

1 DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
2 State of California
BY: DAVID L. GURLEY (Bar No. 194298)
3 455 Golden Gate Ave. 9th Floor
San Francisco, CA 94102
4 Telephone: (415) 703-4863

5 Attorney for the Labor Commissioner

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7 BEFORE THE LABOR COMMISSIONER
8 OF THE STATE OF CALIFORNIA
9

10 TOM CHASIN, an individual,) Case No. TAC 25-98
11)
Petitioner,)
12 vs.) DETERMINATION OF
13) CONTROVERSY
CHRIS BEARD, an individual,)
14)
Respondent.)
15)
16 _____)

17 INTRODUCTION

18 The above-captioned petition was filed on August 31, 1998
19 by TOM CHASIN dba THE CHASIN AGENCY (hereinafter "Petitioner"),
20 alleging that CHRIS BEARD (hereinafter "Respondent"), breached
21 their agency contract by failing to remit commissions owed to the
22 petitioner, stemming from petitioner's efforts to secure employment
23 engagements in the entertainment industry on respondent's behalf.
24 The petition seeks \$47,500.00 in commissions, reflecting 10% of
25 respondent's earnings for the engagement in issue. Respondent was
26 personally served with the petition on January 18, 1999.

27

1 Respondent filed his answer on April 27, 1999, asserting seven
2 affirmative defenses, most notably, petitioner should be barred
3 from relief pursuant to the one-year statute of limitations found
4 at Labor Code §1700.44(c).

5 A hearing was scheduled for and held on December 3, 1999,
6 in Los Angeles, California, before the undersigned attorney
7 specially designated to hear this matter. Petitioner appeared
8 through his attorney, Allison S. Hart, of Barab, Kline & Coate,
9 LLP; Respondent appeared through his attorney, Eric S. Jacobson.

10 Based on the testimony, evidence, and briefs submitted,
11 the Labor Commissioner adopts the following determination of
12 controversy.

13
14 FINDINGS OF FACT

15 1. On May 1, 1993, the parties signed an exclusive one-
16 year personal services contract whereby petitioner would act as
17 respondent's exclusive talent agent in the entertainment industry.
18 Respondent is a writer/producer, who pursuant to the terms of the
19 contract was obligated to pay 10% of all his earnings in connection
20 with the entertainment industry to petitioner. In return,
21 petitioner was to use best efforts to secure respondent employment.

22 2. In or around January of 1994, petitioner began
23 negotiating a deal with Vin DiBona Productions for respondent's
24 services as writer/producer/creator for a weekly series named
25 "SHERMAN OAKS". Testimony reflected petitioner was instrumental in
26 creating and negotiating the deal points for the April 1994
27 contract eventually signed between respondent and Vin DiBona.

1 3. On June 13, 1994, respondent terminated the contract
2 between the parties but assured petitioner that, "your company will
3 be entitled to any commission from the 'SHERMAN OAKS' project..."
4 On June 1, 1995, respondent signed another two-year deal between
5 himself and Vin DiBona, creating an overall production deal for
6 "Sherman Oaks" and various other projects. Respondent worked on
7 "Sherman Oaks" throughout 1995 and the show aired during the 1995
8 and 1996 television seasons. Despite respondent's assurances to
9 pay petitioner commissions for the "Sherman Oaks" project,
10 respondent failed to remit commissions to the petitioner for monies
11 earned in connection with the show.

12 4. On February 10, 1997, petitioner hired counsel to
13 collect on the debt. After two letters from petitioner's counsel
14 directly to respondent, Beard obtained counsel on March 12, 1997.
15 On March 13, 1997, petitioner through his attorney, threatened
16 litigation if the respondent did not "change [his] attitude".
17 Again, on March 31, 1997, petitioner threatened litigation and
18 stated, "[i]n not responding to our letter, ...,we will proceed
19 forward with the understanding that you are not [authorized to
20 accept service on your client's behalf] and will serve your client
21 directly." Respondent's following correspondence authorized
22 discussions to be commenced regarding commissions for "Sherman
23 Oaks", "so we can resolve this matter and [have] a settlement and
24 release prepared." Throughout the correspondence, both parties
25 expressly retained all rights in law and equity via standard non-
26
27

1 waiver language¹.

2 5. Throughout April and May of 1997, petitioner
3 continued to correspond with respondent seeking documents that
4 could establish respondent's earnings for "Sherman Oaks". On May
5 6, 1997, petitioner losing patience with respondent's lack of
6 cooperation, placed a two-week deadline for respondent to produce
7 documents or face "all remedies available to redress the
8 situation."

9 6. On May 8, 1997, respondent provided correspondence
10 asserting that he had received \$239,800.00 as compensation for his
11 work on "Sherman Oaks". Petitioner immediately requested
12 supporting documentation, stating petitioner believed the amount to
13 be much higher. Testimony and evidence conflicted on the amount
14 respondent had received for "Sherman Oaks". Evidence was
15 introduced reflecting various amounts earned for the show and
16 testimony was equally unavailing. The dispute as to how much of
17 respondent's per episode salary for "Sherman Oaks" included
18 advances and development fees from the overall production agreement
19 was not resolved.

20 7. Between June and August of 1997, petitioner
21 continued to seek complete documentation for respondent's earnings
22 on "Sherman Oaks". Respondent failed to supply the documents that

24 ¹ The last paragraph of Petitioner's correspondence stated, "[t]his letter
25 is without prejudice to my client's claims and rights and all of which are
expressly reserved."

26 Respondent's correspondence ended with the phrase, "[u]ntil such time as
27 the parties reach agreement on the terms of a settlement and release, please be
assured that nothing contained herein should be deemed a waiver of any of Mr.
Beard's rights or remedies, at law or in equity, and all such rights are
expressly reserved.

1 would clear up the compensation discrepancy, and again on August 7,
2 1997, petitioner threatened to "pursue its legal rights to
3 ascertain and collect said amount." Petitioner sent a letter on
4 September 22, 1997, setting another deadline for respondent to
5 provide the requested documentation. The deadline came and passed.
6 On October 7, 1997, respondent wrote the following:

7
8 Chris is prepared to commission the Chasin Agency on
9 income attributable to his services on Sherman Oaks. His
10 writing fees, producing fees and royalties total
11 \$239,800; therefore, \$23,980.00 represents the 10%
12 commission fee. If this is acceptable to your client I
13 will prepare an appropriate agreement and arrange
14 payment.

15 Nothing contained herein shall be deemed a waiver of my
16 client's rights or remedies, at law or in equity, and all
17 such rights and remedies are expressly reserved.

18 8. On May 26, 1998, **seven months after the October 7,**
19 **1997 offer** of \$23,980, petitioner made a demand for \$45,700.00,
20 subsequently raised to \$47,400.00 on June 1, 1998. Respondent did
21 not reply. On July 21, 1998, petitioner made one last demand and
22 set yet another deadline. After no response from respondent was
23 received, petitioner filed the petition on August 31, 1998, seeking
24 \$47,450.00 in unpaid commissions.

25 CONCLUSIONS OF LAW

26 1. Petitioner is an "artist" within the meaning of
27 Labor Code §1700.4(b), defining "artist" to include, "directors and

1 other artists and persons rendering professional services in motion
2 pictures, ...and other entertainment enterprises."

3 2. It was stipulated respondent is a "talent agency"
4 within the meaning of Labor Code §1700.4(a), defining "talent
5 agency" as a person who "engages in the occupation of procuring,
6 offering, promising, or attempting to procure employment or
7 engagements for an artist." Therefore, the Labor Commissioner has
8 jurisdiction to hear this matter pursuant to Labor Code §1700.44.

9 3. The issue is whether Labor Code §1700.44(c) bars
10 petitioner from bringing this action. §1700.44(c) states, "No
11 action or proceeding shall be brought pursuant to this chapter with
12 respect to any violation which is alleged to have occurred more
13 than one year prior to commencement of the action or proceeding."

14 4. Initially, we must establish a definitive date for
15 respondent's most recent and final alleged violation. This will
16 provide a specific date for purposes of calculating the statute of
17 limitations. Petitioner alleges breach of contract for failing to
18 pay commissions when due. In looking to the contract provisions,
19 section seven communicates the parties' intention when commissions
20 are due and payable. Section seven of the contract² mandates that
21 petitioner is entitled to receive commissions promptly after
22 respondent is compensated. The evidence, which was not disputed,

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24 ² Section (7) of the contracts states in pertinent part: "Your commission
25 under this Agreement shall be payable as an when gross compensation is received
26 by you or me, my firm, or any other person or entity on my behalf...With respect
27 to gross compensation subject to this Agreement which is paid directly to me, my
firm, or any other person or entity on my behalf, an amount equal to said
commission shall be deemed to received an held by me or them in trust for you and
**your commission thereon shall be paid to you promptly after receipt by me or them
of such gross compensation."**

1 established that respondent's final payment for his work performed
2 in connection with "Sherman Oaks" was received in June of 1997.
3 Petitioner did not receive commissions promptly after this date or
4 any other. Respondent failing to remit commissions upon this last
5 payment, allegedly breached his duty to petitioner and committed
6 his last violation. We will use this date to calculate when the
7 action should have been brought for purposes of addressing the
8 statute of limitations defense. Consequently, petitioner should
9 have filed the petition by June of 1998. The petition was filed on
10 8-31-98 and as a result the petition is time barred.

11 5. Petitioner makes various arguments in support of his
12 contention that §1700.44(c) is inapplicable. First, petitioner
13 argues that respondent's October 7, 1997 letter, acknowledges the
14 debt and subsequently extends the statutory time period from this
15 date. Petitioner cites several cases, standing for the proposition
16 that the acknowledgment of a prior unenforceable obligation gives
17 rise to new enforceable promise. General Credit Corporation v.
18 Pichel 44 Cal.App.3d 844, 848. Petitioner is misguided, as the
19 October 7, 1997 letter from respondent was still an **enforceable**
20 debt.

21 6. The Supreme Court case of Southern Pacific v.
22 Prosser 122 Cal. 413, 416 states, "an acknowledgment or promise
23 made before the statute has run vitalizes the old debt for another
24 statutory period dating from the time of the acknowledgment or
25 promise" If the October 7, 1997 letter is categorized as an
26 acknowledgment and the statutory period is tolled pursuant to
27 Southern Pacific, then petitioner's claim survives. An

1 acknowledgment is defined in the Supreme Court case of McCormick v.
2 Brown. There the Court held, "an acknowledgment, within the
3 statute [of limitations], to support an implied promise, must be a
4 direct, distinct, unqualified, and unconditional admission of the
5 debt which the party is liable and willing to pay. Such
6 acknowledgment cannot be deduced from an offer or promise to pay
7 part of the debt, or the whole debt in a particular manner, or at
8 a specified time, or upon specified conditions." McCormick v.
9 Brown 36 Cal. 180, 185. This rule expressed by the Court is
10 clearly not applicable to the case at bar. Here, the
11 correspondence between the parties immediately established an
12 adversarial relationship, with petitioner threatening litigation
13 throughout. Further, correspondence and evidence produced at the
14 hearing, clearly demonstrated many questions of fact in issue,
15 including: how much respondent was compensated; what percentage of
16 that compensation related to "Sherman Oaks"; and whether petitioner
17 was entitled to compensation derived from the 1995 modified
18 contract. Cases relied on by petitioner present the defendant in
19 a far more unqualified demeanor. In General Credit v. Pichel, the
20 defendant writes, "I, Jack Pichel, hereby acknowledgment [sic] my
21 debt to...Hecht... in the sum of \$19,157.065 and I promised [sic]
22 to pay this amount to them." General Credit, supra at 847. This
23 presents dramatically different facts. Here, a close analysis of
24 respondent's correspondence demonstrates an aggressive posture by
25 petitioner followed by respondent's vague and uncertain answers to
26 petitioner's questions. This behavior by both parties certainly
27 does not reflect a "direct, distinct, unqualified, and

1 unconditional admission of the debt which the party is liable and
2 willing to pay."

3 7. In respondent's May 8, 1997 letter he states he
4 received \$239,800 in compensation for "Sherman Oaks" and is willing
5 to settle. On June 27, 1997, he forwards a portion of the "Sherman
6 Oaks" contract between respondent and the production company,
7 reflecting potentially \$457,000.00 in compensation. Finally, on
8 October 7, 1997, respondent is "prepared to commission the Chasin
9 Agency on ...\$239,800; therefore, \$23,980 represents the 10%
10 commission fee. If this is acceptable to your client, I will
11 prepare an appropriate agreement." This language established a
12 conditional payment to an amount obviously in controversy. The
13 letter is consistent with settlement language and will not be
14 considered an acknowledgment for purposes of tolling the statute.

15 8. The only acknowledgment is the April 1994 severance
16 letter, inapplicable to toll the statute because of its remoteness
17 in time. Importantly, both parties expressly reserved their rights
18 in law and equity. Many of the cases tolling the statute involve
19 express waivers. That simply is not the case here. The evidence
20 taken as a whole leaves no doubt the respondent was not motivated
21 by moral obligation and did not acknowledge his debt as reflected
22 in case law. As such, the acknowledgment cases have no bearing.

23 9. Secondly, petitioner argues the doctrine of estoppel
24 should prohibit respondent from asserting the statute. In applying
25 estoppel, Estate of Pieper 224Cal.App2d 670, states: "A person, by
26 his conduct, may be estopped to rely on the statute; where the delay
27 in commencing and action is induced by the conduct of the defendant,

1 it cannot be availed by him as a defense; one cannot justly or
2 equitably lull his adversary into a false sense of security and
3 thereby cause him to subject his claim to the bar of the statute of
4 limitations, and then be permitted to plead the very delay caused
5 by his conduct." Pieper, supra. at 690

6 10. Here, there was evidence of settlement discussions.
7 There was no evidence of fraud or any attempt by the respondent to
8 "lull his adversary into a false sense of security." While we agree
9 respondent did not cooperate with petitioner at every turn,
10 petitioner's conduct did not rise to the level of deceit or even bad
11 faith. Notably, petitioner failed to act on its promise of filing
12 suit time and time again. In fact, petitioner threatened to file
13 suit at every corner and inevitably and no doubt regrettably, chose
14 not to exercise that option.

15 11. Finally, we reject petitioner's argument that
16 petitioner's cause of action accrued on October 7, 1997. Petitioner
17 contends the statute of limitations does not begin until all
18 elements of petitioners cause of action are met. Petitioner
19 maintains that respondent first breached the contract when
20 respondent offered \$23,980.00 pursuant to the October 7, 1997
21 letter. Petitioner asserts this is "when Beard first refused to pay
22 Chasin his rightful commission" which evokes accrual of the statute.
23 As discussed, the breach occurred when respondent did not promptly
24 pay commissions after receipt of compensation. Breach began when
25 respondent first received compensation and ended shortly after
26 respondent received his final compensation in June 1997. "A
27 plaintiff must bring a cause of action within the limitations

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Dated: 4/20/2000

Thomas E. Grogan
THOMAS E. GROGAN
Assistant Chief

