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BEFORE THE LABOR COMMISSIONER

STATE OF CALIFORNIA

SHANDRA SINNAMON, Petitioner, v. GREGORY McKAY, McKAY PRODUCTIONS, INC., BLUE GEM MUSIC, INC., and GEM PRODUCTIONS, INC., Respondents.	NO. SFMP 73/TAC 9-80 DETERMINATION AND AWARD

The above-entitled Controversy came on regularly for hearing, commencing July 8, 1980, Richard N. Dinallo, Esq., presiding as Special Hearing Officer for, and on behalf of the Labor Commissioner of the State of California. Donald S. Engle, Esq., appeared on behalf of Petitioner, SHANDRA SINNAMON, and Irwin O. Spiegel, Esq., appeared on behalf of Respondents, GREGORY McKAY, McKAY PRODUCTIONS, INC., BLUE GEM MUSIC, INC., and GEM PRODUCTIONS, INC.

Evidence, both oral and documentary, having been introduced, the matter having been duly submitted, and

GOOD CAUSE APPEARING THEREFOR, the Labor Commissioner makes the following Determination and Award:

FINDINGS OF FACT

None of the Respondents has been licensed by the Labor Commissioner to act as a Talent Agency. None of the agreements between the parties was ever approved by the Labor Commissioner.

Petitioner testified that she is a singer (also stipulated by the parties that she is a recording artist) and had been when she met Respondent GREGORY McKAY, in June of 1977. McKAY helped SINNAMON terminate her agreement with her previous manager and promised to help her with her career.

Approximately in February of 1978, the parties entered into two agreements whereby McKAY PRODUCTIONS, INC. sought and obtained what purported to be an exclusive recording contract, despite the fact that McKAY, prior to its execution, told SINNAMON that he was not going to produce the records. Rather, with his connections, he would "get her a record deal with a major record company; that he wasn't a record producer . . . ." McKAY further represented that he could take some tapes previously made by Petitioner, and through his connections, procure a record deal. One such record company was Elektra-Asylum Records. McKAY was also instrumental in Petitioner's appearing on the Jim Nabors Show, some nine days after the February 1st agreement was signed. Respondents received no compensation for this engagement. McKAY also secured for Petitioner, an engagement at Madam Wong's and the Blue Lagoon Saloon.

Between February 1978, and August 1979, Petitioner received $500.00 per month from Respondents, pursuant to their recording agreement and $500.00 pursuant to a publishing agreement. These sums were "advances" made by Respondents "to help Petitioner with the band." McKAY introduced Petitioner to McKAY PRODUCTIONS, INC., the signatory to the Exclusive Recording Agreement. Petitioner's Exhibit No. 1.

McKAY admitted having booked three engagements for Petitioner, but testified that he never received any compensation pursuant to these events.

Owen J. Sloane, attorney for Respondents, testified that the only reason SINNAMON was paid $1,000.00 per month, was to facilitate a legal basis for securing injunctive relief against Petitioner in the event she breached. While Petitioner's Exhibit No. 1 refers to Petitioner's right to choose a personal manager, McKAY told Sloane that he may, himself, want to manage Petitioner.

McKAY testified that he was not interested in managing Petitioner, but was only interested in signing her to his record company; that he only considered being her manager while considering getting her a record deal. After he said he disregarded the idea, he signed Petitioner to his record company.

Petitioner was paid by McKAY PRODUCTIONS, INC. after the February 1, 1979 agreement was entered into. There was no evidence supporting the fact that third parties paid her directly.

McKAY PRODUCTIONS, INC. was formed in 1972. In January of 1979, it became GEM PRODUCTIONS, INC. GEM MANAGEMENT, INC. was created in July of 1979.

In an independent Court deposition, McKAY admitted having been Petitioner's manager prior to the February 1st agreement.

Testimony from the deposition also revealed that McKAY carried tapes of Petitioner to ten different record companies; attempted to get Petitioner "showcased" when the record companies failed to show interest in the tapes; and attempted to get Petitioner engagements at the Bla Bla Club, Troubador and Madam Wong's. Further, the entire purpose of the February 1st agreement was to get major record companies interested in Petitioner whereby Respondents would economically benefit. Testimony read at the hearing which came from the deposition also established that the $1,000.00 per month "loan" was not intended to be paid back by Petitioner, but rather, was to be subtracted from money paid to McKAY PRODUCTIONS, INC. by third party record companies.

While Respondent asserted that Petitioner was an employee of McKAY PRODUCTIONS, INC., no deductions were ever taken out of her monthly allotment. McKAY testified that while he may have said to Petitioner that he would get her a "deal", he meant one with his own record company. He further testified that he had no right to hire or fire Petitioner; that her work hours were irregular and generally unsupervised, and supervised only when she performed or recorded, which was during a two or three week period during the entire term of their business dealings.

ISSUE

1. WAS PETITIONER AN ARTIST AND WERE RESPONDENTS TALENT AGENCIES AS THOSE TERMS ARE DEFINED BY THE ACT?

2. DID RESPONDENTS, OR ANY OF THEM, UNLAWFULLY ACT AS A TALENT AGENCY?

THE LAW AND DECISION

In the exercise of our authority and jurisdiction to determine jurisdiction in the first instance, we begin by finding that the Labor Commissioner has primary jurisdiction to determine this controversy as requires to be found in the first instance. Buchwald v. Superior Court, 254 C.A. 3d 347; 62 Cal.Rptr. 364 (1967); and further find that the parties, and the subject-matter are the proper subjects of our jurisdiction.

An artist refers to "musical artists . . . rendering professional services in . . . televisions and other entertainment enterprises." Labor Code, §1700.4. Since Petitioner was a "singer" and "recording artist," having actually appeared on television and having recorded tapes and records for the music industry, we find she was an "artist" within the meaning of the Talent Agency Act, Labor Code §1700, et seq. (hereinafter referred to as "the Act.")

"A talent agency is hereby defined to be a person or corporation who engages in the occupation of procuring, offering, promising or attempting to procure employment or engagements for an artist . . . talent agencies may, in addition, counsel or direct artists in the development of their professional careers." Id. §1700.4.

The evidence conclusively showed that Respondent McKAY, as an individual, attempted to get, and succeeded in getting

Petitioner club and television engagements, albeit without compensation, prior to the execution of the February 1st agreement between Petitioner and his company, McKAY PRODUCTIONS, INC. He further procured the contract between this company and Petitioner. Further, the evidence conclusively illustrated that no Respondent was licensed, as required by Labor Code, §§1700.5. We find that McKAY's having performed the acts constituting those peculiar to a talent agency, as defined by the Act, and having at the same time been unlicensed, acted unlawfully in violation of the Act - regardless of whether he actually derived economic gain during his conduct as an individual. He may not be held less accountable because he was more patient in being willing to wait for benefits expected further down the line. The mere fact that he procured "employment" with his own company suffices for purposes of the requirements of constituting a talent agency. Not having been paid, McKAY, as an individual, need not disgorge any profits.

McKAY PRODUCTIONS, INC., we find similarly operated as a talent agency. It sought to secure record deals with record companies and, therefore, secure or procure employment for Petitioner, albeit indirectly through it.

Respondents contend Petitioner was an employee of McKAY PRODUCTIONS, INC., and, therefore, their conduct cannot be classified as a talent agency. The record, however, established

1. No deductions made form Petitioner's monthly allotment;

2. No regular hours or supervision; and

3. No unbridled right to hire and hire.

See Fleming v. Foothill Montrose Ledger, 71 C.A. 3d 681; 139 Cal.Rptr. 579 (1977).

"Where no employee/employer relationship exists, when employer's' right to discharge cannot be capriciously exercised and where method of perfecting work left largely to 'employee's' discretion."

Her fee or salary was directly proportioned to how and for what amounts her product (singing) could draw in the market place. In this sense, McKAY PRODUCTIONS, INC. did just what any artist's manager does for his client; he attempts to get her employment, the difference being that the "employer" usually pays the artist, who, in turn, pays the manager a commission.

Here, the "manager" company received the fee and paid the artist a "commission" as it were. While it is unusual for the "agency" to pay the "artist," nothing we have found ipso facto renders such an arrangement exempt from the requirements of the Act. Further, testimony established that the purpose in the monthly payments to the artist were intended to provide a legal basis for securing injunctive relief. The fact of payment, therefore, in no way supported any intention of Respondents to treat Petitioner as an "employee". The mere inversion of the usual flow of money and role reversal of the parties, we hold, will not serve to defeat the licensing requirements of the Act. If the entity attempts to procure employment or situations where an Artist gets paid for the product of his or her toil, and is in the occupation of so doing, we deem that entity to be a talent agency as a matter of law, no matter how elaborate the

terminology employed in the contract or unorthodox the agency's conduct. Substance prevails over form. The Labor Commissioner is free to search out the illegality of conduct violative of the purposes of the Act. Buchwald v. Superior Court, supra.

In the situation, here, where there exists an unapproved "Exclusive Recording Agreement", the relationship is instinct with illegality. An entity or individual has an even greater opportunity to take advantage of the artist whose entire livelihood hinges upon what, by virtue of its non-compliance, becomes the unregulated agency. Greater opportunity is afforded the exclusive agency by virtue of such agreements as their compensation terms, as here, amply demonstrate.

We do not, today, hold that all "exclusive recording agreements" are illegal. Rather, a case by case approach will be more equitably dispositive. But where that agreement is unapproved by the Labor Commissioner, and where the entity contracting with the Artist is unlicensed, a presumption against the lawfulness of the relationship arises and may be dispelled only by shifting the burden to he who seeks to uphold that agreement's validity.

Respondent, GREGORY McKAY, McKAY PRODUCTIONS, INC., and GEM PRODUCTIONS, INC'S. (also known as McKAY PRODUCTIONS, INC.) conduct having violated the Act, they, and each of them, must disgorge all monies, profits, royalties or commissions derived as a result of marketing Petitioner's art.

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WHEREFORE, Petitioner is granted relief as herein ordered:

1. That Respondents, and each of them, save and except for BLUE GEM MUSIC, INC. ordered dismissed from these proceedings, have acted unlawfully as Talent Agents within the meaning of Labor Code §§1700 et seq.; and,

2. All agreements entered into between Petitioner and Respondents, or any of them, are declared, for all purposes, null and void; and,

3. That Petitioner is awarded an accounting whereby Respondents, and each of them, are forthwith ordered to account to Petitioner for all monies secured directly or indirectly from the sale or marketing of Petitioner's artistic endeavors, and to forthwith, thereafter, pay to Petitioner all such sums; and,

4. That Respondents have no rights whatsoever with respect to any claims contemplated against Petitioner in regard to their business dealings with her as an artist.

DATED: May 6, 1981

_____/S_____
RICHARD N. DINALLO, ESQ.
Special Hearing Officer for
Labor Commissioner

APPROVED: __///_____

_____/S_____
LOUIS GIANNINI
Chief Counsel and Supervising
Special Hearing Officer of the
Labor Commissioner

ADOPTED: __/DATED_____

_____/S_____