illegal
25 nor void³.

26
27 ³ Rooney's petition also seeks relief on the basis that Levy
28 had a conflict of interest; the claim is plainly not within the
jurisdiction of the Labor Commissioner over proceedings arising
under the Act and is therefore not considered.

DISPOSITION

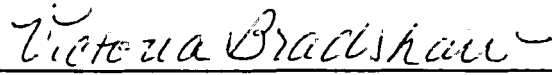
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3 Accordingly, it is hereby determined and declared that
4 under the provisions of the Talent Agencies Act the contract
5 between Levy and Rooney is neither illegal, nor invalid, nor
6 unenforceable. Therefore, the petition of Rooney is denied.
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9 Dated: February 6, 1995


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

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13 The above Determination is adopted in its entirety by the
14 Labor Commissioner.
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17 Dated: 2/10/95


VICTORIA BRADSHAW,
State Labor Commissioner