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7
8 BEFORE THE LABOR COMMISSIONER
9 STATE OF CALIFORNIA

10
11 HERNAN DE BEKY,) No. TAC 11-02
)
12) Petitioner,)
)
13) vs.)
)
14) PIEDAD BONILLA, an individual dba) DETERMINATION OF
Pinata Productions and Management,) CONTROVERSY
15)
) Respondent.)
16)
17)

18 The above-captioned matter, a petition to determine
19 controversy under Labor Code §1700.44, came on regularly for
20 hearing on October 29, 2002, in Los Angeles, California, before
21 the Labor Commissioner's undersigned hearing officer. Hernan de
22 Beky (hereinafter "Petitioner") was represented by Ronald G.
23 Rosenberg; Piedad Bonilla, an individual dba Pinata Productions
24 and Management (hereinafter "Respondent") appeared in propria
25 persona. Based on the evidence presented at this hearing and on
26 the other papers on file in this mater, the Labor Commissioner
27 hereby adopts the following decision.

28 //

1 FINDINGS OF FACT

2 1. Petitioner performs as an actor and a Spanish language
3 voice-over artist in radio and television commercials and movie
4 trailers.

5 2. On September 5, 2000, Petitioner entered into a written
6 "personal management agreement" with Respondent for a period of
7 one and one-half years, commencing May 2, 2000, whereby
8 Respondent was to provide advice and counsel "with respect to
9 decisions concerning employment ... and all other matters
10 pertaining to [Petitioner's] professional activities and career
11 in entertainment, amusement, music, recording, literary fields
12 and in any and all media." Under the terms of this contract,
13 petitioner agreed to pay commissions to respondent in the amount
14 of 15% of his gross earnings in these fields during the term of
15 the agreement, and his earnings following expiration of the
16 agreement as to any agreements entered into or substantially
17 negotiated during the term of the contract. The contract
18 specified that respondent is not a theatrical agent, and is not
19 licensed to obtain, seek or procure employment for the
20 petitioner. The contract also provided that "in any arbitration
21 or litigation under this agreement, the prevailing party shall be
22 entitled to recover from the other party any and all costs
23 reasonably incurred by the prevailing party in such arbitration
24 or litigation, including without limitation, reasonable
25 attorney's fees."

26 3. Respondent has never been licensed by the State Labor
27 Commissioner as a talent agency.

28 4. Prior to May 3, 2000, petitioner was not represented by

1 a licensed talent agency. Since May 3, 2000, petitioner has been
2 represented by Larry Hummel, an agent employed by ICM
3 (International Creative Management, Inc.), a licensed talent
4 agency.

5 5. On March 9, 2000, petitioner performed work as an extra
6 in the movie "Blow". Petitioner learned of this job from
7 respondent, who telephoned the petitioner to advise him of the
8 opportunity. According to respondent, she was employed by the
9 production company that produced "Blow" as an assistant to the
10 casting director, and her call to petitioner was to secure his
11 services for the film in her capacity as an assistant to the
12 film's casting director. No evidence was presented that would
13 indicate that respondent collected or attempted to collect any
14 commission from petitioner for this job.

15 6. On September 13, 2000, petitioner sent an e-mail to
16 respondent inquiring about the progress of obtaining work doing
17 the Spanish language voice-over for the trailer for the movie
18 "Woman on Top". Respondent responded by e-mail, stating "I have
19 to talk to the owner. . . I'll keep you informed." Larry Hummel,
20 the ICM agent, credibly testified that ICM had no role whatsoever
21 in attempting to procure or in procuring work for the petitioner
22 in connection with this film. Nonetheless, petitioner did get
23 the job doing the voice-over for the trailer for this film. The
24 production company paid petitioner \$825 for his work on the
25 trailer, and paid an additional check for \$100 made out to the
26 respondent. Respondent's testimony that she did not procure this
27 job for petitioner was not credible, as it is contradicted by all
28 of the other evidence on this issue. The weight of this evidence

1 compels the finding that respondent attempted to procure, and did
2 procure, this employment for petitioner.

3 7. On December 7, 2000, petitioner performed work doing the
4 Spanish language voice-over for a trailer for the movie "Quills".
5 Larry Hummel credibly testified that ICM had no role whatsoever
6 in attempting to procure or in procuring work for the petitioner
7 in connection with this film, and furthermore, that prior to this
8 hearing, ICM wasn't even aware that petitioner performed any work
9 in connection with that film. Petitioner credibly testified
10 that he found out that he got the "Quills" job through
11 respondent, and that until the respondent told him about this
12 job, he had not had any sort of contact with any production
13 company regarding the job. Respondent's testimony that this job
14 was procured by ICM is not believable, as it is contradicted by
15 all of the other evidence on this issue. From this evidence, we
16 draw the inference that this job was procured by the respondent.

17 8. On December 19, 2000, the respondent invoiced the
18 production company that produced the Spanish language trailer for
19 "Quills", in the amount of \$2,000, payable to the respondent.
20 The production company paid this amount to the respondent the
21 next day. On January 16, 2001, respondent sent a check to
22 petitioner in the amount of \$1,800, retaining \$200 as a
23 commission.

24 9. In November 2001, petitioner notified respondent of his
25 intent to terminate the personal management agreement. On
26 December 31, 2001, respondent filed a small claims action against
27 petitioner for payment of \$1,500 allegedly owed under the
28 personal management agreement.

1 10. By letter dated January 4, 2002, the law firm Holguin &
2 Garfield, acting on behalf of the petitioner, advised respondent
3 that because she procured employment for the petitioner without
4 having been licensed as a talent agent by the State Labor
5 Commissioner, the "personal management agreement" is
6 unenforceable and void from its inception, and demanded that
7 respondent not pursue the small claims action.

8 11. Despite the letter from petitioner's attorney,
9 respondent proceeded with her small claims action against the
10 petitioner. The small claims court entered a judgment in favor
11 of respondent, from which petitioner filed a de novo appeal. A
12 judgment was ultimately entered in favor of the respondent in the
13 amount of \$1,620.42. On June 5, 2002, respondent executed on
14 this judgment by levying on petitioner's bank account. As a
15 result of the levy, \$1,670.42 (the amount of the judgment plus a
16 \$50 bank fee) was removed from petitioner's account.

17 12. On March 21, 2002, petitioner filed this petition to
18 determine controversy with the Labor Commissioner, seeking a
19 determination that the "personal management agreement" is
20 unenforceable and void from its inception, with reimbursement for
21 all amounts paid to the respondent pursuant to this agreement,
22 and payment of petitioner's attorney's fees incurred in this
23 proceeding.

24 13. On May 23, 2002, respondent filed a second small claims
25 action against the petitioner, seeking payment of \$2,000 in
26 commissions allegedly owed under the personal management
27 contract. As of the date of the hearing before the Labor
28 Commissioner, this small claims action was still pending.

1 obtained a talent agency license from the Labor Commissioner,
2 respondent violated Labor Code §1700.5.

3 An agreement that violates the licensing requirement of the
4 Talent Agencies Act is illegal and unenforceable. "Since the
5 clear object of the Act is to prevent improper persons from
6 becoming [talent agents] and to regulate such activity for the
7 protection of the public, a contract between an unlicensed
8 [agent] and an artist is void." *Buchwald v. Superior Court*
9 (1967) 254 Cal.App.2d 347, 351. Having determined that a person
10 or business entity procured, promised or attempted to procure
11 employment for an artist without the requisite talent agency
12 license, "the [Labor] Commissioner may declare the contract
13 [between the unlicensed agent and the artist] void and
14 unenforceable as involving the services of an unlicensed person
15 in violation of the Act." *Styne v. Stevens, supra*, 26 Cal.4th at
16 55. "[A]n agreement that violates the licensing requirement is
17 illegal and unenforceable" *Waisbren v. Peppercorn*
18 *Productions, Inc.* (1995) 41 Cal.App.4th 246, 262. Moreover, the
19 artist that is party to such an agreement may seek disgorgement
20 of amounts paid pursuant to the agreement, and "may . . . [be]
21 entitle[d] . . . to restitution of all fees paid the agent."
22 *Wachs v. Curry* (1993) 13 Cal.App.4th 616, 626. This remedy of
23 restitution is, of course, subject to the one year limitations
24 period set out at Labor Code §1700.44(c), so that the Labor
25 Commissioner will not, absent extraordinary circumstances, order
26
27
28 order to employ artists for work on the film or project that the
production company is producing. See *Chinn v. Tobin* (TAC No. 17-
96).

1 the reimbursement of amounts paid to an unlicensed agent prior to
2 one year before the filing of the petition to determine
3 controversy.

4 The primary legal question presented herein is whether the
5 Labor Commissioner has the authority to reimburse petitioner for
6 the amount that petitioner was required to pay to the respondent
7 pursuant to the superior court's judgment after trial de novo on
8 appeal from the small claims court on respondent's claim that
9 petitioner owed this amount under the "personal management
10 agreement." The question that we must address is whether the
11 court judgment can now be attacked through this proceeding before
12 the Labor Commissioner.

13 Our analysis begins with the observation that the Labor
14 Commissioner has exclusive primary jurisdiction to determine all
15 ~~controversies arising under the Talent Agencies Act. The Act~~
16 specifies that "[i]n cases of controversy arising under this
17 chapter, the parties involved shall refer the matters in dispute
18 to the Labor Commissioner, who shall hear and determine the same,
19 subject to an appeal . . . to the superior court where the same
20 shall be heard de novo." (Labor Code §1700.44(a).) Courts
21 cannot encroach upon the Labor Commissioner's exclusive original
22 jurisdiction to hear matters (including defenses) arising under
23 the Talent Agencies Act.

24 "The Commissioner has the authority to hear and determine
25 various disputes, *including the validity of artists' manager-*
26 *artist contracts and the liability of parties thereunder.*
27 ([*Buchwald v. Superior Court, supra, 254 Cal.App.2d 347,*] 357.)
28 The reference of disputes involving the [A]ct to the Commissioner

1 is mandatory. (*Id.* at p. 358.) Disputes must be heard by the
2 Commissioner, and all remedies before the Commissioner must be
3 exhausted before the parties can proceed to the superior court.
4 (*Ibid.*)" (*REO Broadcasting Consultants v. Martin* (1999) 69
5 Cal.App.4th 489, 494-495, italics in original.)

6 Therefore, "[w]hen the Talent Agencies Act is invoked in the
7 course of a contract dispute, the Commissioner has exclusive
8 jurisdiction to determine his jurisdiction in the matter,
9 including whether the contract involved the services of a talent
10 agency." *Styne v. Stevens, supra*, 26 Cal.4th 42, 54. This means
11 the Commissioner, not the court, has "the exclusive right to
12 decide in the first instance all the legal and factual issues on
13 which an Act-based defense depends." *Ibid.* at fn. 6, italics in
14 original. Here, the court's failure to defer to the Labor

15 Commissioner's jurisdiction compels the conclusion that the court
16 acted in excess of its own jurisdiction. "Our conclusion that
17 section 1700.44, by its terms, gives the Commissioner exclusive
18 original jurisdiction over controversies arising under the Talent
19 Agencies Act comports with, and applies, the general doctrine of
20 exhaustion of administrative remedies. With limited exceptions,
21 the cases state that where an adequate administrative remedy is
22 provided by statute, resort to that forum is a "jurisdictional"
23 prerequisite to judicial consideration of the claim." *Ibid.* at
24 56. Even when the Talent Agencies Act is only being raised as a
25 defense to an action for commissions purportedly due under a
26 "personal management contract", there is no concurrent original
27 jurisdiction: "[T]he plain meaning of section 1700.44,
28 subdivision (a), and the relevant case law, negate any inference

1 that courts share original jurisdiction with the Commissioner in
2 controversies arising under the Act. On the contrary, the
3 Commissioner's original jurisdiction of such matters is
4 exclusive." *Ibid.* at 58.

5 Here we are confronted by a final judgment -- albeit a
6 judgment was issued by a court that lacked subject matter
7 jurisdiction. After a final judgment has been rendered in an
8 action, a new action or proceeding based on the same cause of
9 action or defense, ignoring the normal effect of judgment as a
10 merger or bar, is a collateral attack. *Woulridge v. Burns* (1968)
11 265 Cal.App.2d 82, 84. This petition to determine controversy
12 constitutes a collateral attack on the superior court judgment.
13 In a collateral attack, a judgment may be effectively challenged
14 only if it is so completely invalid as to require no ordinary
15 review to annul it. *Ibid.* The grounds for collateral attack
16 include lack of subject matter jurisdiction. Witkin, 8 *Cal. Proc.*
17 (4th), *Attack on Judgment in Trial Court*, §6.

18 When a collateral attack is made against a California
19 judgment, including a judgment issued by a court of limited or
20 special jurisdiction (such as small claims court or a superior
21 court hearing an appeal de novo of a small claims judgment),
22 there is a presumption of that the court acted in the lawful
23 exercise of its jurisdiction, and the judgment is presumed valid.
24 Evidence Code §666. In a collateral attack made against a
25 California judgment, jurisdiction is *conclusive* if the
26 jurisdictional defect does not appear on the face of the record.
27 *Superior Motels v. Rinn Motor Hotels* (1987) 195 Cal.App.3d 1032,
28 1049. Extrinsic evidence is inadmissible even though it might

1 show that jurisdiction did not in fact exist. *Hogan v. Superior*
2 *Court* (1925) 74 Cal.App. 704, 708. A judgment "void on its face"
3 may be collaterally attacked when the defect may be shown without
4 going outside the record or judgment roll. *Becker v. S.P.V.*
5 *Const. Co.* (1980) 27 Cal.3d 489, 493. Here, as we are dealing
6 with a judgment stemming from a small claims proceeding, the
7 record does not appear to reveal any jurisdictional defect.
8 Nonetheless, there are exceptions to the rule that collateral
9 attack against a California judgment will fail unless the
10 judgment is void on its face. Of significance here, a party
11 relying on a judgment may waive the benefit of this rule
12 excluding extrinsic evidence by failure to object to the
13 extrinsic evidence when offered. See *Witkin, 8 Cal. Proc. (4th),*
14 *Attack on Judgment in Trial Court*, §13, and various cases cited
15 therein.

16 In the hearing of this controversy, the petitioner presented
17 extrinsic evidence to which no objection was raised that the
18 respondent had engaged in unlawful procurement activities in
19 violation of the Talent Agency Act, so as to constitute a defense
20 to respondent's small claims action for payment of commissions
21 owed under the personal management agreement. This evidence
22 establishes that the judgment based on the small claims
23 proceeding was void, as it was issued by a court that lacked
24 subject matter jurisdiction.

25 Having found that this proceeding to determine controversy
26 under the Talent Agencies Act is not barred by the judgment on
27 the small claims proceeding, and having found that respondent
28 engaged in unlawful procurement activities, we necessarily

1 conclude that the personal management contract was unlawful and
2 void from its inception, and that respondent has no enforceable
3 rights thereunder. We find that in order to effectuate the
4 purposes of the Act, the petitioner must be reimbursed for all
5 amounts paid to respondent pursuant to this contract from one
6 year prior to the date of the filing of this petition to the
7 present. The total amount that must be reimbursed consists of
8 the \$1,620.42 obtained by respondent pursuant to a levy on
9 petitioner's bank account on June 5, 2002, as that amount was
10 levied pursuant to the void judgment awarding damages to
11 respondent for breach of the void personal management contract.

12 Turning to petitioner's request for attorneys' fees incurred
13 in connection with this proceeding, the contract between the
14 parties did provide for an award of reasonable attorney's fees to
15 the prevailing party "in the event of litigation or arbitration
16 arising out of this agreement or the relationship of the parties
17 created hereby." But an administrative proceeding before the
18 Labor Commissioner pursuant to Labor Code §1700.44 neither
19 constitutes "litigation" nor "arbitration". Litigation is
20 commonly understood as "the act or process of carrying out a
21 lawsuit." (Webster's New World Dictionary, Third College Edition
22 (1988)) Lawsuits take place in courts, not before administrative
23 agencies. Black's Law Dictionary defines "litigation" as a
24 "contest in a court of justice for the purpose of enforcing a
25 right." And an "arbitration", obviously, takes place before an
26 arbitrator, not an administrative agency authorized to hear
27 disputes pursuant to statute. Consequently, we conclude that the
28 contract does not provide for an award of attorneys' fees

1 incurred in a proceeding to determine controversy before the
2 Labor Commissioner. Therefore, even though the petitioner
3 prevailed before the Labor Commissioner, he is not entitled to
4 attorneys' fees in this proceeding.

5 We take this opportunity, however, to caution the respondent
6 that failure to pay the full amount awarded herein to the
7 petitioner within ten days of the date of service of this
8 determination may result in liability for petitioner's attorneys
9 fees in any subsequent judicial proceedings. Such subsequent
10 proceedings could either be initiated by the respondent through
11 the filing of a de novo appeal from this determination, pursuant
12 to Labor Code §1700.44(a), or by the petitioner through the
13 filing of a petition to confirm the determination and enter
14 judgment thereon. See *Buchwald v. Katz* (1972) 8 Cal.3d 493.
15 Of course, the respondent can prevent any subsequent judicial
16 proceedings by expeditiously paying the petitioner the full
17 amount found due herein.

18 ORDER

19 For the reasons set forth above, IT IS HEREBY ORDERED that:

20 1. The personal management contract between petitioner and
21 respondent is illegal and void from its inception, and respondent
22 has no enforceable rights thereunder;

23 2. The judgment that was entered on the small claims court
24 action is void for lack of subject matter jurisdiction;

25 3. Respondent reimburse petitioner for the commissions paid
26 to respondent from March 21, 2001 to the present, in the amount
27 of \$1,620.42;

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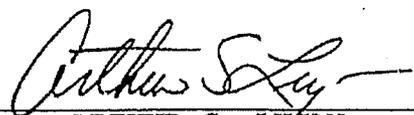
1 4. All parties shall bear their own costs and attorney's
2 fees incurred in this proceeding.

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5 Dated: 1/22/03


MILES E. LOCKER
Attorney for the Labor Commissioner

7
8 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

9
10 Dated: 1/22/03


ARTHUR S. LUJAN
State Labor Commissioner

