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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MARATHON ENTERTAINMENT, INC., Plaintiff and Appellant, v. ROSA BLASI et al., Defendants and Respondents.	B179819 (Super. Ct. No. BC 290839)

APPEAL from a judgment and orders of the Superior Court of Los Angeles County. Rolf M. Treu and James C. Chalfant, Judges. Judgment reversed and remanded with directions; July 29, 2004 order vacated in part, reversed in part; October 12, 2004 order vacated.

Law Offices of Donald V. Smiley and Donald V. Smiley; Fox & Spillane, Gerard P. Fox and Alex M. Weingarten for Plaintiff and Appellant.

Alschuler Grossman Stein & Kahan, Michael J. Plonsker and Daniel A. Fiore for Defendants and Respondents Rosa Blasi and 609 Maple Street Productions, Inc.

In this fee dispute between plaintiff Marathon Entertainment, Inc. (Marathon), a personal manager, and defendant Rosa Blasi, an actress, we reverse the summary judgment for Blasi and remand for consideration of whether the lawful portions of the parties' personal management contract may be enforced under the doctrine of severability of contracts.

INTRODUCTION

Labor Code section 1700.5[1] of the Talent Agencies Act (Lab. Code, § 1700 et seq. (the Act)) requires that anyone who solicits or procures artistic employment or engagements for artists[2] must be licensed as a talent agency.[3] In December 1998, Marathon and Blasi entered into an oral contract for Marathon to serve as Blasi's personal manager in exchange for a percentage of her entertainment employment income. Blasi, who was represented by a licensed talent agent throughout the term of her personal management contract with Marathon, terminated the management contract in the fall of 2001. Thereafter, Blasi successfully invoked Marathon's alleged violation of the Act's licensing requirements as a defense to her obligation to pay Marathon a commission on her 2000-2001 earnings from the television series *Strong Medicine*, an engagement that Blasi does not contend was procured by Marathon in violation of the Act. After being sued by Marathon for the unpaid *Strong Medicine* commission, Blasi moved for summary judgment of the complaint, contending that Marathon's unlicensed

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1 All further undesignated statutory references are to the Labor Code. Section 1700.5 provides in part: "No person shall engage in or carry on the occupation of a talent agency without first procuring a license therefore from the Labor Commissioner. . . ."

2 "'Artists' means actors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organizations, directors of legitimate stage, motion picture and radio productions, musical directors, writers, cinematographers, composers, lyricists, arrangers, models, and other artists and persons rendering professional services in motion picture, theatrical, radio, television and other entertainment enterprises." (§ 1700.4, subd. (b).)

3 "'Talent agency' means a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists, except that the activities of procuring, offering, or promising to procure recording contracts for an artist or artists shall not of itself subject a person or corporation to regulation and licensing under this chapter. Talent agencies may, in addition, counsel or direct artists in the development of their professional careers." (§ 1700.4, subd. (a).)

solicitations of other, unrelated employment opportunities on her behalf had so tainted with illegality the parties' oral management contract that the entire contract must be invalidated as an illegal contract for unlicensed talent agency services. Blasi produced no evidence in the trial court, however, linking the procurement of her *Strong Medicine* employment contract with any illegal activity or violation of the Act by Marathon. The trial court, without considering the applicability of the general rule of severability of contracts, granted the motion and entered summary judgment for Blasi.

In this appeal from the summary judgment, Marathon contends that under the law of severability of contracts (Civ. Code, § 1599), because its oral management contract had the lawful purpose of providing personal manager services that are not regulated by the Act, the possibility exists that its commission on Blasi's *Strong Medicine* employment contract, which Blasi does not argue was procured illegally, is severable from any unlawful parts of the agreement. The California Supreme Court's decision in *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119 (*Birbrower*), supports Marathon's position. In *Birbrower*, the Supreme Court invalidated only that portion of an attorney fee agreement relating to services that a New York law firm had provided in violation of California's attorney licensing statute. Because of the possibility that, under the doctrine of severability of contracts, the firm might be able to recover the fees it had lawfully earned by providing services in New York, the Supreme Court reversed a summary adjudication order that had invalidated the entire attorney fee agreement. The Supreme Court explained in *Birbrower* that under the general rule of severability of contracts, contracts containing both legal and illegal objects may be severed unless it is impossible to distinguish between the lawful and unlawful parts of the agreement such that the illegality taints the entire contract and the entire transaction is illegal and unenforceable. (*Id.* at pp. 138-139.)

In this case, we similarly conclude that the summary judgment for Blasi must be reversed because of the possibility that under the doctrine of severability of contracts, Marathon might be permitted to recover the *Strong Medicine* commission because not

only did the complaint allege that Marathon provided lawful personal manager services neither prohibited nor regulated by the Act, but Blasi produced no evidence in the trial court linking the procurement of her *Strong Medicine* employment contract to any illegal activity by Marathon.

BACKGROUND

In December 1998, Marathon and Blasi entered into an oral contract (the contract or personal management contract) for Marathon to serve as Blasi's personal manager in exchange for a percentage of Blasi's entertainment employment income. During the course of the personal management contract, Blasi's professional appearances included a television pilot, a film (*Noriega: God's Favorite*), and a television series (*Strong Medicine*). Blasi allegedly reneged on her agreement to pay Marathon a 15 percent commission from her *Strong Medicine* employment contract, which allegedly Blasi unilaterally reduced to 10 percent before ceasing payment altogether. Blasi eventually terminated the contract in the fall of 2001, stating that her talent agent, Michael Kelly, who had served as her agent throughout the term of the management contract with Marathon, was going to become her new personal manager.

On February 21, 2003, Marathon filed the present action against Blasi for breach of oral contract, quantum meruit, false promise, and unfair business practices, seeking to recover the unpaid *Strong Medicine* commission. Marathon alleged that it had provided Blasi with lawful personal manager services by providing the down payment on her home, paying the salary of her business manager, providing her with professional and personal advice, and paying her travel expenses.

After obtaining a stay of the action, Blasi initiated a Labor Commission proceeding alleging that Marathon had violated the Act by soliciting and procuring employment for Blasi without a talent agency license.[4] The Commissioner found that

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[4] The Labor Commissioner has original and exclusive jurisdiction over issues arising under the Act (see *Styne v. Stevens* (2001) 26 Cal.4th 42, 54-56). Section 1700.44, subdivision (a) provides: "In cases of controversy arising under this chapter, the parties involved shall refer the matters in dispute to

Marathon had violated the Act and, without considering the possibility of severing the legal and illegal parts of the contract, invalidated the entire contract as an illegal contract for unlicensed talent agency services.

Marathon appealed the Commissioner's ruling to the superior court for a trial de novo.[5] Marathon also amended its complaint to include several declaratory relief claims challenging the constitutionality of the Act (the constitutional claims). Marathon alleged that the sanction of invalidating the contracts of personal managers who solicit or procure employment for artists without a talent agency license, violates the managers' rights to due process, equal protection, and free speech under the state and federal constitutions.

Blasi moved for summary judgment and, alternatively, summary adjudication of the complaint based upon the theory that Marathon's licensing violation had invalidated the entire personal management contract. Blasi submitted excerpts from the Labor Commission hearing transcript as evidence that Marathon had violated the Act by soliciting or procuring employment for Blasi without a talent agency license.[6] Blasi did

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the Labor Commissioner, who shall hear and determine the same, subject to an appeal within 10 days after determination, to the superior court where the same shall be heard de novo. . . ."

5 "'A hearing *de novo* literally means a new hearing, or a hearing the second time. . . . It is in no sense a review of the hearing previously held, but is a complete trial of the controversy, the same as if no previous hearing had ever been held. . . . A hearing *de novo* therefore is nothing more nor less than a trial of the controverted matter by the court in which it is held. . . .'" (*Buchwald v. Katz* (1972) 8 Cal.3d 493, 501; see *Yoo v. Robi* (2005) 126 Cal.App.4th 1089, 1099 [notice of appeal requesting a trial de novo of the Labor Commissioner's ruling was properly filed in a pending superior court action between the same parties].)

6 We deny Marathon's request to take judicial notice of the entire transcript of the Labor Commission proceeding because the entire transcript was not before the trial court on the summary judgment motion. (See *American Continental Ins. Co. v. C & Z Timber Co.* (1987) 195 Cal.App.3d 1271, 1281 [appellate court must consider only those facts that were before the trial court on the summary judgment motion].) The portions of the administrative hearing transcript that were presented below showed, among other things, that: (1) during the term of the contract, Blasi was aware that Marathon (which she hired at the suggestion of her talent agent, Michael Kelly) and her agent Kelly were working together to solicit employment unrelated to *Strong Medicine* on her behalf; (2) Marathon's employee Paula Hammerman, who formerly worked for Kelly as a licensed talent agent, provided for Marathon's clients (including Blasi) the same services that she had provided while working for Kelly as a talent agent; and (3) Marathon regularly informed Kelly, through phone calls, faxes, and weekly submission reports, of its activities on Blasi's behalf. In support of its right to recover its *Strong Medicine* commission under the management contract, Marathon argued that because it had worked as a team with Kelly, all of its activities on Blasi's behalf were protected by the Act's safe harbor provision

not argue or produce evidence that Marathon had illegally procured the *Strong Medicine* employment contract.

The superior court granted Blasi's motion for summary judgment and invalidated Marathon's personal management contract as an illegal contract for unlicensed talent agency services in violation of the Act.[7] Marathon appeals from the summary judgment and order denying its cross-motion for summary adjudication of the constitutional claims.

DISCUSSION

"Personal managers primarily advise, counsel, direct, and coordinate the development of the artist's career. They advise in both business and personal matters, frequently lend money to young artists, and serve as spokespersons for the artists. [Citation.]" (*Park v. Deftones* (1999) 71 Cal.App.4th 1465, 1469-1470.)

Only licensed talent agencies may procure or attempt to procure artistic employment or engagements for artists. (§§ 1700.4, 1700.5.) Unlike talent agencies, personal managers are not covered by the Act or any other statutory licensing scheme. (*Waisbren v. Peppercorn Productions, Inc.* (1996) 41 Cal.App.4th 246, 252 [*Waisbren*].) But if a personal manager even incidentally performs the occupation of a talent agency by soliciting or procuring artistic employment or engagements for an artist, the personal manager must comply with the Act's licensing requirement. (*Id.* at p. 250.)

The fact that a personal manager must comply with the Act's licensing requirements before engaging in the regulated activities of a talent agency does not necessarily mean, however, that a contract for personal manager services must be

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which allows unlicensed persons "to act in conjunction with, and at the request of, a licensed talent agency in the negotiation of an employment contract." (§ 1700.44, subd. (d).) We do not decide any issues in this opinion regarding the meaning or application of the safe harbor provision.

[7] Marathon also moved for summary adjudication of the constitutional claims, which the court denied. The superior court ruled on Blasi's summary judgment motion in two parts, with the Hon. James Chalfant deciding the constitutional claims and the Hon. Rolf M. Treu deciding the remaining claims for breach of oral contract, quantum meruit, false promise, and unfair business practices.

completely invalidated if the personal manager commits even a single violation of the Act. Under the doctrine of severability of contracts, it is possible that Marathon, despite allegedly having violated the Act, may recover a commission on an artist's employment contract that was legally procured. We therefore reverse because there are triable issues of material fact regarding the severability of the parties' agreement.[8]

A. Contracts Made in Violation of a Business Licensing Statute Are Not Necessarily Unenforceable

No blanket prohibition exists against enforcing contracts made in violation of a business licensing statute. Both equity and the law disfavor forfeiture. (*People v. Far West Ins. Co.* (2001) 93 Cal.App.4th 791, 795.) The Supreme Court has stated that in determining whether to enforce a contract made in violation of a business licensing statute, courts must consider whether "the forfeiture resulting from unenforceability is disproportionately harsh considering the nature of the illegality." (*Lewis & Queen v. N.M. Ball Sons* (1957) 48 Cal.2d 141, 151.) The Supreme Court has also warned that courts must be wary of transforming a protective licensing scheme intended for the public safety into "an unwarranted shield for the avoidance of a just obligation." (*Gatti v. Highland Park Builders, Inc.* (1946) 27 Cal.2d 687, 690.)

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8 A court may grant summary judgment only if there are no material issues of fact or the record establishes, as a matter of law, that none of the causes of action has merit. After examining the facts before the trial judge on a summary judgment motion, an appellate court independently determines their effect as a matter of law. (*Nicholson v. Lucas* (1994) 21 Cal.App.4th 1657, 1664.) "A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff or cross-complainant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(2).)

The Act does not expressly prohibit the enforcement of contracts made by unlicensed talent agencies. Unlicensed contractors, real estate brokers, and insurance adjusters, on the other hand, are all expressly prohibited by statute from suing to recover on contracts made in violation of their respective business licensing statutes. (Bus. & Prof. Code, §§ 7031, 10136; Ins. Code, § 15006.) Nevertheless, in *Gatti*, the Supreme Court enforced a construction contract despite the plaintiffs' technical violation of the contractor's licensing statute because, even though the plaintiffs lacked a required additional partnership license, both plaintiffs were individually licensed and, during the course of the contract, were jointly licensed with a third person.

In *Wood v. Krepps* (1914) 168 Cal. 382, the Supreme Court enforced a promissory note despite the plaintiff pawnbroker's violation of a municipal business licensing statute that, like the Act, did not expressly prohibit the enforcement of contracts made in violation of the statute. The Supreme Court stated that there "is no law in this state making the business of loaning money on personal property illegal. It is a legitimate branch of commercial business which the state has only regulated to the extent of fixing the maximum rate of interest. . . . The ordinance does not pretend to prescribe or prohibit the business. . . . The ordinance does not declare that a contract made by any one in the conduct of the various businesses for which licenses are provided to be procured under the ordinances, shall, if a license is not obtained, be invalid; nor is there any provision therein indicating in the slightest that this failure was intended to affect in any degree the right of contract." (*Id.* at p. 387.)

B. <u>The Doctrine of Severability of Contracts</u>

Consistent with the general rule in both equity and law that forfeiture is disfavored, the law of severability of contracts provides: "Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." (Civ. Code, § 1599.)

In determining whether to apply the doctrine of severability of contracts, the courts must consider the main objective of the parties' agreement. If the illegality is

collateral to and severable from the main purpose of the contract, then severance is appropriate. (*Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 659.) If, however, the taint of illegality so permeates the entire agreement that it cannot be removed by severance or restriction but only by reformation or augmentation, the courts must invalidate the entire agreement. (*Id.* at p. 660.)

The overarching consideration in determining whether to allow a severance of an agreement is whether the interests of justice would be furthered by severing the agreement. (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1074.) A severance is more likely to be granted if separating the legal and illegal parts of the agreement would: (1) "conserve a contractual relationship [without] condoning an illegal scheme . . . ."; and (2) "prevent parties from gaining undeserved benefit or suffering undeserved detriment as a result of voiding the entire agreement – particularly when there has been full or partial performance of the contract. [Citations.]" (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 123-124.)

In general, contracts made in violation of business licensing statutes may be severed if it is appropriate to do so. As we mentioned earlier, the Supreme Court reversed a summary adjudication in *Birbrower, supra,* 17 Cal.4th at pp. 137-140, based on the possibility of severing an attorney fee contract of a New York law firm that had practiced law in California illegally without a license under Business and Professions Code section 6129. Because California does not regulate legal services provided outside California and the firm had provided some services in New York, *Birbrower* stated that "notwithstanding an illegal consideration, courts may sever the illegal portion of the contract from the rest of the agreement. [Citation.]" (*Birbrower, supra,* 17 Cal.4th at p. 138.) It is only "[i]f the court is unable to distinguish between the lawful and unlawful parts of the agreement[and] 'the illegality taints the entire contract, [that] the entire transaction is illegal and unenforceable.' [Citation.]" (*Ibid.*)

Similarly, in *Johnson v. Mattox* (1968) 257 Cal.App.2d 714, the appellate court upheld the severance of an unlicensed contractor's construction contract made in violation of Business and Professions Code section 7031. That statute expressly

prohibits the enforcement of construction contracts of unlicensed contractors. Even though the unlicensed contractor in *Johnson* could not recover its illegal construction fees, it was permitted under the doctrine of severability of contracts to recover $650 for the lawful sale of goods that were not fixtures and were not related to the illegal construction activities.

Even contracts that are made in violation of public policy may be severed if it is appropriate to do so. In *Whorton v. Dillingham* (1988) 202 Cal.App.3d 447, for example, the appellate court found that a possibility existed of severing the parties' *Marvin* agreement (*Marvin v. Marvin* (1976) 18 Cal.3d 660), because although the agreement expressly relied upon some illegal consideration (the couple's sexual relationship), the agreement also relied upon other legal consideration independent of the sexual relationship (being a chauffeur, bodyguard, secretary, and partner and counselor in real estate investments).

C. Blasi's Summary Judgment Must Be Reversed Because the Possibility of Severing the *Strong Medicine* Commission Exists in This Case

In this case, the parties entered into a lawful contract for personal manager services that are not regulated by the Act. The complaint alleged that Marathon lawfully provided personal manager services such as providing the down payment on Blasi's home, paying the salary of her business manager, providing professional and personal advice, and covering her travel expenses. Accordingly, the parties' contract had at least one distinct and lawful purpose, which was to provide personal manager services.

In moving for summary judgment based on the theory that, because of Marathon's unlicensed talent agency activities, the contract was completely illegal and unenforceable, Blasi produced no evidence linking her *Strong Medicine* employment contract to any illegal activity by Marathon. Without such evidence, the possibility exists, as it did in *Birbrower, supra,* 17 Cal.4th 119, that the legal and illegal portions of the contract might be severable. It is only "[i]f the court is unable to distinguish between the lawful and unlawful parts of the agreement[and] 'the illegality taints the

entire contract, [that] the entire transaction is illegal and unenforceable.' [Citation.]" (*Id.* at p. 138.)

Blasi objects to any consideration on appeal of the doctrine of severability of contracts because it was not raised below. The general rule that precludes consideration of a new theory on appeal does not apply, however, where the issue before the appellate court is a question of law. (*California School of Culinary Arts v. Lujan* (2003) 112 Cal.App.4th 16, 26.) Because whether the doctrine of severability of contracts potentially applies to the facts that were presented below is a question of law, the general rule precluding the consideration of a new theory on appeal does not apply.

D. The Availability of Severance Will Not Undermine the Act

Blasi argues that if we allow personal managers who engage in unlicensed talent agent activities to recover commissions from lawfully procured employment contracts, we will destroy the managers' incentive to comply with the Act. We disagree. We believe that permitting the possible recovery of commissions on lawfully procured employment contracts but barring such recovery on illegally procured employment contracts will provide personal managers with ample financial incentive to comply with the Act.

E. The Widespread Interpretation that *Waisbren* Precluded Severance Is Incorrect

The parties believe that our decision in *Waisbren* completely precludes severance if the personal manager commits even a single violation of the Act and contend that the Commissioner has also adopted that view. In this opinion we clarify that *Waisbren* should not be so construed. Although *Waisbren* held that the personal manager's contract was unenforceable as a matter of law because of the manager's illegal acts of procurement, *Waisbren* did not expressly discuss the doctrine of severability of contracts. "[C]ases are not authority for propositions not considered. [Citations.]" (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176.)[9]

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9 In this appeal, we need not decide whether *Yoo v. Robi*, *supra*, 126 Cal.App.4th 1089, was

F. Marathon's Other Contentions

Marathon raises several other issues, none of which has merit or requires extensive discussion. Marathon's constitutional claims were premised on the interpretation that *Waisbren* prohibits the severance of contracts of personal managers who violated the Act. Given our rejection of that widespread interpretation, we conclude that there is no need to decide the constitutional issues in this appeal. The "long-established policy obliges us not to 'reach out and unnecessarily pronounce upon the constitutionality of any duly enacted statute.' (*Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 65 . . . .) We are constrained to avoid constitutional questions where other grounds are available and dispositive of the issues of the case. [Citations.]" (*Kollander Construction, Inc. v. Superior Court* (2002) 98 Cal.App.4th 304, 314, disapproved on another ground in *LeFrancois v. Goel* (2005) 35 Cal.4th 1094, 1107, fn. 5.)

We reject Marathon's remaining contentions as meritless: (1) Marathon's contention that personal managers are incapable of obtaining a talent agency license lacks support in the record and in the law; (2) Marathon's contention that Blasi is not an artist under the Act also lacks support in the record and in the law; and (3) Marathon's contention that Blasi is barred by the statute of limitations from raising the Act as a defense to the action was rejected by the Supreme Court in *Styne v. Stevens*, *supra*, 26 Cal.4th 42, 51-54.

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correctly decided on its facts. Although *Yoo* broadly stated that "the public policy underlying the Act is best effectuated by denying all recovery, even for activities which did not require a talent agency license" (*id.* at p. 1105), that statement is dicta because the trial court in *Yoo* had found that the main purpose of the agreement was illegal (*id.* at p. 1096) and the appellate court concluded, for factual reasons, that it was inappropriate to sever the agreement. In this case, however, neither the Commissioner nor the trial court has evaluated the contract, the parties' intentions, and the parties' conduct according to the factors relevant to the doctrine of severability of contracts. Given that the doctrine of severance requires that each case be evaluated on its own merits, the mere fact that severance was denied in *Yoo* does not dictate the outcome of this case.

DISPOSITION

The summary judgment is reversed. The July 29, 2004 order granting Blasi's alternative motion for summary adjudication is vacated as to the constitutional claims and reversed as to the remaining claims. The October 12, 2004 order denying Marathon's cross-motion for summary adjudication of the declaratory relief claims is vacated. The superior court is directed to stay the matter pending submission of the dispute to the Labor Commissioner for an opportunity to grant a new hearing in light of this opinion. The parties are to bear their own costs on appeal.

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ROTHSCHILD, J.

We concur:

SPENCER, P.J.

MALLANO, J.