

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SPYKE'S GROVE, INC., d/b/a)
FRESH FRUIT EXPRESS; EMERALD)
ESTATE; NATURE'S CLASSIC,)
)
Petitioner,)
)
vs.) Case No. 01-2417A
)
DOOLEY GROVES, INC., AND)
RELIANCE INSURANCE COMPANY,)
)
Respondents.)
_____)

RECOMMENDED ORDER

The parties having been provided proper notice,
Administrative Law Judge John G. Van Laningham of the Division
of Administrative Hearings convened a formal hearing of this
matter by telephone conference on September 21, 2001.

Petitioner and Respondent Dooley Groves, Inc. appeared at their
offices in Davie, Florida and Sun City, Florida, respectively,
and the Administrative Law Judge presided in Tallahassee,
Florida.

APPEARANCES

For Petitioner: Barbara Spiece, President
Spyke's Grove, Inc.
7250 Griffin Road
Davie, Florida 33314

For Respondent Dooley Groves, Inc.:

Diane M. Houghtaling, Vice President
Dooley Groves, Inc.
1651 Stephens Road
Post Office Box 7038
Sun City, Florida 33586-7038

For Respondent Reliance Insurance Company:

No appearance

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent Dooley Groves, Inc. owes Petitioner a sum of money for shipments of citrus fruit.

PRELIMINARY STATEMENT

On April 30, 2001, Petitioner Spyke's Grove, Inc. ("Spyke's Grove") filed a Complaint with the Department of Agriculture and Consumer Services (the "Department") in which it alleged that Respondent Dooley Groves, Inc. ("Dooley") had failed to pay in full for gift fruit packages that Spyke's Grove had shipped during the 1999-2000 citrus shipping season pursuant to a series of sales contracts between the parties. Spyke's Grove claimed that Dooley owed a balance of \$2,383.71. Respondent Reliance Insurance Company was named in the Complaint as Dooley's surety.

In an Answer filed with the Department on June 13, 2001, Dooley denied Spyke's Grove's allegations and requested a hearing. Shortly thereafter, the Department forwarded the matter to the Division of Administrative Hearings.

At the final hearing on September 21, 2001, Spyke's Grove was represented by its President, Barbara Spiece, who testified on the company's behalf. Spyke's Grove introduced 20 exhibits into evidence, and all were received. (Most of Spyke's Grove's exhibits were composite exhibits comprising numerous separate documents.)

On behalf of Dooley appeared its Vice President, Diane Houghtaling. She testified, as did the company's Direct Marketing Manager, Debra Thaxton. Dooley offered five exhibits, mostly composites, alpha-numerically identified as DG-2, DG-3, DG-5, DG-7, and DG-9. All were admitted into evidence.

Although a court reporter recorded the proceeding, none of the parties ordered a transcript. Spyke's Grove and Dooley submitted proposed recommended orders, and the undersigned reviewed them judiciously.

FINDINGS OF FACT

The evidence presented at final hearing established the facts that follow.

The Parties and Their Problem

1. Spyke's Grove and Dooley are "citrus fruit dealers" operating within the Department's regulatory jurisdiction.
2. As a wholesale shipper, Spyke's Grove packages and arranges for delivery of citrus products pursuant to purchase orders that retail sellers such as Dooley submit. The packages

typically are labeled with the retail seller's name (e.g. Dooley), and thus the retail buyer (and the recipient, if the citrus is purchased as a gift) usually will not be aware of Spyke's Grove's involvement.

3. The instant case involves a series of orders that Dooley placed with Spyke's Grove between November and December 1999 for packages of gift fruit. Under a number of informal, largely unwritten contracts, Spyke's Grove agreed, each time it received an order from Dooley, to ship a gift fruit box or basket to the donee designated by Dooley's retail customer, for which fruit shipment Dooley agreed to pay Spyke's Grove.

4. Spyke's Grove alleges that Dooley failed to pay in full for all of the gift fruit packages that Dooley ordered and Spyke's Grove duly shipped. Dooley contends (though not precisely in these terms) that Spyke's Grove materially breached the contracts, thereby discharging Dooley from further performance thereunder. Dooley also claims, as an affirmative defense, that the alleged debt was extinguished pursuant to an accord and satisfaction.

The Transactions

5. From mid-November 1999 until around December 12, 1999, Dooley faxed to Spyke's Grove approximately 150 individual orders for gift fruit packages. Each order consisted of a shipping label that identified the product (e.g. the type of

gift box or basket), the intended recipient, the destination, and a proposed shipping date. Spyke's Grove manifested its intent to fill these orders by faxing statements of acknowledgment to Dooley.

6. Although the many contracts that arose from these transactions were thus documented, the writings left much unsaid. For example, contrary to Dooley's assertion, the parties did not agree in writing that Spyke's Grove would deliver the subject gift baskets to the donees before Christmas, nor did they make any express oral agreements to this effect.

7. Further, the parties did not specifically agree that Spyke's Grove would be obligated to deliver the gift fruit into the hands of the donees and bear the risk of loss until such tender of delivery. Rather, the contracts between Spyke's Grove and Dooley were ordinary shipment contracts that required Spyke's Grove to put the goods into the possession of carriers (such as the U.S. Postal Service or United Parcel Service) who in due course would deliver the packages to the donees.

8. For several weeks, until early December 1999, Dooley placed orders, and Spyke's Grove filled them, under the arrangement just described, without controversy.

The Fire

9. On the night of Sunday, December 12, 1999, a devastating fire at Spyke's Grove's premises caused substantial

damage, temporarily disrupting its citrus packing and shipping operations at the peak of the holiday season. Working through and around the loss, Spyke's Grove soon recovered sufficiently to reopen for business. By around noon on Tuesday, December 14, 1999, its telephone service had been restored, and activities relating to shipping resumed on Friday, December 17, 1999.

Dooley's Response

10. Dooley did not immediately learn about the fire that had interrupted Spyke's Grove's operations. Continuing with business as usual on Monday, December 13, 1999, Dooley attempted then and throughout the week to fax orders to Spyke's Grove but consistently failed to connect because the lines were busy.

11. With unplaced orders piling up, Dooley began to worry that the gift baskets its customers had ordered earlier in the month—orders that Spyke's Grove already had agreed to fill—would not arrive by Christmas, as Dooley had guaranteed when taking those orders. Then, on December 16, word of the Spyke's Grove fire reached Dooley. Dooley's worry escalated into alarm.

12. That same day, Dooley placed telephone calls to as many of its retail customers or their donees as it could reach, to ascertain whether Spyke's Grove had shipped any of the gift fruit baskets that Dooley had ordered before December 12, 1999. Dooley was unable to confirm the receipt of a single package—and it panicked.

13. Disregarding its existing contractual obligations and with no advance notice to Spyke's Grove, Dooley made alternative arrangements for filling all of the orders that it had faxed to Spyke's Grove in December 1999. Dooley packaged and shipped some of the subject gift boxes on its own, and it placed orders for the rest with another wholesale shipper. These substitute packages were being shipped as early as December 17 or 18, 1999.

14. Even after the fact, Dooley failed to inform Spyke's Grove that it had, in effect, repudiated the existing shipment contracts between them. Having no knowledge of Dooley's actions, Spyke's Grove packaged and shipped all of the gift fruit that Dooley had ordered pursuant to the contracts entered into before December 12, 1999.

The Inevitable Dispute

15. On January 27, 2000, Spyke's Grove sent three invoices to Dooley seeking payment for most of the citrus shipped pursuant to Dooley's orders. These bills totaled \$3,242.55. A fourth and final invoice, for \$70.57, was sent on February 18, 2000. Combined with the other bills, this last brought the grand total to \$3,313.12.

16. Each of these invoices contained the following boilerplate "terms":

Net 14 days prompt payment is expected and appreciated. A 1 1/2% monthly service charge (A.P.R. 18% per annum) may be charged on all

past due accounts. Customer agrees to pay all costs of collection, including attorneys [sic] fees and court costs, should collection efforts ever become necessary.

17. Dooley did not remit payment or otherwise respond to Spyke's Grove's statements. Accordingly, on June 20, 2000, Spyke's Grove sent a letter to the Department requesting assistance. Dooley was provided a copy of this letter.

18. On June 30, 2000, Dooley sent a letter to Spyke's Grove in which it explained the reasons why Dooley believed Spyke's Grove was not entitled to full payment of \$3,313.12. Dooley had decided, unilaterally, that a deduction of \$1,723.53 was in order. In its letter, Dooley described the remaining balance of \$1,589.59 as the "final total payment," and a check for that amount was enclosed therewith.

19. Nothing in Dooley's letter fairly apprised Spyke's Grove that the check for \$1,589.59 was being tendered, in good faith, in full satisfaction of Spyke's Grove's demand for payment of \$3,313.12. No language in that June 30, 2000, letter so much as hinted that Spyke's Grove's acceptance of the check would be considered a manifestation of assent to Dooley's position or an agreement to accept the lesser sum in satisfaction of a greater claim.

20. In short, the parties did not make a mutual agreement, either expressly or by implication, to settle Spyke's Grove's claim for a total payment of \$1,589.59.

21. Spyke's Grove was entitled to accept Dooley's check for \$1,589.59 as a partial payment against the total indebtedness, and it did.

22. Shortly thereafter, Spyke's Grove filed a Complaint with the Department, initiating the instant proceeding.

Ultimate Factual Determinations

23. Dooley's refusal to pay in full for the goods it ordered from Spyke's Grove constituted a breach of the contracts between the parties. Spyke's Grove did not materially breach the agreements, nor was the indebtedness discharged pursuant to an accord and satisfaction.

24. Spyke's Grove has suffered an injury as a result of Dooley's breach. Spyke's Grove's damages consist of the principal amount of the debt together with pre-award interest at the statutory rate, less the partial payment that Dooley made on June 30, 2000.

25. Accordingly, Spyke's Grove is entitled to recover the following amounts from Dooley:

<u>Principal</u>	<u>Due Date</u>	<u>Statutory Interest</u>
\$3,242.55	2/10/99	\$ 18.66 (2/10/99 - 3/03/99)
<u>\$ 70.57</u>	3/04/99	
<u>\$3,313.12</u>	3/04/99	\$ 437.56 (3/04/99 - 6/29/00)
LESS: <\$1,589.59>		
<u>\$1,723.53</u>	6/30/00	\$ 86.89 (6/30/00 - 12/31/00)
		<u>\$ 157.92</u> (1/01/01 - 10/31/01)
<u>\$1,723.53</u>		<u>\$ 701.03</u>

Interest will continue to accrue on the outstanding balance of \$1,723.53 in the amount of \$0.52 per day from November 1, 2001, until the date of the final order.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

27. Chapter 601, Florida Statutes, is known as "The Florida Citrus Code of 1949." Section 601.01, Florida Statutes. "Citrus fruit" is defined in Section 601.03(7), Florida Statutes, as

all varieties and regulated hybrids of citrus fruit and also means processed citrus products containing 20 percent or more citrus fruit or citrus fruit juice, but, for the purposes of this chapter, shall not mean limes, lemons, marmalade, jellies, preserves, candies, or citrus hybrids for which no specific standards have been established by the Department of Citrus.

28. A "citrus fruit dealer" is defined in Section 601.03(8), Florida Statutes, as

any consignor, commission merchant, consignment shipper, cash buyer, broker, association, cooperative association, express or gift fruit shipper, or person who in any manner makes or attempts to make money or other thing of value on citrus fruit in any manner whatsoever, other than of growing or producing citrus fruit, but the term shall not include retail establishments whose sales are direct to consumers and not for resale or persons or firms trading solely in citrus futures contracts on a regulated commodity exchange.

Both Spyke's Grove and Dooley are citrus fruit dealers under this definition.

29. Citrus fruit dealers are required to be licensed by the Department in order to transact business in Florida. Section 601.55(1), Florida Statutes. As a condition of obtaining a license, such dealers are required to provide a cash bond or a certificate of deposit or a surety bond in an amount to be determined by the Department "for the use and benefit of every producer and of every citrus fruit dealer with whom the dealer deals in the purchase, handling, sale, and accounting of purchases and sales of citrus fruit." Section 601.61(3), Florida Statutes.

30. Section 601.65, Florida Statutes, provides that "[i]f any licensed citrus fruit dealer violates any provision of this

chapter, such dealer shall be liable to the person allegedly injured thereby for the full amount of damages sustained in consequence of such violation." This liability may be adjudicated in an administrative action brought before the Department or in a "judicial suit at law in a court of competent jurisdiction." Id.

31. Section 601.64(4), Florida Statutes, defines as an "unlawful act" by a citrus fruit dealer the failure to pay promptly and fully, as promised, for any citrus fruit which is the subject of a transaction relating to the purchase and sale of such goods.

32. Any person may file a complaint with the Department alleging a violation of the provisions of Chapter 601, Florida Statutes, by a citrus fruit dealer. Section 601.66(1), Florida Statutes. The Department is charged with the responsibilities of determining whether the allegations of the complaint have been established and adjudicating the amount of indebtedness or damages owed by the citrus fruit dealer. Section 601.66(5), Florida Statutes. The Department shall "fix a reasonable time within which said indebtedness shall be paid by the [citrus fruit] dealer," and, if the dealer does not pay within the time specified by the Department, the Department shall obtain payment of the damages from the dealer's surety company, up to the

amount of the bond. Section 601.66(5) and (6), Florida Statutes.

33. The contracts at issue between Spyke's Grove and Dooley were for the sale of goods. Accordingly, in addition to being subject to the provisions of Chapter 601, Florida Statutes, these transactions are governed by Florida's Uniform Commercial Code ("UCC"). See Section 672.102, Florida Statutes (describing scope of UCC's Article II on "sales"); Section 672.105(1), Florida Statutes (defining "goods").

34. The informal nature of the subject agreements does not adversely affect their enforceability. The parties intended to form contracts, and reasonably certain grounds exist in the record for giving an appropriate remedy. See, e.g., Sections 672.204, 672.206, 672.207, and 672.208, Florida Statutes.

35. The contracts at issue contained no explicit provisions allocating the risk of loss while the goods were in the possession of a carrier, nor did they provide for any delivery terms. Hence, these were ordinary shipment contracts, not destination contracts, for the latter must be explicitly agreed to. See Pestana v. Karinol Corp., 367 So. 2d 1096, 1099 (Fla. 3d DCA 1979); Sig M. Glukstad, Inc. v. Lineas Aereas Paraguayas, 619 F.2d 457, 459 (5th Cir. 1980)(absent specific contrary terms, sales contract is a shipment contract).

36. Under a shipment contract, the seller is required to tender the goods to a carrier for delivery to the buyer, and the risk of loss passes to the buyer upon the carrier's receipt of the goods. See Pestana, 367 So. 2d at 1099; Section 672.504, Florida Statutes.

37. Spyke's Grove bore the burden of proving the allegations in its Complaint against Dooley by a preponderance of the evidence. See Florida Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981); Florida Department of Health and Rehabilitative Services v. Career Service Commission, 289 So. 2d 412, 415 (Fla. 4th DCA 1974); Section 120.57(1)(j), Florida Statutes. Dooley, however, had the burden to establish any breach with respect to goods accepted. See Section 672.607(4), Florida Statutes. The burden was also on Dooley to prove its affirmative defense of accord and satisfaction. See Nelson v. Ziegfeld, 131 So. 316, 317 (Fla. 1930).

38. Spyke's Grove carried its burden of proving that Dooley has failed and refused to pay, as agreed, for citrus fruit that Spyke's Grove properly tendered to various carriers for delivery.

39. Dooley failed to establish that it rejected the tender of goods by Spyke's Grove, or that it properly revoked the acceptance of such goods. Having failed to make an effective

and timely rejection or revocation of acceptance, Dooley is deemed to have accepted all of the citrus fruit for which Spyke's Grove has sought payment. See Sections 672.601, 672.606, and 672.608, Florida Statutes.

40. Dooley did not demonstrate that Spyke's Grove had breached the contracts relating to the accepted goods. See Section 672.607(4), Florida Statutes. Moreover, Dooley failed to prove that it had timely notified Spyke's Grove of any breaches, and for that additional reason is barred from any remedy therefor. See Section 672.607(3)(a), Florida Statutes.

41. Dooley failed to establish an accord and satisfaction, either as a matter of fact or as a matter of law. See St. Mary's Hospital, Inc. v. Schocoff, 725 So. 2d 454, 455-56 (Fla. 4th DCA 1999); Section 673.3111, Florida Statutes.

42. Thus, Dooley is indebted to Spyke's Grove in the principal amount of \$1,723.53. See Section 672.607(1), Florida Statutes.

43. The amounts that Dooley owes Spyke's Grove came due as provided in the invoices that Spyke's Grove sent to Dooley, namely, 14 days after the date of the invoice. See Section 672.310, Florida Statutes.

44. Spyke's Grove is entitled to simple interest on the outstanding balance at the statutory rate of ten percent per annum until December 31, 2000, and at the rate of 11% per year

beginning January 1, 2001. See Section 687.01, Florida Statutes; Section 55.03, Florida Statutes; <http://www.dbf.state.fl.us/interest.html>; see also United Services Automobile Ass'n v. Smith, 527 So. 2d 281, 283-84 (Fla. 1st DCA 1988)(improper to award compound statutory interest). Notwithstanding the boilerplate in its invoices, Sypke's Grove is not entitled to recover interest at an annual rate of 18%, because the parties did not make a special contract for that rate. See Celotex Corp. v. Buildex, Inc., 476 So. 2d 294, 296 (Fla. 3d DCA 1985), rev. denied, 486 So. 2d 595 (1986).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department enter a final order awarding Sypke's Grove the sum of \$1,723.53, together with pre-award interest in the amount of \$701.03 (through October 31, 2001), plus additional interest from November 1, 2001, until the date of the final order, which will accrue in the amount of \$0.52 per day.

DONE AND ENTERED this 12th day of October, 2001, in
Tallahassee, Leon County, Florida.

JOHN G. VAN LANINGHAM
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of October, 2001.

COPIES FURNISHED:

Barbara Spiece, President
Spyke's Grove, Inc.
7250 Griffin Road
Davie, Florida 33314

Diane M. Houghtaling, Vice President
Dooley Groves, Inc.
1651 Stephens Road
Post Office Box 7038
Sun City, Florida 33586-7038

Reliance Insurance Company
Three Parkway
Philadelphia, Pennsylvania 19102

Honorable Charles H. Bronson
Commissioner of Agriculture
Department of Agriculture and
Consumer Services
The Capitol, Plaza Level 10
Tallahassee, Florida 32399-0810

Richard D. Tritschler, General Counsel
Department of Agriculture and
Consumer Services
The Capitol, Plaza Level 10
Tallahassee, Florida 32399-0810

Brenda D. Hyatt, Bureau Chief
Department of Agriculture
and Consumer Services
500 Third Street Northwest
Post Office Box 1072
Winter Haven, Florida 33882-1072

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.