

1 DIVISION OF LABOR STANDARDS ENFORCEMENT
2 Department of Industrial Relations
3 State of California
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9
10 BEFORE THE LABOR COMMISSIONER

11 OF THE STATE OF CALIFORNIA

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NICHOLAS SCOTT CANNON, an)	Case No. TAC 11-00
individual; and BETH GARDNER, an)	
individual,)	
)	
Petitioner,)	
vs.)	DETERMINATION OF
)	CONTROVERSY
)	
SAMIR Y. TOMA,)	
)	
Respondent.)	
)	
)	

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18 INTRODUCTION

19 The above-captioned petition was filed on May 11, 2000,
20 by NICHOLAS SCOTT CANNON and BETH GARDNER as guardian at litem for
21 petitioner, (hereinafter "Petitioner"), alleging that SAMIR Y.
22 TOMA, (hereinafter "Respondent"), acted in the capacity of a talent
23 agency without possessing the required California talent agency
24 license pursuant to Labor Code §1700.5¹. The petitioner seeks from
25 the Labor Commissioner a determination voiding the parties 1998
26 management agreement *ab initio* and requests disgorgement of all

27 ¹ All statutory citations will refer to the California Labor Code unless otherwise specified.

1 the Improv.

2 3. Petitioner soon established a following and made
3 regular appearances at both the *Improv* and *The Comedy Store* venues.
4 Petitioner soon began appearing on cruises, radio shows, and
5 colleges in the San Diego and Los Angeles areas. Television
6 opportunities soon materialized reflected by petitioner's
7 performance on the Keenan Ivory Wayans television program *Keenan*
8 *and Kel* and appearances on *Nickelodeon*.

9 4. In October of 1997, the petitioner engaged the
10 services of Marquee Tollin/Robbins Inc., an additional talent
11 manager to handle all of petitioner's television and film work. In
12 the summer of 1998 Tollin Robbins hired Karen Forman of
13 Metropolitan Talent to act as petitioner's talent agent.

14 5. On October 8, 1998, petitioner dissatisfied with
15 respondent's services terminated the agreement. In November of
16 1999, respondent filed a breach of contract law suit against the
17 petitioner in the Superior Court, County of San Diego, Case No.
18 GIC737891 seeking past and future commission. In response,
19 petitioner filed this action seeking a determination by the Labor
20 Commissioner that the contract is illegal and void against public
21 policy.

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23 CONCLUSIONS OF LAW

24 1. It is undisputed that as an actor and comedienne,
25 petitioner is "artist" within the meaning of Labor Code §1700.4(b).

26 2. The only issue is whether based on the evidence
27 presented at this hearing, did the respondent operate as a "talent

1 agency" within the meaning of Labor Code §1700.40(a)? If so, are
2 there any applicable defenses afforded the respondent?

3 3. Labor Code §1700.40(a) defines "talent agency" as,
4 "a person or corporation who engages in the occupation of
5 procuring, offering, promising, or attempting to procure employment
6 or engagements for an artist or artists." In Waisbren v.
7 Peppercorn Production, Inc (1995) 41 Cal.App.4th 246, the court
8 held that any single act of procuring employment subjects the agent
9 to the Talent Agencies Act's licensing requirement, thereby
10 upholding the Labor Commissioner's long standing interpretation
11 that a license is required for any procurement activities, no
12 matter how incidental such activities are to the agent's business
13 as a whole.

14 4. Respondent contends that his primary duty was to
15 counsel and guide petitioner's career and that any incidental acts
16 of procurement should not subject him to the Act's licencing
17 requirements. In respondent's moving papers, he quotes Wachs v.
18 Curry, which stands for the proposition that, "if counseling and
19 directing the clients' careers constitutes the significant part of
20 the agent's business then he or she is not subject to the licensing
21 requirement of the Act." Wachs, supra., 13 Cal.App.4th 616 at 627.
22 The Waisbren decision soundly rejects this idea. Waisbren, states,
23 "Given Wachs's recognition of the limited nature of the issue
24 before it, we regard as dicta . . . its statement that the Act
25 does not apply unless a person's procurement function is
26 significant. Because the Wachs dicta is contrary to the Act's
27 language and purpose, we decline to follow it. In that regard, we

1 note that Wachs applied an overly narrow concept of 'occupation'
2 and did not consider the remedial purpose of the Act, the decisions
3 of the Labor Commissioner, or the Legislature's adoption of the
4 view (as expressed in the California Entertainment Commission's
5 Report) that a license is necessary for incidental procurement
6 activities. Thus, we conclude that the Wachs dicta is incorrect to
7 the extent it indicates that a license is required only where a
8 person's procurement efforts are 'significant.'" Waisbren, supra,
9 at 261. As a result, the Labor Commissioner continues to follow
10 Waisbren and the long-standing policy that even incidental
11 procurement of employment requires a license.

12 5. Respondent maintains that Tollin Robbins,
13 petitioner's film and television manager, as well as other "agents"
14 procured most if not all of petitioner's engagements. Notably,
15 respondent did not provide testimony from any licensed talent
16 agent, nor produced any competent evidence that other talent agents
17 were involved in the negotiation or procurement of petitioner's
18 stand-up engagements. Conversely, the respondent's testimony was
19 severely impeached when comparing his sworn deposition. In
20 respondent's deposition he stated, "[I] scheduled him to perform at
21 the Improv up in L.A." (Depo. Pg. 199 line 27) When asked whether
22 respondents actually booked performances at the Improv, he stated,
23 "Yes sir." Respondent also stated in his sworn deposition that he
24 set up appearances at The Comedy Store. (Depo. Pg. 121 line 1)
25 Respondent further stated that he made the arrangements with the
26 particular club to have him appear. (Depo. Pg. 121 line 11).
27 Respondent's testimony was riddled with similar inconsistencies.

1 6. Finally, respondent's contract that he created and
2 entered into with the petitioner, expressly maintained that the
3 responsibility for all engagements and public appearances was the
4 managers. Applying Waisbren, it is clear respondent acted in the
5 capacity of a talent agency within the meaning of Labor Code
6 §1700.4(a).

7 7. Labor Code section 1700.5 provides that "no person
8 shall engage in or carry on the occupation of a talent agency
9 without first procuring a license therefor from the Labor
10 Commissioner." It was stipulated the respondent had never procured
11 a talent agency license.

12 8. Respondent argues that the petitioner filed his
13 petition late, and therefore the petition must be dismissed.
14 Respondent argues that Labor Code section 1700.44(c) provides that
15 "no action or proceeding shall be brought pursuant to [the Talent
16 Agencies Act] with respect to any violation which is alleged to
17 have occurred more than one year prior to the commencement of this
18 action or proceeding." Respondent contends that any violations
19 must have occurred prior to the October 1998 termination. The
20 petition being filed on May 11, 2000, consequently violates the
21 statute of limitations. Here, the petitioner raises the issue of
22 respondent's unlicensed status purely as a defense to the
23 proceedings brought by respondent's action against the petitioner
24 filed in superior court.

25 9. A statute of limitations is procedural, that is it
26 only affects the remedy, not the substantive right or obligation.
27 It runs only against causes of action and defenses seeking

1 affirmative relief, and not against any other defenses to an
2 action. The statute of limitations does not bar the defense of
3 illegality of a contract, and in any action or proceeding where the
4 plaintiff is seeking to enforce the terms of an illegal contract,
5 the other party may allege and prove illegality as a defense
6 without regard to whether the statute of limitations for bringing
7 an action or proceeding has already expired. Sevano v. Artistic
8 Production, Inc., (1997)TAC No. 8-93 pg.11.

9 10. Additionally, this issue was brought before the
10 California Court of Appeals in Park v. Deftones 84 Cal.Rptr.2d 616,
11 at 618, which agreed with the Labor Commissioners ruling in Moreno
12 v. Park (1998) TAC No. 9-97, p.4, stating, "the attempt to collect
13 commissions allegedly due under the agreement was itself a
14 violation of the Act." In that case, as here, the petitioner has
15 brought this case before the Labor Commissioner as a result of
16 respondents superior court action. Park adds, "it also assures
17 that the party who has engaged in illegal activity may not avoid
18 its consequences through the timing of his own collection action."
19 Park, supra at 618. We thus conclude that §1700.44(c) does not bar
20 petitioner from asserting the defense of illegality of the contract
21 on the ground that respondent acted as a talent agent without a
22 license.

23 11. In Buchwald v. Superior Court (1967) 254 Cal.App.2d
24 347, 351, the court held that because "the clear object of the Act
25 is to prevent improper persons from becoming [talent agents] and to
26 regulate such activity for the protection of the public, a contract
27 between an unlicensed [agent] and an artist is void." We do

1 recognize the respondent went to great lengths in providing travel,
2 expenses and opportunities to the petitioner; however, the
3 resulting contract establishing a 50/50 split of the profits
4 between the parties is unconscionable.

6 ORDER

7 For the above-stated reasons, IT IS HEREBY ORDERED that
8 the 1998 contract between petitioner NICHOLAS SCOTT CANNON and
9 respondent, SAMIR Y. TOMA is unlawful and void *ab initio*.
10 Respondent has no enforceable rights under that contract.

11 Having made no clear showing that the respondent
12 collected commissions within the one-year statute of limitations
13 prescribed by Labor Code §1700.44(c), petitioner is not entitled to
14 a monetary recovery.

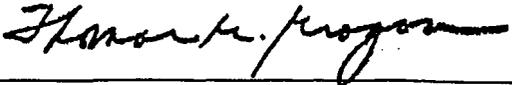
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17 Dated: 1/30/01



DAVID L. GURLEY
Attorney for the Labor Commissioner

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21 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

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24 Dated: 1/30/01



TOM GROGAN
Deputy Chief Labor Commissioner

