BEFORE ACTION DISPUTE RESOLUTION SERVICES

ARBITRATION IN THE COUNTY OF LOS ANGELES

SCREEN ACTORS GUILD, INC., a non-profit corporation on behalf of Affected Performers, 20 Doe Performers, and the Producers-Screen Actors Guild Pension and Health Plans, KATE JACKSON, an individual, and GRANNY ENTERPRISES INC. F/S/O KATE JACKSON

Claimants,

vs.

LEO BURNETT COMPANY, INC., LEO BURNETT U.S.A., and ELI LILLY AND COMPANY

Respondents.

ADRS Case No.: 99-1332-CL
SAG Case No.: 99-0056

AWARD AND OPINION OF ARBITRATOR

Hon. Campbell Lucas

Dates: November 11-12, 15 1999
December 1, 7 1999

AWARD

This arbitration was commenced pursuant to the Arbitration Agreement, attached hereto as Exhibit A, and pursuant to the Statement of Claim and Demand for Arbitration brought by the Screen Actors Guild, Inc. ("SAG") pursuant to the SAG 1997 Commercials Contract and/or the Producers-Screen Actors Guild 1996 Codified Industrial and Educational Contract. Arbitrator Justice Campbell Lucas convened the arbitration hearing on November 11, 1999. The arbitration hearing and the taking of oral and documentary evidence continued on November 12, 15 and December 1 and 7, 1999.

Claimants Screen Actors Guild, Inc., a non-profit corporation on behalf of Affected Performers, and the Producers-Screen Actors Guild Pension and Health Plans (relating to the services of Granny Enterprises Inc. f/s/o Kate Jackson) appeared through its counsel Alison Platt with the Screen Actors Guild, Inc. Claimants Kate Jackson, an individual, and Granny Enterprises Inc. f/s/o Kate Jackson (collectively, "Jackson") were represented by Edward M. Kubec, of Lavely & Singer. Respondents Leo Burnett Company, Inc., Leo Burnett U.S.A. and Eli Lilly and Company (collectively, "Burnett-Lilly") were represented by Michael K. Brown and Stacey L. Zill, of Crosby, Heafey, Roach & May, a Professional Corporation.

The primary issues addressed in this arbitration are as follows:

1. Whether a binding contract was formed between Jackson and Burnett-Lilly for Jackson to appear as a host in a non-broadcast educational video.

2. Whether the Screen Actors Guild, Inc. ("SAG") has jurisdiction to assert claims against Leo Burnett Company, Inc. and Leo Burnett U.S.A. (collectively, "Leo Burnett") If so, was Jackson "definitely engaged" under the provisions of the applicable SAG contract?

3. Whether Burnett-Lilly is estopped from denying the existence of a binding agreement.

4. Whether Burnett-Lilly waived any conditions precedent to the existence of a binding agreement.

5. Whether Burnett-Lilly interfered, intentionally or negligently, with any prospective business advantage to Jackson.

6. Whether Burnett-Lilly engaged in fraud and/or made misrepresentations as it related to the negotiations entered into among the parties for the non-broadcast video.

The arbitrator finds that there was no binding contract entered into between Jackson and Burnett-Lilly. A formal written agreement was a condition precedent to the existence of a binding contract and the parties never entered into the required written agreement. There was also no mutual assent to the terms of the alleged contract as the parties were in the negotiation process at the time Lilly decided not to go forward with the video project. Moreover, Jackson was not "definitely engaged" under SAG's Industrials Contract. In any event, if there had been an oral agreement, the statute of frauds would render that agreement unenforceable. The arbitrator further finds that Jackson did not satisfy the burden of proof on the issues of estoppel, waiver, fraud, misrepresentation, and interference with prospective business advantage.

I, the undersigned arbitrator, having heard the evidence and allegations of the parties, AWARD as follows:

A. All of the claims asserted by Jackson and SAG are denied.

B. This AWARD is a full resolution of any and all claims Jackson has against Burnett-Lilly.

C. This AWARD is a full resolution of any and all claims SAG has against Leo Burnett.

D. All parties shall bear their own attorneys fees and costs, except that Jackson, on the one hand, and Burnett-Lilly, on the other hand, shall share equally the fees associated with the arbitrator and court reporter.

DATED: December 23, 1999.

Justice Campbell Lucas, Arbitrator

OPINION

A. The Parties Never Entered Into An Enforceable Contract

1. Under California Law, Where Any Terms Are Left For Future Determination Or Where It Is Understood That The Agreement Is Incomplete Until Reduced To A Signed Writing, No Contract Results

Whether an enforceable contract exists between Burnett-Lilly and Jackson is determined by examining the parties' negotiations to determine if there was a "meeting of the minds" with respect to all "material" terms. Under California law, where any of the terms are left for future determination and it is understood that the agreement is not to be deemed complete until they are settled or where it is understood that the agreement is incomplete until reduced to writing and signed by the parties, no contract results until this is done. See e.g., Beck v. American Health Group Int'l, 211 Cal. App. 3d 1555, 1562-63 (1989); Duran v. Duran, 150 Cal. App. 3d 176, 180 (1983) (when the parties understand that the terms of the contract are to be reduced to a writing and signed by the parties, acceptance of the terms must be evidenced in the manner agreed upon or it does not become a binding agreement); see also Wolfsen v. Hathaway, 32 Cal.2d 632, 641 (1948) (preliminary negotiations with agent, but rejected by principal); Mason v. Woodland Savings & Loan Ass'n., 254 Cal. App. 2d 41, 44 (1967) (oral agreement to lend money which had failed to settle certain details); Kerr Glass Mfg. Corp. v. Elizabeth Arden Corp., 61 Cal. App. 2d 55, 56 (1943) (purported agreement to make future agreement subject to approval by parties); Patterson v. Reid, 132 Cal. App. 454, 456 (1933) (plaintiff signed contract with amount and terms of payment were still blank and with understanding that no contract was to be effective until she gave approval); B.A.J.I. 10.58.

Additionally, a contract which leaves an essential element (i.e., a material term) for future agreement of the parties is usually held fatally uncertain and unenforceable under California law. As the California Supreme Court stated in Ablett v. Clauson, 43 Cal. 2d 280, 284 (1954):

> Although a promise may be sufficiently definite when it contains an option given to the promisor or promisee, yet if an essential element is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until such future agreement. Since either party by the terms of the promise may refuse to agree to anything to which the other party may agree, it is impossible for the law to affix any obligation to such a promise.

See also Laks v. Coast Federal Savings & Loan Ass'n, 60 Cal. App. 3d 885, 891 (1976), citing, Burgess v. Rodom, 121 Cal. App. 2d 71 (1953) ("the law does not provide a remedy for breach of an agreement to agree in the future and the court may not speculate upon what the parties will agree").

As described below, the evidence at the arbitration demonstrated that essential elements of a binding contract were left for future determination. The evidence further demonstrated that Burnett-Lilly did not intend to be bound to any agreement without the execution of a formal written contract.

2. There Was Never Any Meeting Of The Minds On Contract Terms And The Required Written Agreement Was Never Executed By The Parties

The December 2, 1997 letter from Peggy Walter of Leo Burnett, to Nina Nisenholtz of the William Morris Agency ("William Morris") [Exhibit 1], falls within the authorities cited above holding that the parties had not entered into an enforceable agreement. Specifically, it is clear from the language of the letter that

its contents constitute a "proposal," or "agreement to agree" and that a written agreement is a condition precedent to the existence of a contract. Indeed, Ms. Walter states:

> "This letter will serve as a memorandum, outlining certain **proposed terms**, which **if mutually acceptable**, shall be **incorporated in a formal agreement** setting forth the entire agreement between us and your client . . . ." [Emphasis added.]

The express language in the December 2, 1997 letter should have placed Jackson and/or her representatives on notice that finalization of the terms would undoubtedly require additional negotiations and be memorialized in a writing signed by both parties.[1] Further evidence that the final terms were far from fully negotiated is Ms. Walter's statement in the final paragraph of the letter, that **"[u]ntil such time as these and any other necessary provisions are incorporated into a formal written agreement, executed by both parties, there shall be no binding agreement between us."** [Emphasis added.]

Even if the December 2, 1997 letter could be considered an "offer," there was no acceptance. Ms. Nisenholtz's December 10, 1997 response letter [Exhibit 3] cannot be considered an acceptance because it contained significant modifications and additions to the terms of the purported offer. And, the response letter did not satisfy the writing requirement demanded in the December 2, 1997 letter. Also, Ms. Walter testified that she spoke with Ms. Nisenholtz following the

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[1] Contrary to Jackson's arguments, Burnett-Lilly never waived the written agreement requirement. Monteleone v. Allstate Ins. Co., 51 Cal. App. 4th 509, 517 (1996) (waiver must be proved "by clear and convincing evidence that does not leave the matter to speculation, and doubtful cases will be decided against waiver"); Moss v. Minor Properties, 262 Cal. App. 2d 847, 857 (1968) (waiver of a contract condition requires an affirmative act by the party charged); 1 Bernard E. Witkin, Summary of California Law Contracts § 769, at 695 (9th ed. 1987) (A waiver is an intentional relinquishment of a known right).

receipt of the December 10, 1997 letter and advised her that there were terms that were not agreed upon. In any event, under California law, acceptance sufficient to create a binding contract must be absolute and unconditional (B.A.J.I. 10.68) and there was no such evidence here.

Further evidence that the parties did not enter into an enforceable contract is the January 23, 1998 letter forwarded by Leo Burnett to William Morris enclosing the detailed "Talent Agreement." The first sentence of the agreement alerts Jackson and her representatives to the fact that there is no contract until executed: "This letter, when executed . . . constitutes an Agreement with respect to the services of Artist in connection with the advertising, marketing and promotion of Advertiser's product, Prozac." The very last provision repeats this fact: "This Agreement shall not be binding on either party until signed by both parties."

In addition, Jackson's representatives made several handwritten modifications to the Talent Agreement indicating that negotiations were ongoing and that an agreement had not been reached on several essential terms. [Exhibits 6, 8.] However, despite making several revisions to the proposed Talent Agreement, Jackson's representatives did not object to the execution of a written agreement as a condition precedent to contract formation. See Louis Lesser Enterprises, Ltd. v. Roeder, 209 Cal. App. 2d 401, 405-06 & 410 (1962) (no contract is formed where the parties agree to a condition precedent "that the letters would not constitute a binding contract until reduced to a formal writing"); DeMott v. Amalgamated Meat Cutters and Butcher Workmen of N. Am., 157 Cal. App. 2d 13, 24-25 (1958) (agreement forwarded with understanding that it will not be operative until signed).

Despite the writing requirement being reiterated in each of the documents prepared by Leo Burnett — and despite evidence that William Morris knew Leo Burnett's custom and practice to require a signed agreement — neither the Talent Agreement nor any other written contract was ever signed. Instead, Jackson's representatives returned the Talent Agreement to Leo Burnett with significant modifications and reserved the right to make more modifications. [Exhibit 8.]

No contract was formed between the parties because not only was there no offer and acceptance (i.e., no meeting of the minds), the parties never executed the required writing (i.e., the condition to contract formation was never satisfied).

B. Jackson Was Not "Definitely Engaged" Under The SAG Industrials Contract

The production of the non-broadcast educational video here is governed by either of two union contracts: The American Federation of Television and Radio Artists ("AFTRA") National Code of Fair Practice for Non-Broadcast / Industrial / Educational Recorded Material or SAG's 1996-1999 Industrial / Educational Contract ("Industrials Contract").[2]

[2] The parties' dispute is not covered by SAG's 1997 Commercials Contract. That contract applies to the production of commercials defined as "short advertising or commercial messages made as motion pictures, 3 minutes or less in length, and intended for showing over television." The video here was to be 15-20 minutes in length and intended to be distributed only to potential customers of Prozac® who express an interest in the medication. During the course of the arbitration, SAG conceded that the Commercials Contract did not apply to the video project.

Although Leo Burnett is not a signatory to the Industrials Contract, SAG has jurisdiction to demand arbitration given that Leo Burnett made representations that it was a signatory to the applicable union agreements.

Applying the terms of the Industrials Contract, the SAG rules do not support Jackson's breach of contract claim. The factual scenario here does not fit into any of the five factors used in determining whether a performer is "definitely engaged," such that an oral agreement exists, under the Industrials Contract. [Industrials Contract, page 31, ¶ 24.]

First, a performer is considered definitely engaged "when written notice of acceptance is received by the performer." The parties never agreed to the final terms of any agreement and Burnett-Lilly never expressed any notice, written or otherwise, of acceptance.

Second, a performer is considered definitely engaged when "a contract signed by the Producer is received by the performer, or when a contract unsigned by producer is received by performer, executed and returned as delivered." Not one of the parties – Lilly, Leo Burnett, Jackson (or her representatives) signed any contract.

Third, a performer is considered definitely engaged "when a script is given to the performer to prepare for the role." This does not include delivery of a script to see if the performer desires the engagement. Here, a draft script was given to Jackson on December 4, 1997 to determine whether Jackson was interested in the role. [Exhibit 18.] Later, on December 16, 1997, Jackson was forwarded sample introduction script options for her to select from. [Exhibit 5.] The first sample introduction included a reference to Jackson having personal

experience with depression. The second sample option suggested that Jackson had a close friend or family member with depression. For the negotiations to proceed, Jackson was required to choose one of the two options. Jackson chose the second. The evidence did not establish that Jackson was given a script with the understanding that she should begin to prepare for the role, as required by the "definitely engaged" language contained in SAG's Industrials Contract.

Fourth, a performer is considered definitely engaged "when the performer is fitted, other than wardrobe tests." While wardrobe may have been discussed in general terms, the evidence established that Jackson was never "fitted", the clothes were not purchased, and alterations were not made. Accordingly, this "definitely engaged" criteria was not met.

Fifth, a performer is considered definitely engaged "when the performer is actually called and agrees to report." Jackson was never "called"; i.e., she was not specifically told to be at a particular location, at a specified time, on a specific date.

C. The Statute Of Frauds Precludes Enforcement Of Any Alleged Oral Agreement Regardless Of Whether The SAG Rules Apply

The Statute of Frauds is codified in Section 1624 of the California Civil Code and provides, in pertinent part:

> (a) The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent:
>
> (1) An agreement that by its terms is not to be performed within a year from the making thereof.

See also Munoz v. Kaiser Steel Corp., 156 Cal. App. 3d 965, 971 (1984) (an oral employment contract for a minimum of three years is one which, by its terms, cannot be performed within a year from its making and comes within the purview of the statue of frauds); Winburn v. All American Sportswear Co., 215 Cal. App. 380, 382-83 (1963) (an express oral license to manufacture a patent device is unenforceable); Gressley v. Williams, 193 Cal. App. 2d 636, 640 (1961) (oral contract made in March of one year and to continue until December of the following year was invalid under the statute of frauds).

Here, the December 2, 1997 and December 10, 1997 letters [Exhibits 1, 3], which allegedly evidence the terms of an "oral agreement", specifically state that the term of the "contract" is for a term of two years. Similarly, the January 23, 1998 proposed Talent Agreement [Exhibit 6] also calls for a two year term and, in the proposed modifications to the Talent Agreement made by Jackson's representatives [Exhibit 8], a term of "two or more" years was suggested. Any alleged oral contract thus runs directly afoul with the Statute of Frauds and is voidable unless there is a writing subscribed by the party to be charged. None of the parties assert that there was a sufficient memorandum signed by the party to be charged (Burnett-Lilly).

The Statute of Frauds would preclude enforcement of any oral agreement, notwithstanding the SAG rules. The SAG Industrials Contract contains "definitely engaged" language in the context of determining whether a contract has been formed between a producer and talent. In contrast, the Statute of Frauds addresses the issue of voidability of contracts after formation. Accordingly, whereas a contract could theoretically be formed pursuant to the terms of the Industrials Contract – which was not the case here -- that contract is still voidable by operation of the Statute of Frauds.

D. Claimants' Estoppel Argument Does Not Apply: Jackson Could Not Have Reasonably Relied On Any Representations Made By Burnett-Lilly As A Basis For Rejecting The Pharmacia & Upjohn Offer

Jackson raised an estoppel argument that: (1) she relied upon certain representations of Leo Burnett to the effect that the parties had a "deal" containing an "exclusivity" provision which would be violated if the Pharmacia & Upjohn offer was accepted and (2) she reasonably and detrimentally relied upon such representations by rejecting the offer.[3]

Here, Jackson cannot establish the necessary elements for estoppel. Specifically, (1) that a clear promise had been made to Jackson by Leo Burnett, as agent for Lilly, (2) that there was reasonable reliance on that promise, and (3) that substantial detriment was suffered.

The evidence did not establish that Burnett-Lilly informed Jackson to reject the Pharmacia & Upjohn offer. The promissory estoppel doctrine is inapplicable where, as here, no clear promise is made. See Southern California Acoustics Co. v. Holder, 71 Cal.2d 719, 723 (1969) (subcontractor relied on prime contractor's listing in ladders bid, but prime contractor never accepted subcontractor's bid, i.e., never made a promise to subcontractor); Laks v. Coast Federal Savings & Loan Ass'n, 60 Cal. App. 3d 885, 891 (1976) ("conditional commitment" to make loan); Division of Labor Law Enforcement v. Transpacific Transp. Co., 69 Cal. App. 3d 268, 275 (1977). Specifically, absent a written agreement signed by both parties, Burnett-Lilly never made representations that the deal was done.

[3] In closing argument, Jackson also raised an equitable estoppel argument. Jackson, however, did not establish the elements necessary to prove that claim.

Additionally, Burnett-Lilly never informed Jackson to reject the Pharmacia & Upjohn offer. Jackson was always free to communicate an acceptance. Jackson rejected the offer knowing that she had not entered into a written agreement with Burnett-Lilly.

Any reliance on Burnett-Lilly's "conflict of interest" determination was not reasonable. Before the promissory estoppel doctrine applies, any reliance on the purported promise must be reasonable. Where, as here, the express language of a letter of intent indicates that there is no contract until a formal written agreement is approved by all parties, reliance upon a party's commitment to a deal is unreasonable. Rennick v. O.P.T.I.O.N. Care, Inc., 77 F.3d 309, 316-17 (9th Cir. 1996).

Jackson claims to rely on oral representations of a deal even though Leo Burnett's correspondence unequivocally informed Jackson that there is no deal until a formal written agreement is executed by all parties. The Leo Burnett writings specifically contradict the alleged oral representations of a deal. And, where a party relies on oral representations that are contradicted by a writing, about which that party knew, reliance is deemed unreasonable. Malmstrom v. Kaiser Aluminum and Chemical Corp., 187 Cal. App. 3d 299, 319 (1986).

Any detriment that Jackson incurred by not having accepted the Pharmacia & Upjohn offer was not caused by relying on any "conflict of interest" determination. At the time Lilly decided not to go forward with the video project, Pharmacia & Upjohn had not located a spokesperson for its urinary incontinence medication. To the contrary, the evidence suggested that the position was still available. Instead of trying to mitigate her damages, neither Jackson nor her representatives attempted to secure the job.

E. Other Claims

During the arbitration, Jackson asserted various additional causes of action for which damages were requested, including the following: Intentional Misrepresentation, Negligent Misrepresentation, Fraud, Intentional Interference with Prospective Business Advantage, Negligent Interference with Prospective Business Advantage, and Equitable Estoppel. The evidence presented did not support any of these causes of action and, therefore, Claimants did not meet their burden of proof.

F. Conclusion

Having heard the testimony from numerous witnesses, including expert witnesses, and having admitted into evidence and considered numerous documents, the Arbitrator concludes that the evidence does not support Claimants' case and hereby finds in favor of Burnett-Lilly on all claims asserted by Jackson and SAG.

DATED: December 23, 1999.

Campbell Lucas

Justice Campbell Lucas, Arbitrator