

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
12

13 ANGELA WELLS,) Case No. TAC 17-00
14 Petitioner,)
15 vs.) DETERMINATION OF
16) CONTROVERSY
17)
18)
19 BARMAS, INC., a California Corporation)
20 dba FRED SEGAL AGENCY,)
21 Respondents.)
22)
23)
24)

25 INTRODUCTION

26 The above-captioned petition was filed on June 13, 2000,
27 by ANGELA WELLS (hereinafter "Petitioner" or "Wells"), alleging that
28 BARMAS INC., dba FRED SEGAL AGENCY, (hereinafter "Respondents" or
"Agency"), acted as petitioner's exclusive talent agent without
possessing a talent agency license required by Labor Code §1700.5.
Petitioner also alleges breach of contract, in that respondent
failed to collect monies from a third-party on behalf of petitioner
as required by the express terms of the agreement.

Petitioner seeks a determination that would preclude the
respondent from collecting any currently owed commissions, and
requests reimbursement for all commissions previously paid and
finally, respondent should be ordered to collect monies owed to

1 petitioner from a third party or be liable for those amounts.

2 Respondent filed a response on July 14, 2000, defending
3 on the grounds that the petition should be dismissed by reasons of
4 *res judicata* and *collateral estoppel* and moreover, claims the Labor
5 Commissioner is without jurisdiction, as the petitioner is not an
6 "artist" within the meaning of Labor Code 1700.4(b).

7 A hearing was held on August 25, 2000, before the
8 undersigned attorney for the Labor Commissioner. Petitioner
9 appeared with her attorney, Debra L. Johnson; Respondent appeared
10 in *pro per*. Based upon the testimony and evidence presented at
11 this hearing, the Labor Commissioner adopts the following
12 Determination of Controversy.

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14 **FINDINGS OF FACT**

15 1. In early 1999, the parties entered into an agreement
16 whereby respondent acted as petitioner's exclusive representative,
17 both managing, directing and developing petitioner's career, as
18 well as procuring and negotiating petitioner's employment
19 engagements.

20 2. In March of 1999, respondent secured petitioner a
21 ten (10) picture deal with Imani Pictures. Petitioner was hired as
22 the Department Head -- Makeup and Hair. In that capacity,
23 petitioner would oversee all makeup, hairstyles and use her skills
24 in the application of any burns, cuts, gunshots, aging and bald-
25 caps that a particular scene may require. Notably, the deal memo
26 executed on March 11, 1999 between Imani Pictures and petitioner
27 provided for 25 paid hiatus days (days-off).

28 3. At the conclusion of the last picture, Imani failed

1 to pay petitioner for the 25 hiatus days as required in the
2 contract. Petitioner claims that pursuant to the terms of the deal
3 memo, Imani owed her \$180.00 per hiatus day totaling \$4,500.00.
4 Petitioner maintains it is respondent's responsibility to collect
5 the amounts allegedly owed for hiatus days, as collections are an
6 express duty of the Agency as stated in the Agency Guidelines.

7 4. In a March 1, 2000 letter, several weeks after
8 conclusion of the Imani deal, petitioner severed the relationship
9 between the parties. In petitioner's severance letter, she
10 concluded that respondent's duty required him to collect the
11 \$4,500.00 owed by Imani. Petitioner stated the Agency could double
12 their commissions for those collections. And the Agency could
13 deduct any outstanding commissions presently owed by petitioner to
14 the Agency¹ from those collections.

15 5. The Agency responded on March 15, 2000, claiming
16 the Agency only commissions "days worked", hiatus days are not "days
17 worked" and consequently the Agency is not entitled to commission
18 those days. Moreover, because Wells severed the contract between
19 the parties, the Agency no longer has the authority to collect on
20 Wells behalf. As a result, the outstanding commissions admittedly
21 owed by Wells from the last film remain owed.

22 6. On March 31, 2000, respondent filed an action in
23 the small claims court of Beverly Hills, Ca., case No. 00S00469,
24 seeking \$341.50 in unpaid commissions. On May 11, 2000, petitioner
25 cross claimed for the sum of \$4,318.00 on the grounds that, "I was
26 represented by Fred Segal Agency, [and] they do not have a license
27

28 ¹ In the March 1, 2000 severance letter, Wells acknowledged that the Agency
is "still owed some commission from the last film."

1 from the California State Labor Commissioner to operate as a talent
2 agency." The hearing in small claims court was not stayed pending
3 the determination of this administrative proceeding and commenced
4 as scheduled on June 1, 2000. On June 2, 2000, judgment was
5 entered in favor of respondent for the sum of 191.50 and costs.

6 7. Petitioner now seeks to re-litigate the same cause
7 of action here.

8
9 CONCLUSIONS OF LAW

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11 1. Labor Code §1700.44 vests the Labor Commissioner
12 with exclusive and primary jurisdiction in cases arising under the
13 Talent Agencies Act. The Act² governs the relationship between
14 artists and talent agencies.

15 2. Labor Code §1700.4(a) defines "talent agency" in
16 pertinent part as: "a person or corporation who engages in the
17 occupation of procuring, offering, promising, or attempting to
18 procure employment or engagements **for an artist or artists...**"

19 3. The controlling issue is whether petitioner's job
20 responsibilities as a makeup and hair stylist fall within the
21 meaning of "artist" found at Labor Code §1700.4(b). If the
22 petitioner is not an "artist", the respondent could not have acted
23 as a talent agency, and the Labor Commissioner would be divested of
24 jurisdiction to hear this matter.

25
26 Labor Code §1700.4(b) defines "artists" as:

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² The "Act" refers to the "Talent Agencies Act" which describes the
statutory scheme created to regulate talent agents and found at Labor Code
§§1700.00 et seq.

1
2 actors and actresses rendering services on the legitimate
3 stage and in the production of motion pictures, radio
4 artists, musical artists, musical organization, directors
5 of legitimate stage, motion pictures and radio
6 productions, musical directors, writers,
7 cinematographers, composers, lyricists, arrangers,
8 models, and other artists rendering professional services
9 in the motion picture, theatrical, radio, television and
10 other entertainment enterprises."

11 4. Although Labor Code §1700.4(b) does not expressly
12 cover the term "hair stylist" or "makeup artist" within the
13 definition of "artist", the broadly worded definition does leave
14 room for interpretation. The statute ends with the phrase, "**and**
15 **other artists and persons rendering professional services in...**
16 **other entertainment enterprises.**"

17 5. Historically the Labor Commissioner has held,
18 "[d]espite this seemingly open ended formulation, we believe the
19 Legislature intended to limit the term 'artists' to those
20 individuals who perform creative services in connection with an
21 entertainment enterprise. Without such a limitation, virtually
22 every 'person rendering professional services' connected with an
23 entertainment project - - would fall within the definition of
24 "artists". We do not believe the Legislature intended such a
25 radically far reaching result." *American First Run Studios v.*
26 *Omni Entertainment Group No. TAC 32-95, pg. 4-5.*

27 6. Petitioner argues that her expertise in makeup
28 extends beyond traditional cosmetology duties and reaches a level
that could be described as a special effects makeup artist. And
she opines that her expertise is of such a creative nature that she
would fall within the protected class. We do not agree. We
believe a makeup specialist might possibly be considered an artist
under the Act if the skills demonstrated are a focal point of the

1 production. Here, the evidence presented at the hearing did not
2 rise to the level of special effects wizardry which might be
3 afforded protection under the Act.

4 7. Throughout the history of the Act, the definition
5 of "artist" only included above-the-line creative performers, or
6 the creative forces behind the production whose contributions were
7 an essential an integral element of the production, (i.e.
8 directors, writers and composers).

9 8. An example of special effects makeup that may be
10 protected under the Act would be the prosthetics specialist in the
11 Jim Carrey movies "*The Mask*" and "*The Grinch*", Robin Williams
12 makeup specialist in "*Bicentennial Man*", or the artist responsible
13 for the transformation of Michael Jackson to a werewolf in the John
14 Landis' production of "*Thriller*". These contributions were as
15 crucial to the productions artistry and success as were the
16 performances of many of the cast members.

17 9. It is apparent after viewing several photos of
18 petitioner's work that she is a respected makeup artist, and
19 creates realistic scars, bruising, gun shot wounds and other
20 injuries utilizing various makeup techniques, but the evidence
21 produced did rise to the level of the examples mentioned above.

22 10. Further, the Labor Commissioner has historically
23 taken the position that "an agency whose clients consist solely of
24 makeup artists and hair stylists (and those performing similar
25 below-the-line, cosmetology related services) would not qualify as
26 a 'talent agency' under the Act, and said clients would not qualify
27 as 'artists' under the Act." Testimony reflected the respondent
28 only represents persons conducting these types of services in the

1 entertainment industry and we believe Ms. Wells skills fall into
2 this category.

3 11. This is not to say the Legislature has never
4 expanded on the term "artist". A very significant change made by
5 the California Entertainment Commission³ was to add the occupation
6 of "models" to the definition of artist as defined by Labor Code
7 §1700.4(b). The Commission reasoned that, "as persons who function
8 as an integral and significant part of the entertainment industry,
9 models should be included within the definition of artist" (Report
10 p. 33-34). Again, we are not advocating that hair stylists and
11 makeup artists are not an integral and significant part of the
12 entertainment industry, we are simply stating that if the
13 Commission, who by statutory mandate analyzed the Act in minute
14 detail, thought that below-the-line cosmetology related occupations
15 required statutory protection under the Act, they could have made
16 this recommendation to the Legislature. This was certainly the
17 forum do make such a recommendation.

18 12. The Commission's utter silence with respect to
19 cosmetology related occupations can only be interpreted to mean,
20 that if in the discretion of the Labor Commissioner, a showing of
21 creativity in special effects makeup comprises an integral and
22 essential part of the production, then that individual or team of
23 individuals **may** be considered "artists" within the meaning of Labor
24 Code §1700.4(b). We do not reach that conclusion here.

25 13. The Division does conclude and maintains the
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27 ³ In 1982, AB 997 established the California Entertainment Commission.
28 Labor Code §1702 directed the Commission to study the laws and practices of this
state, ...relating to the licensing of agents, and representatives of artists in
the entertainment industry in general, ... so as to enable the commission to
recommend to the Legislature a model bill regarding this licensing.

1 historical policy that makeup, hairstylists and other cosmetology
2 related occupations are not "artists" within the meaning of Labor
3 Code 1700.4(b) and hence petitioner is not an artist within the
4 statutory definition and hence, not a member of the protected
5 class.

6 14. As the petitioner is not an "artist", it follows
7 that respondents are not "talent agents", as a talent agency is
8 defined as procuring employment for "artists".

9 15. We therefore find the parties do not fall within
10 the provisions of the Talent Agencies Act. Consequently, the Labor
11 Commissioner is without jurisdiction to hear or decide the merits
12 of this case. Accordingly, respondents *res judicata* and *collateral*
13 *estoppel* defenses do not require discussion.

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16 ORDER

17 For the above-state reasons, IT IS HEREBY ORDERED that
18 this petition is denied and dismissed on motion by the undersigned
19 hearing officer.

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23 Dated:

11/8/00



DAVID L. GURLEY

Attorney for the Labor Commissioner

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27 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:
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Dated: NOV 08 2000

Arthur S. Lujan (2)

ARTHUR S. LUJAN
State Labor Commissioner

