

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. 01-2649A
)
CARLYN R. KULICK, d/b/a CARLYN'S)
and WESTERN SURETY COMPANY,)
)
Respondents.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on September 19, 2001, by video teleconference with the parties appearing in Fort Lauderdale, Florida, before Administrative Law Judge Michael M. Parrish of the Division of Administrative Hearings, who was present in Tallahassee, Florida.

APPEARANCES

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

For Respondent Carlyn's: Carlyn R. Kulick, Owner
Carlyn's
1601 Fifth Avenue, North
St. Petersburg, Florida 33713

For Respondent Western Surety: No appearance

STATEMENT OF THE ISSUE

Whether the Respondent Carlyn R. Kulick, d/b/a Carlyn's, failed to pay amounts owing to the Petitioner for the shipment of citrus fruit, as set forth in the Complaint dated April 30, 2001, and, if so, the amount the Petitioner is entitled to recover.

PRELIMINARY STATEMENT

On or about April 30, 2001, the Petitioner, Spyke's Grove, Inc., d/b/a Fresh Fruit Express, Emerald Estate, Nature's Classic ("Spyke's Grove") filed a Complaint with the Department of Agriculture and Consumer Services ("Department") alleging that Respondent, Carlyn R. Kulick, d/b/a Carlyn's ("Kulick or Carlyn's"), had failed to pay Spyke's Grove for "gift fruit" that it had shipped during the 1999-2000 citrus shipping season pursuant to instructions from Kulick. Spyke's Grove alleged that Kulick owed \$1,335.22 for the "gift fruit" in question. Respondent, Western Surety Company ("Western"), was named in the Complaint as the surety for Kulick.

On or about June 29, 2001, Carlyn R. Kulick, as owner of Carlyn's, filed an answer on behalf of Carlyn's denying that it was indebted to Spyke's Grove and requested a hearing. The Department duly forwarded the matter to the Division of Administrative Hearings for assignment of an administrative law judge. Pursuant to notice, the final hearing was held on

September 19, 2001. At the hearing, Barbara Spiece testified on behalf of Spyke's Grove, and Petitioner's Exhibits 1 through 19 were offered and received into evidence. Carlyn R. Kulick testified on behalf of Carlyn's, and Respondent's Exhibits 1 through 31 were offered and received into evidence.

No transcript of the proceeding was filed. At the close of the evidentiary hearing, the parties were advised that their proposed findings of fact and conclusions of law were to be filed on or before September 29, 2001. Thereafter, Spyke's Grove filed a timely Proposed Recommended Order. Carlyn's did not file a proposed recommended order.

FINDINGS OF FACT

1. At all times material to this proceeding, Spyke's Grove and Carlyn's were "citrus fruit dealers" licensed by the Department.

2. As part of its business, Carlyn's sells to its retail customers "gift fruit" consisting of oranges and grapefruit for shipment to third persons identified by the customers.

Carlyn R. Kulick is the owner of Carlyn's and acted on its behalf with respect to the transactions that are the subject of this proceeding.

3. Spyke's Grove is in the business of packaging and shipping "gift fruit" consisting of oranges and grapefruit pursuant to orders placed by other citrus fruit dealers.

Barbara Spiece is the president of Spyke's Grove and acted on its behalf with respect to the transactions that are the subject of this proceeding.

4. In November and December 1999, Spyke's Grove received a number of orders for "gift fruit" from Carlyn's. Most of the orders were for single shipments of fruit. One order was for six monthly shipments of fruit. This was the first year Carlyn's had done business with Spyke's Grove, and Carlyn's and Spyke's Grove did not execute a written contract governing their business relationship.

5. On the night of Sunday, December 12, 1999, the Spyke's Grove's packinghouse was destroyed by fire, and its offices were substantially damaged. The fire could not have happened at a worse time because it was at the peak of the holiday fruit-shipping season. Spyke's Grove was able to move into temporary offices and to obtain the use of another packinghouse very quickly. It had telephone service at approximately noon on Tuesday, December 14, 1999, and it began shipping "gift fruit" packages on Friday, December 17, 1999, to fill the orders it had received.

6. Carlyn R. Kulick, the owner of Carlyn's, learned of the fire at Spyke's Grove and attempted to contact the Spyke's Grove offices for an update on the orders Carlyn's had placed for shipment during the holidays. Mr. Kulick was unable to contact

anyone at Spyke's Grove for three or four days after the fire, and he was worried that his customers' orders for "gift fruit" would not be shipped on time. Mr. Kulick called another packinghouse and placed orders duplicating some of the orders Carlyn's had placed with Spyke's Grove.

7. Meanwhile, Spyke's Grove was giving priority to its smaller wholesale customers such as Carlyn's, and it shipped all of the orders it had received from Carlyn's.

8. Carlyn's did not cancel its orders with Spyke's Grove or otherwise notify Spyke's Grove that it should not ship the fruit; Mr. Kulick assumed that Spyke's Grove would contact him if it intended to ship the fruit ordered by Carlyn's.

9. Spyke's Grove sent numerous invoices and statements of account to Carlyn's Regarding the gift fruit at issue here. According to the statement of account dated June 1, 2001, as of that date Carlyn's owed Spyke's Grove \$1,069.78 for the gift fruit at issue here.

10. Most of the invoices to Carlyn's that were submitted by Spyke's Grove contain the following: "Terms: Net 14 days prompt payment is expected and appreciated. A 1½% monthly service charge (A.P.R. 18% per annum) may be charged on all past due accounts. . . ." Relying on this language, Spyke's Grove also seeks to recover a monthly service charge for each month that Carlyn's account was past due.

11. Carlyn's does not dispute Spyke's Grove's claim that \$1,069.78 worth of "gift fruit" was shipped by Spyke's Grove pursuant to orders Carlyn's placed in November and December 1999. Carlyn's' basic position is that it need not pay Spyke's Grove for the fruit because Spyke's Grove did not notify it after the December 12, 1999, fire that it would ship the orders and because Carlyn's had to make sure that its customers' orders were filled.

12. The uncontroverted evidence establishes that Carlyn's was, at the times material to this proceeding, a Florida-licensed and bonded citrus fruit dealer; that, in November and December 1999, Carlyn's submitted orders to Spyke's Grove for the shipment of "gift fruit" consisting of oranges and grapefruit; that Spyke's Grove shipped all of the "gift fruit" ordered by Carlyn's in November and December 1999; that the price of the "gift fruit" shipped by Spyke's Grove pursuant to Carlyn's' orders totaled \$1,069.78; and that Spyke's Grove timely filed its complaint alleging that Carlyn's failed to promptly pay its indebtedness to Spyke's Grove for citrus products shipped pursuant to orders placed by Carlyn's. Spyke's Grove is, therefore, entitled to payment of the principal amount of \$1,069.78, plus pre-judgment interest. Based on the date of the last invoice which contained a charge for any of the gift

fruit at issue here, the prehearing interest would run from May 1, 2000.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

14. Spyke's Grove has the burden of proving the allegations in its complaint against Carlyn's 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. However, even though Spyke's Grove has the ultimate burden of proving the truth of the claim, once it has made a prima facie case of entitlement to recover from Carlyn's, Carlyn's has the obligation to come forward with evidence to refute the entitlement. See J.W.C., 396 So. 2d at 787.

15. 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.

Grapefruit and oranges are "citrus fruit" pursuant to this definition.

16. 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.

Carlyn's is a "citrus fruit dealer" under this definition.

17. 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. Carlyn's is licensed and bonded pursuant to Florida law.

18. Section 601.64(4), Florida Statutes, defines as an "unlawful act" by a citrus fruit dealer the failure to "make full payment promptly in respect of any such transaction [the purchase, handling, sale or accounting of sales] in any such citrus fruit to the person with whom such transaction is had, or to fail or refuse on such account to make full payment of such amounts as may be due thereon."

19. 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.

20. 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 responsibility 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.

21. Based on the findings of fact herein, Spyke's Grove has met its burden of proving that Carlyn's was indebted to Spyke's Grove in the principal amount of \$1,069.78 from May 1, 2000, and that the debt remains unpaid.

22. Spyke's Grove also seeks to recover monthly "finance charges" of one and one-half percent of the balance. However, such "finance charges" should not be included in the calculation of Carlyn's' indebtedness to Spyke's Grove because they are not part of the amounts owed to Spyke's Grove for shipping the "gift fruit" ordered by Carlyn's. Rather, because the claims of Spyke's Grove are based in contract, see Florida Fruit Sales, Inc. v. Kingfisher Groves, 343 So. 2d 840 (Fla. 2d DCA 1976), Spyke's Grove is entitled to pre-judgment interest if the Department determines that Carlyn's is indebted to Spyke's Grove, to be calculated on the amount of the indebtedness from

the date payment was due until the Department enters its final order. See Celotex Corp. v. Buildex, Inc., 476 So. 2d 294, 295 (Fla. 3d DCA 1985)("The settled law is that where a disputed contractual claim becomes liquidated . . . as to the amounts recoverable, interest should be awarded from the date payment was due."); Cooper v. Alford, 477 So. 2d 31, 31 (Fla. 1st DCA 1985)("In an action ex contractu, interest runs from the date a liquidated debt is due. This is so even if there exists an honest dispute as to whether the debt was in fact due. Once it is finally determined the debt was due, the person to whom it was owed is entitled to payment of the principal plus interest from the due date. . . . The purpose in awarding such interest is to compensate a party for deprivation of property.").

23. The evidence establishes that there was no written contract governing the dealings between Spyke's Grove and Carlyn's. Spyke's Grove is, therefore, not entitled to recover interest on the amount owing at the rate of 18 percent per annum as stated in the invoices. Rather, the amount of pre-judgment interest payable to Spyke's Grove is the statutory rate specified in Section 55.03, Florida Statutes. See Section 687.01, Florida Statutes; Celotex, 476 So. 2d at 295-96 ("It is undisputed that invoices sent to Buildex over the course of dealings with the parties contained a statement that 'interest will be charged at the rate of 1 1/2% per month or 18%

per annum on all past due accounts.' No proof was presented however, that the parties ever agreed in writing that interest shall accrue at 18% per annum."). Accord Nelson v. Ameriquest Technologies, Inc., 739 So. 2d 161 (Fla. 3d DCA 1999).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Agriculture and Consumer Services enter a final order ordering Carlyn R. Kulick, d/b/a Carlyn's, to pay \$1,069.78 to Spyke's Grove, Inc., d/b/a Fresh Fruit Express, Emerald Estate, Nature's Classic, together with pre-judgment interest calculated at the rate specified in Section 55.03, Florida Statutes, on the amounts owing.

DONE AND ENTERED this 1st day of November, 2001, in Tallahassee, Leon County, Florida.

MICHAEL M. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of November, 2001.

COPIES FURNISHED:

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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.