

1 DIVISION OF LABOR STANDARDS ENFORCEMENT
2 Department of Industrial Relations
3 State of California
4 BY: STUART M. KAYE, Attorney #095122
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8 BEFORE THE LABOR COMMISSIONER
9 OF THE STATE OF CALIFORNIA

10 RICHARD LEE EMLER, et al.,) CASE NO. TAC 56-93
11)
12 Petitioner,)
13 v.) DETERMINATION
14 JOHN DEBNEY,)
15)
16 Respondent.)

17 The above-entitled controversy came on regularly for
18 hearing on January 17, 1995, before the Labor Commissioner,
19 Division of Labor Standards Enforcement, Department of
20 Industrial Relations, State of California, by Stuart M. Kaye,
21 attorney for the Division of Labor Standards Enforcement,
22 serving as Special Hearing Officer under the provisions of
23 California State Labor Code Section 1700.44. Petitioner,
24 RICHARD LEE EMLER dba RICHARD LEE EMLER ENTERPRISES TALENT
25 AGENCY, appeared through their attorney of record, J. William
26 Nosel and Respondent JOHN DEBNEY appeared through his attorney
27 of record, Jeffrey M. Blue of the Law Offices of Ross T.
Schwartz.

1 Evidence, both oral and documentary having been
2 presented, at the conclusion the matter was submitted for
3 decision and the labor Commissioner makes the following
4 determination:

5 1. Petitioner RICHARD LEE EMLER dba RICHARD LEE
6 EMLER ENTERPRISES TALENT AGENCY, was a talent agency, as that
7 term is defined in Labor Code Section 1700.4(a) and acted on
8 Respondent's behalf, in that capacity during the period
9 relevant to this proceeding.

10 2. Respondent JOHN DEBNEY was an artist as that term
11 is defined in Labor Code Section 1700.4(b), during the period
12 relevant to this proceeding.

13 3. Petitioner and Respondent entered into an
14 agreement entitled "EXCLUSIVE TALENT AGENCY AGREEMENT", the
15 form of same having previously been submitted to and approved
16 by the Labor Commissioner, pursuant to the provisions of Labor
17 Code Section 1700.23.

18 4. Respondent was not induced to accept the terms of
19 the "EXCLUSIVE TALENT AGENCY AGREEMENT" on the basis of any
20 fraudulent representation by Petitioner.

21 5. That Respondent be ordered to provide to
22 Petitioner a complete accounting of all earnings received
23 continuously from July 6, 1992 resulting from the employment
24 procured for Respondent by Petitioner.

25 6. That Respondent pay to Petitioner the sum equal
26 to fifteen percent (15%) of the earnings received by

1 Respondent, continuously from July 6, 1992, resulting from the
2 employment procured for Respondent by Petitioner pursuant to
3 the provisions of the "EXCLUSIVE TALENT AGENCY AGREEMENT."

4 7. Petitioner's request that Respondent be ordered
5 to pay reasonable attorney's fees is denied.

6
7 INTRODUCTION

8 On July 6, 1993, Petitioner RICHARD LEE EMLER dba
9 RICHARD LEE EMLER ENTERPRISES TALENT AGENCY (hereinafter
10 "EMLER") filed a Petition to Determine Controversy pursuant to
11 Section 1700.44 with the Labor Commissioner of the State of
12 California against Respondent JOHN DEBNEY (hereinafter
13 "DEBNEY"). The petition alleged that EMLER acted as a talent
14 agency, "duly licensed by the laws of the State of California";
15 that EMLER acted in the capacity of a talent agent on behalf of
16 Respondent DEBNEY, pursuant to a "written agency contract", a
17 copy of which was attached to the petition; that petitioner,
18 pursuant to the terms of the parties agreement, "would be paid
19 a sum equal to fifteen (15) percent of all of respondent's
20 earnings, in perpetuity, which resulted from work obtained
21 during the term of said contract"; and that "respondent has
22 failed to pay petitioner, all sums due and owing to petitioner
23 from April 1, 1992 to the present".

24 At the commencement of the proceeding, the petition
25 was amended, on the record, to reflect "all sums due and owing
26 to petitioner from July 6, 1992 to the present", the one year

1 period commencing prior to the filing of the Petition to
2 Determine Controversy.

3 Petitioner prayed for the following relief:

4 1. That respondent provide a complete accounting of
5 all earnings under the afore-mentioned contracts.

6
7 2. That a determination be made as to what sums are
8 due and owing to petitioner.

9 3. That respondent be ordered to pay petitioner all
10 sums due and owing under said contracts.

11 4. That respondent be ordered to pay attorneys' fees
12 due and owing.

13 On September 19, 1993, respondent filed an answer in
14 letter form conceding the parties agreement; that payments were
15 made by respondent to petitioner, under the agreement until
16 January of 1993 and that the payments made by respondent to
17 petitioner were made "on the basis of fraudulent
18 representation".

19
20 DISCUSSION

21 Labor Code Section 1700.4(a) defines talent agency to
22 mean:

23 ". . . . a person or corporation who engages in the
24 occupation of procuring, offering, promising, or
attempting to procure employment or engagements
for an artist or artists"

25 Labor Code Section 1700.4(a) also provides:

26 "Talent agencies may, in addition, counsel or
direct artists in the development of their
27

1 contract in prominent type the following: "This
2 talent agency is licensed by the Labor Commissioner
of the State of California."

3 Petitioner's Exhibit 1, submitted at the hearing is
4 a copy of Petitioner's "EXCLUSIVE TALENT AGENCY AGREEMENT". A
5 review of Petitioner's Exhibit 1 establishes that EMLER
6 submitted their "form of contract" to the Labor Commissioner,
7 pursuant to the provisions of Labor Code Section 1700.23 and
8 that said talent agency agreement was "approved as to form" on
9 April 5, 1983, by the Labor Commissioner.

10 Respondent's Exhibit "B" submitted at the hearing is
11 a copy of the talent agency agreement executed by the parties.
12 A comparison of Petitioner's Exhibit 1 and Respondent's
13 Exhibit "B" demonstrates that with limited exception, the form
14 is substantially the same. Of significant interest is that
15 Petitioner's Exhibit 1 calls for a fee of twenty percent (20%)
16 to be paid to petitioner for services rendered, whereas
17 Respondent's Exhibit "B" establishes that Petitioner reduced
18 the fee to fifteen percent (15%) as between the parties, for
19 all such services.

20 In addition to establishing the rate of "compensation
21 for services to be rendered hereunder" as fifteen percent
22 (15%), paragraph 3(a) of the parties talent agency agreement
23 provides as follows:

24 " I also agree to pay to you a similar sum
25 following the expiration of the term hereof
26 upon and with respect to any and all
engagements, contracts and agreements entered
27 into during the term hereof relating to any of
the foregoing, and upon any resumptions of such

1 engagements, contracts and agreements, which
2 may have been discontinued during the term
3 hereof and resumed within one (1) year
4 thereafter."

5 There is no dispute that the parties understood this
6 to mean that DEBNEY was to pay EMLER fifteen percent (15%) of
7 all sums received by DEBNEY after termination of the parties
8 contract, on the various "entertainment enterprises" procured
9 for DEBNEY by EMLER during the term of the contract.

10 There is no dispute that the parties entered into the
11 agreement on June 21, 1985; that the contract terminated three
12 years later on June 21, 1988; that EMLER procured numerous
13 projects in feature films, television series, single episodes,
14 television pilots and others, for DEBNEY, during the term of
15 the contract; that pursuant to paragraph 3(a) of the parties
16 talent agency agreement, DEBNEY, after termination of the
17 agreement, continuously paid EMLER fifteen percent (15%) of
18 sums DEBNEY received on work EMLER procured for DEBNEY during
19 the term of the talent agency agreement and that DEBNEY stopped
20 making such payments in January of 1993.

21 Neither DEBNEY nor EMLER raised the issue, at the
22 time of the hearing, as to whether the obligation imposed upon
23 DEBNEY, pursuant to paragraph 3(a) of the talent agency
24 agreement creates a contract in perpetuity. As the issue is
25 raised by the allegations, it necessarily requires
26 determination.

27 It is a fundamental principal that perpetual
obligations are disfavored by law.

1 In Lura v. Multaplex, Inc. (1982) 129 Cal. App. 3d
2 410, the court was asked to review the issue of whether a
3 contract, requiring commissions to be paid on business procured
4 and is silent as to duration, as here, creates a contract in
5 perpetuity. The court said:

6 "The mere fact that an obligation under
7 a contract may continue for a very long
8 time is not reason in itself for declaring
9 the contract to exist by perpetuity, or for
10 giving it a construction which would do
11 violence to the express intent of the parties.
12 (Warner-Lambert Pharm. Co. v. John J. Reynolds,
13 Inc. (S.D. N.Y. 1959) 178 F. Supp. 655, 661,
14 aff'd. 280 F. 2d 193)"

15 In Lura, Supra, the court also noted that the
16 reasoning in Warner-Lambert was particularly instructive. That
17 reasoning is particularly instructive here, as well.

18 In Warner-Lambert, plaintiff sought a judgment
19 determining that it was no longer obligated to make periodic
20 payments to the defendant based on the sale of Listerine.
21 Payments had been made for some seventy-five (75) years based
22 upon an agreement to provide royalty payments for the use of
23 the formula for Listerine. No fixed date for the termination
24 of this obligation was provided in their contract.

25 The Warner-Lambert court rejected the arguments as to
26 the creation of a perpetual obligation where no fixed date is
27 provided, stating:

"contracts which provide no fixed date
for the termination of the promisor's
obligation, but conditions the obligation
upon an event which would necessarily
terminate the contract are in quite a
different category . . . The important

1 factor, then, is not whether the contract
2 fails to specify a termination date, but
3 whether there is an ascertainable event which
4 necessarily implies termination."

5 The payment by DEBNEY to EMLER of fifteen percent
6 (15%) of the sums DEBNEY receives "is subject to the
7 construction that it is to continue for as long as 'billings'
8 are made."

9 Since this obligation imposed upon DEBNEY will
10 terminate upon the aforementioned "ascertainable event" , a
11 contract in perpetuity was not created.

12 DEBNEY contends that he was induced to accept
13 paragraph 3(a) of the parties talent agency agreement by
14 EMLER'S representations; that the provisions of paragraph 3(a)
15 "is industry standard and common place" and that as such, he
16 was induced to sign the talent agency agreement based on a
17 fraudulent misrepresentation.

18 In its broad, general sense, the concept of fraud
19 embraces anything which is intended to deceive. There is no
20 absolute or fixed rule for determining what facts will
21 constitute fraud. Fraud may be proved by direct evidence or it
22 may be inferred from all the circumstances in the case and
23 whether or not it is found depends upon the particular facts of
24 the case under inquiry. See Ach v. Finkelstein (1968) 264
25 Cal.App. 2d 667.

26 In Pinney & Topliff v. Chrysler Corp. (1959) 176 F.
27 Supp: 801, the Court said:

1 ". . . evidence in proof of fraud must be
2 clear and convincing."

3 The evidence offered at the hearing is as follows:

4 First, as noted above, the form of contract signed by
5 the parties herein was submitted to the Labor Commissioner for
6 approval and was approved as to form by the Labor Commissioner
7 more than two (2) years prior to the parties execution of the
8 agreement.

9 Second, DEBNEY and EMLER met to discuss the terms of
10 their agreement approximately two (2) months prior to the time
11 it was actually signed. Two (2) to three (3) weeks lapsed
12 between the time the talent agency agreement was mailed to
13 DEBNEY for execution and its return to EMLER, and DEBNEY
14 testified that EMLER advised him to speak to others in the
15 industry and to an attorney, about the terms of the contract,
16 prior to its execution.

17 Third, EMLER testified that he never advised DEBNEY
18 that the "contract met Industry Standard." Rather, paragraph
19 3(a) was included in the agreement, as a result of EMLER'S
20 experience in the entertainment industry in the development of
21 the artists careers and the contract was EMLER'S standard
22 agreement for the industry.

23 Lastly, DEBNEY testified that his family has been
24 involved in this business for years; that he understood that in
25 addition to procuring employment, EMLER would work to develop
26 his career; that his position in the industry was enhanced by
27 EMLER'S efforts and that he may have been naive in signing the

1 agreement.

2 Apart from his testimony, the only evidence offered
3 by DEBNEY in support of what is "industry standard" in this
4 context, is a copy of a letter from the Society of Composers
5 and Lyricists, Inc., addressed to "SCL Member", prepared on
6 September 16, 1985 and suggesting at best, that the provisions
7 of the talent agency agreement DEBNEY complains of, are not
8 unique to EMLER but rather a "relatively new development" and
9 a departure from a previous standard.

10 Upon application of the above-cited authority, after
11 a review of all the evidence presented by the parties, this
12 hearing officer finds that DEBNEY'S inducement to sign the
13 'EXCLUSIVE TALENT AGENCY AGREEMENT' as offered by EMLER, was
14 not on the basis of a fraudulent representation by EMLER.

15 Accordingly, DEBNEY, having demonstrated that he is
16 "a person with the capacity of reading and understanding the
17 instrument" which he has signed, "he is, in the absence of
18 fraud" bound by its contents. Dobler v. Story (1959) 268 F.2d
19 274.

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1 No specific statutory authority exists granting the
2 Labor Commissioner the authority to award attorney's fees in
3 this proceeding. Although Petitioner has prayed for such
4 relief, as Petitioner has failed to allege or otherwise
5 demonstrate a basis for such award, Petitioner's request for
6 attorney's fees is denied.

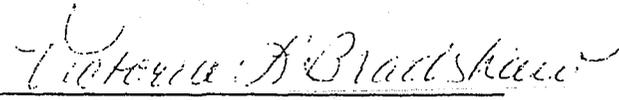
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9 DATED: February 2, 1995



STUART M. KAYE
Special Hearing Officer

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11
12 ADOPTED

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14 DATED: 2/10/95



VICTORIA L. BRADSHAW
State Labor Commissioner