

1 DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
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8 BEFORE THE LABOR COMMISSIONER

9 STATE OF CALIFORNIA
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11 ANITA BAKER BRIDGFORTH, aka) CASE NO. TAC 12-96
ANITA BAKER,)
12) DETERMINATION OF CONTROVERSY
Plaintiff/Respondent)
13)
vs.)
14)
BNB ASSOCIATES, LTD., SHERWIN)
15 BASH,)
16 Defendant/Appellant)
_____)
17)

18 The above-entitled petition to determine controversy, filed on May
19 2, 1996, alleges, inter alia, that from October 1, 1983 and continuing
20 thereafter, each of the respondents performed the functions and acted in
21 the capacity of a talent agent without a license, in violation of Labor
22 Code §1700.5. Petitioner [hereinafter "Baker"] seeks a determination
23 from the Labor Commissioner that the written and oral agreements under
24 which respondents [hereinafter "Bash" and "BNB"] performed these services
25 for petitioner are void ab initio and are therefore unenforceable from
26 the time of inception. Petitioner also seeks restitution of all sums
27 paid to respondent as commissions pursuant to these written and oral

1 agreements. Respondents have admitted that they were not licensed talent
2 agents during the times in question but deny that they have violated the
3 Talent Agencies Act. In addition, they claim that the petition is barred
4 by the one-year statute of limitations set forth in Labor Code
5 §1700.44(c) and have requested dismissal of the petition on that ground.

6 The matter came on for several days of hearing in July and August of
7 1996 before Thomas S. Kerrigan, Special Hearing Officer, in Los Angeles,
8 California. Petitioner appeared through her attorneys Gerard P. Fox and
9 Cynthia Vroom of Fox & Spillane; respondents appeared through their
10 attorney Thomas A. Schultz of the Harney Law Offices. The matter was
11 taken under submission at the close of the hearing on August 15, 1996.

12 ISSUES

13 The questions presented are as follows:

- 14 1. Did respondents function as talent agents as that phrase
15 is defined in the Labor Code?
- 16 2. If so, what relief, if any, is petitioner entitled to?

17 DISCUSSION AND FINDINGS

18 There is no dispute between the parties that Baker, a well-known
19 singer and performer, is an artist within the meaning of Labor Code
20 §1700.4(b).

21 The parties stipulated that Bash and BNB were not licensed as
22 talent agents during the times material to the allegations of the
23 petition.

24 Between October, 1983 and December, 1994, Baker and BNB entered into
25

26 1 The Labor Commissioner issued a preliminary order denying the request
27 for dismissal on June 4, 1996, finding that if the aforementioned contracts are,
28 in fact, violative of the Talent Agencies Act, respondents' attempt to enforce these
contracts through a court action constituted a new and separate violation of the
law within the one-year limitations period.

1 written agreements whereby Bash and BNB agreed to render services to
2 Baker as her personal manager. The agreements recite that respondents
3 were not rendering services as talent agents within the meaning of the
4 Labor Code. In consideration of the rendition of these services, Baker
5 was to pay BNB a 15 per cent commission on all gross monies received by
6 her during the term of each agreement. There were written agreements
7 executed in 1983 and 1987, the terms of which are substantially similar.
8 In 1991 the parties entered into an oral agreement at a commission rate
9 of 10 per cent on "an as needed basis." Baker purported to terminate
10 this final agreement on December 13, 1994.

11 Early in this relationship Bash and BNB negotiated an endorsement
12 contract for Baker with Soft Sheen Products, a manufacturer of hair care
13 products for African-American women, as documented by undisputed
14 correspondence emanating from Bash. They also negotiated renewal
15 contracts through 1993. As a result of these negotiations Baker became
16 "The Soft Sheen Girl," i.e., the spokesperson for this company. Bash and
17 BNB received a commission from monies earned by Baker from this work. No
18 licensed talent agent participated in these transactions.

19 Baker secured a number of major television engagements during the
20 period of her representation by Bash and BNB, as documented by undisputed
21 correspondence, including appearances on The Songwriters Hall of Fame
22 Awards Show in May of 1989, The National Literacy Honors Show in February
23 of 1990, The Detroit Car Show Special in January of 1991 and 1992, the
24 Earth Voice '92 Concert in May of 1992, the Essence Awards Show in April
25 of 1993, a Frank Sinatra special entitled "Duets" in October of 1994, the
26 Disney American Teachers Awards Show in November of 1994, the Christmas
27 in Washington Show in December of 1994, and the Soul Train Awards Show in
28 March of 1995. Bash and BNB were responsible for all business

1 negotiations in connection with these appearances.

2 At a certain point in her career, Baker, like many other concert
3 performers, was eager to convert her career from concert tours to
4 television and films. She testified at the hearing in this matter that
5 Bash promised to "shake the bushes" to get her movie offers. One such
6 opportunity she claimed Bash tried to solicit was an HBO movie in
7 November of 1990. Correspondence was received documenting discussions
8 between Bash and the producer of that film. Bash purportedly sought
9 production teams to develop television pilots for Baker.

10 BNB also assisted in securing major concert appearances by Baker
11 during the period of these agreements, including, inter alia, an
12 appearance with the Boston Pops Orchestra in July of 1994, and a
13 lucrative appearance at the Universal Amphitheatre in December of 1994.

14 Though they did not come to fruition, BNB also actively negotiated
15 on Baker's behalf for concert appearances in Japan, England, at the
16 Montreux Jazz Festival, and in Germany, Denmark, Holland and elsewhere
17 between 1989 and 1994. Detailed correspondence traces BNB's efforts in
18 this regard. In a letter dated September 27, 1989 to a French concert
19 promoter, Bash (on BNB letterhead) stated, "I am Anita Baker's manager,
20 and I wonder if you might be interested in presenting her in concert in
21 Paris during June of 1990." Bash wrote similar letters to English and
22 Dutch promoters. He admitted during his testimony that he had
23 longstanding relationships with European concert promoters and initiated
24 contacts with these promoters on Baker's behalf for the purpose of
25 securing employment for her.

26 Baker appears to have increasingly grown restless under Bash and
27 BNB's tight control of her career. This particularly seems to be the
28 case with respect to her film and television ambitions. Though the

1 testimony is in conflict, it appears that Bash and BNB'S took pains to
2 discourage Baker from retaining the services of established licensed
3 talent agents such as the William Morris Agency, on the theory that they
4 could do anything that a regular talent agent could do to help her
5 career.

6 Except for the period between June of 1992 and December of 1993,
7 when Baker was represented by Creative Artists Agency for purposes of
8 securing television and film work, she had no licensed representation
9 during this eleven year period. The Hearing Officer takes official
10 notice that Associated Booking Corporation, the organization that handled
11 a number of concert bookings for Baker, was not licensed as a talent
12 agent in California during this period.² There is no evidence that Bash
13 and BNB acted in "conjunction" with a licensed talent agent within the
14 meaning of Labor Code §1700.44(d).

15 Bash testified at the hearing that he is the sole owner of BNB. He
16 claimed that as an artist manager he primarily "guides" his clients
17 careers, assisting them in finding proper professional help. He has
18 represented Neil Diamond, Herb Alpert, Lou Rawls, and other noted musical
19 artists and performers during a long and apparently distinguished career.
20 He insisted that while he responds to and sometimes negotiates the terms
21 of offers, he never solicits offers for his clients. In the case of
22 Baker, for example, he insisted that he served solely as a "conduit" for
23 employment offers that passed through his office.

24 To accept Bash's testimony one would have to assume that a major
25 musical artist went without any talent agent representation for a period
26 of almost eleven years (excluding the period of time Baker was

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28 ² The records of the Labor Commissioner reflect that Associated Booking Corporation was licensed in California between 1961 and 1982, but not thereafter.

1 represented by Creative Artists Agency) during which time the artist
2 received numerous major television and live concert engagements. Such a
3 proposition not only defies logic, it flies in the face of common
4 industry practice and experience.

5 Moreover, it is manifest from the record, including voluminous
6 correspondence between Bash and third parties, that Bash was actively
7 engaged in promoting Baker's employment opportunities. It will not do to
8 argue, as respondents argue, that Bash and BNB did not initiate contacts
9 with music, television, and film producers. For one thing, as noted, the
10 evidence is to the contrary with respect to several of the transactions
11 involved. This evidence more than meets the minimal standard described
12 in Waisbren v. Peppercorn Productions, Inc. (1995), 41 Cal. App. 4th 246,
13 255-260. Secondly, and as Baker points out, even negotiations that
14 "exploit" employment offers emanating from the outside constitute
15 solicitation within the meaning of the Talent Agency Act (see, e.g.,
16 discussion in Hall v. X Management, Inc., T.A.C. 19-90 at pp. 29-30).
17 Here there can be no question based on the pages and pages of back and
18 forth correspondence received in evidence at the hearing that Bash and
19 BNB actively "exploited" offers to the extent they did not initiate them.

20 Respondents also argue that many of the television shows in which
21 Baker appeared were merely "promotional," so that she received lesser
22 amounts of compensation, and that most of the European solicitations by
23 Bash resulted in no employment for Baker. These arguments are not well
24 taken. The crucial element is the act of solicitation, even where the
25 solicitation results in either insufficient remuneration or no
26 remuneration for the artist.

27 Bash and BNB additionally argue that the express language of the
28 written agreements providing that they were not acting as talent agents

1 should be given substantial weight. But it is the actual conduct of the
2 parties, not their self-serving exculpatory contractual provisions that
3 are at the forefront of the inquiry in a case of this nature. See
4 Buchwald v. Superior Court (1967) 254 Cal. App.3d 347, 355. Any other
5 rule would permit circumvention of the law based on careful
6 draftsmanship. The key, therefore, is not how respondents defined their
7 relationship with Baker but how they actually performed it.

8 As mentioned hereinabove, respondents initially challenged the
9 jurisdiction of the Labor Commissioner in prehearing proceedings,
10 claiming that the petition was untimely under Section 1700.44(c) of the
11 Labor Code. That challenge was rejected on the ground that the filing of
12 the Complaint in the underlying Superior Court action on July 25, 1995
13 was an attempt within the one-year statute of limitations of Section
14 1700.44(c) to enforce the aforementioned contracts entered into by the
15 parties. Respondents renewed this challenge at the time of the hearing.
16 A ruling must again issue in petitioner's favor on this point inasmuch as
17 the allegations of the Complaint, specifically the allegations of
18 Paragraphs 7, 8, 9, 10, and 15 thereof, make it evident that respondents
19 are seeking to enforce all contracts entered into between the parties.
20 The filing of this Complaint effectively started the one-year statute of
21 limitations running again.

22 CONCLUSIONS OF LAW

- 23 1. Petitioner is an "artist" within the meaning of Labor Code
24 §1700.44(a). The Labor Commissioner has jurisdiction to determine this
25 controversy pursuant to Labor Code §1700.44(a).
- 26 2. Respondents violated Labor Code §1700.5, in that they, and each of
27 them, engaged in and carried on the occupation of a talent agency without
28 first procuring a license therefor from the Labor Commissioner. The

1 various aforementioned agreements between respondents and petitioner are
2 accordingly void ab initio and are unenforceable for all purposes.

3 (Waisbren v. Peppercorn Productions, Inc., supra, 41 Cal. App. 4th 246;
4 Buchwald v. Superior Court, supra, 254 Cal. App. 2d 347.)

5 3. Petitioner has made no showing that respondents received any
6 commissions or other monies pursuant to the aforementioned agreements
7 during the one-year period prior to May, 1996, the date the Petition was
8 filed with the Labor Commissioner. She is accordingly entitled to no
9 monetary recovery.

10 DETERMINATION

11 The written agreements entered into between the parties in 1983 and
12 1987, and the oral agreement entered into between them in 1991, are each
13 void and unenforceable for all purposes. Having made no showing that
14 respondents received compensation pursuant to these agreements during the
15 one-year limitations period prescribed by Labor Code §1700.44(c),
16 petitioner shall have no monetary recovery.

17 DATED: December 23, 1996

18 *Thomas S. Kerrigan*
19 Thomas S. Kerrigan
Special Hearing Officer

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

22
23 DATED: December 27, 1996

24 *Roberta E. Mendonca*
Roberta Mendonca
State Labor Commissioner