

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. 01-2811A
)
A & J PAK SHIP, INC., and OLD)
REPUBLIC SURETY COMPANY,)
)
Respondents.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was held in this case in accordance with Section 120.57(1), Florida Statutes, on August 29, 2001, by video teleconference at sites in Fort Lauderdale and Tallahassee, Florida, before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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

For Respondent A & J Pak Ship, Inc:

Scott A. Wiley, President
A & J Pak Ship, Inc.
1616 West Cape Coral Parkway
No. 102
Cape Coral, Florida 33914

For Respondent Old Republic Surety Company:

No Appearance

STATEMENT OF THE ISSUE

Whether Respondent A & J Pak Ship, Inc., owes Petitioner \$551.16 for "gift fruit," as alleged in Petitioner's Complaint.

PRELIMINARY STATEMENT

On or about April 30, 2001, Petitioner filed a Complaint with the Department of Agriculture and Consumer Services (Department) alleging that A & J Pak Ship, Inc. (A & J) had failed to pay Petitioner for "gift fruit" that Petitioner had shipped in accordance with A & J's instructions. According to the Complaint, A & J owed Petitioner a total of \$551.16 for the "gift fruit" in question. Old Republic Surety Company (Old Republic) was identified in the Complaint as the surety for A & J.

On or about June 27, 2001, A & J filed with the Department an answer to Petitioner's Complaint denying that it was indebted to Petitioner.

On July 16, 2001, the Department referred the matter to the Division of Administrative Hearings to conduct a "formal hearing" in accordance with Section 601.66, Florida Statutes.

On July 24, 2001, Old Republic advised the Division in writing that it would "look to [A & J] to handle the matter and represent it" in the proceedings before the Division.

As noted above, the final hearing in this case was held on August 29, 2001. Two witnesses testified at the hearing. Barbara Spiece, the owner of Petitioner, testified on behalf of Petitioner. Scott A. Wiley, A & J's president, testified on behalf of A & J. In addition to Ms. Spiece's and Mr. Wiley's testimony, the following exhibits were offered and received into evidence: Petitioner's Exhibits 1 through 7, 9 through 15, 20, 21, and 23 through 25, and Respondent's Exhibits A, A-1, B, B-1, C, D, F, and G.

At the close of the evidentiary portion of the hearing, the undersigned announced on the record that proposed recommended orders had to be filed no later than September 12, 2001.

On September 5, 2001, and September 6, 2001, respectively, A & J and Petitioner filed their Proposed Recommended Orders. These post-hearing submittals have been carefully considered by the undersigned.

FINDINGS OF FACT

Based upon the evidence adduced at the final hearing and the record as a whole, the following findings of fact are made:

1. At all times material to the instant case, Petitioner and A & J have been licensed by the Department of Citrus as "citrus fruit dealers."

2. As part of its operations, A & J sells "gift fruit" to retail customers. The "gift fruit" consists of oranges or grapefruits, or both, that are packaged and sent to third parties identified by the customers.

3. In November and December of 1999, A & J took orders for "gift fruit" from retail customers that it contracted with Petitioner (doing business as Fresh Fruit Express) to fill. Under the agreement between A & J and Petitioner (which was not reduced to writing), it was Petitioner's obligation to make sure that the "gift fruit" specified in each order was delivered, in an appropriate package, to the person or business identified in the order as the intended recipient at the particular address indicated in the order.

4. Among the intended recipients identified in the orders that Petitioner agreed to fill were: the Uthe family, the Weckbachs, Mr. and Mrs. T. Martin, Angelo's, Susan Booth, Mr. and Mrs. E. Coello, Mr. and Mrs. Dalbey, Carol Baker and family, the Tarvin family, Shelly and Mark Koontz, Pamela McGuffey, Jerome Melrose, Russell Oberer, Mrs. Josephine Scelfo, Curt and Becky Tarvin, Heidi Wiseman, Kay and Artie Witt, and

the William Woodard family, who collectively will be referred to hereinafter as the "Intended Recipients in Question."

5. A & J agreed to pay Petitioner a total of \$438.18 to provide "gift fruit" to the Intended Recipients in Question, broken down as follows: \$21.70 for the Uthe family order, \$21.70 for the Weckbachs order, \$22.82 for the Mr. and Mrs. T. Martin order, \$27.09 for the Angelo's order, \$21.70 for the Susan Booth order, \$31.67 for the Mr. and Mrs. E. Coello order, \$17.50 for the Mr. and Mrs. Dalbey order, \$21.70 for the Carol Baker and family order, \$27.09 for the Tarvin family order, \$21.70 for the Shelly and Mark Koontz order, \$21.70 for the Pamela McGuffey order, \$32.44 for the Jerome Melrose order, \$21.70 for the Russell Oberer order, \$17.60 for the Mrs. Josephine Scelfo order, \$21.70 for the Curt and Becky Tarvin order, \$17.50 for the Heidi Wiseman order, \$17.50 for the Kay and Artie Witt order, and \$31.67 for the William Woodard family order.

6. All of these orders, which will be referred to hereinafter as the "Intended Recipients in Question 'gift fruit' orders," were to be delivered, under the agreement between A & J and Petitioner, by Christmas day, 1999.

7. On Sunday night, December 12, 1999, fire destroyed Petitioner's packing house and did considerable damage to Petitioner's offices.

8. With the help of others in the community, Petitioner was able to obtain other space to house its offices and packing house operations. By around noon on Tuesday, December 14, 1999, Petitioner again had telephone service, and by Friday, December 17, 1999, it resumed shipping fruit.

9. Scott Wiley, A & J's President, who had learned of the fire and had been unsuccessful in his previous attempts to contact Petitioner, was finally able to reach Petitioner by telephone on Monday, December 20, 1999. After asking about the status of the Intended Recipients in Question "gift fruit" orders and being told by the employee with whom he was speaking that she was unable to tell him whether or not these orders had been shipped, Mr. Wiley advised the employee that A & J was "cancelling" all "gift fruit" orders that had not been shipped prior to the fire. Mr. Wiley followed up this telephone conversation by sending, that same day, the following facsimile transmission to Petitioner:

As per our conversation on 12-20-99, please cancel all orders sent to you from A & J Pak-Ship (Fresh Fruit Express).

After trying to contact your company numerous times on December 13, I called the Davie Police Department, who [sic] informed me that you had experienced a major fire. I tried to contact you daily the entire week with no luck. Since I had no way to contact you, it was your responsibility to contact me with information about your business status. Without that contact, I had to

assume that you were unable to continue doing business. With Christmas fast approaching and with no contact from anyone on your end, I had no choice but to begin to issue refunds. While I understand the fire was devastating for you, understand that my fruit business is ruined, and will take years to reestablish.

Please note that I will not pay for any orders shipped past the date of your fire, 12-13-99, as I have already issued refunds, and I will need proof of delivery for all those orders delivered before the fire. Again, cancel all orders including the remainder of multi-month packages, and honeybell orders.

Your lack of communication has put me in a very bad situation with my customers. One short phone call to me could have avoided all this difficulty. Had I not tried your phone on 12-20, I would still have no information from you.

10. Petitioner did not contact Mr. Wiley and tell him about the fire because it did not think that the fire would hamper its ability to fulfill its obligations under its agreement with A & J.

11. By the time Mr. Wiley made telephone contact with Petitioner on Monday, December 20, 1999, Petitioner had already shipped (that is, placed in the possession of a carrier and made arrangements for the delivery of) all of the Intended Recipients in Question "gift fruit" orders (although it had not notified A & J it had done so).

12. Petitioner did not ship any A & J "gift fruit" orders after receiving Mr. Wiley's December 20, 1999, telephone call.

13. On or about February 18, 2000, Petitioner sent A & J an invoice requesting payment for "gift fruit" orders it had shipped for A & J. Among the orders on the invoice for which Petitioner was seeking payment were the Intended Recipients in Question "gift fruit" orders (for which Petitioner was seeking \$438.18). The invoice erroneously reflected that all of these orders had been shipped on December 25, 1999. They, in fact, had been shipped on December 18, 1999, or earlier. 1/

14. Mr. Wiley, acting on behalf of A & J, wrote a check in the amount of \$858.26, covering all of the invoiced orders except the Intended Recipients in Question "gift fruit" orders, and sent it to Petitioner, along with the following letter dated February 22, 1999:

As per my conversation on 12/20/90 at 11:20 a.m. with Yvette we cancelled all orders shipped after the fire, and also followed up with a certified letter.

We had to reorder all of those orders and also refunded a lot of orders as they were not there in time for Xmas as all orders are required to arrive before Xmas.

As I said in my certified letter to you it was a[n] unfortunate fire but all you had to do was to inform me what was going on and we could have worked something out. Our fruit business has been ruined by this incident, and quite possibly our entire company. It is unbelievable that more than sixty days

after the fire we still have had no correspondence from you whatsoever.

We have deducted those orders that were cancelled and arrived well after Xmas and remitted the remainder.

15. A & J has not yet paid Petitioner the \$438.18 for the Intended Recipients in Question "gift fruit" orders.

CONCLUSIONS OF LAW

16. Chapter 601, Florida Statutes, is known as the "The Florida Citrus Code of 1949" (Code). Section 601.01, Florida Statutes.

17. The Code, among other things, regulates the activities of "citrus fruit dealers."

18. "Citrus fruit," as that term is used in the Code, is defined in Section 601.03(7), Florida Statutes, as follows:

"Citrus fruit" means 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," as defined in Section 601.03(7), Florida Statutes.

19. A "citrus fruit dealer," as that term is used in the Code, is defined in Section 601.03(8), Florida Statutes, as follows:

"Citrus fruit dealer" means 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[.]

20. Pursuant to Section 601.55(1), Florida Statutes, a "citrus fruit dealer," as defined in Section 601.03(8), Florida Statutes, must be licensed by the Department of Citrus to transact business in the State of Florida. At all times material to the instant case, Petitioner and A & J were "citrus fruit dealers," as defined in Section 601.03(8), Florida Statutes, and were licensed as required by Section 601.55(1), Florida Statutes.

21. With certain exceptions not applicable to the instant case, "prior to the approval of a citrus fruit dealer's license, the applicant therefor must deliver to the Department of Agriculture and Consumer Services a good and sufficient cash bond, appropriate certificate of deposit, or a surety bond executed by the applicant as principal and by a surety company qualified to do business in this state as surety, in an amount

as determined by the Department of Citrus." Section 601.61(1), Florida Statutes.

22. "Said bond shall be to the Department of Agriculture [and Consumer Services], 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.

23. Section 601.64, Florida Statutes, describes "unlawful acts" in which "citrus fruit dealers" may not engage "in connection with, any transaction relative to the purchase, handling, sale, and accounting of sales of citrus fruit." Among these "unlawful acts" is the failure to "make full payment promptly in respect of any such transaction in any such citrus fruit to the person with whom such transaction is had." Section 601.64(4), Florida Statutes.

24. "Any person may complain of any violation of any of the provisions of [the Code] by any citrus fruit dealer during any shipping season, by filing of a written complaint with the Department of Agriculture and Consumer Services at any time prior to May 1 of the year immediately following the end of such shipping season." Section 601.66(1), Florida Statutes.

25. A hearing held in accordance with Section 120.57(1), Florida Statutes, on the complaint must be conducted if there

are disputed issues of material fact. The complainant has the burden of proving the allegations of the complaint by a preponderance of the evidence. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996) ("The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue"); Florida Department of Transportation v. J.W.C. Company, 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); and Section 120.57(1)(j), Florida Statutes ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute. . . .").

26. If the Department determines that the complainant has met its burden of proof, the Department must "make its findings of fact accordingly and thereupon adjudicate the amount of indebtedness or damages due to be paid by the dealer to the complainant. The administrative order [must] fix a reasonable time within which said indebtedness shall be paid by the dealer." Section 601.66(5), Florida Statutes.

27. If the dealer fails to comply with the order, the Department must "call upon the surety company to pay over to the

Department of Agriculture and Consumer Services, out of the bond theretofore posted by the surety for such dealer, the amount of damages sustained but not exceeding the amount of the bond. The proceeds to the Department of Agriculture and Consumer Services by the surety company shall, in the discretion of the Department of Agriculture and Consumer Services, be either paid to the original complainant or held by the Department of Agriculture and Consumer Services for later disbursement, depending upon the time during the shipping season when the complaint was made, when liability was admitted by the dealer, when the proceeds were so paid by the surety company to the Department of Agriculture and Consumer Services, the amount of other claims then pending against the same dealer, the amount of other claims already adjudicated against the dealer, and such other pertinent facts as the Department of Agriculture and Consumer Services in its discretion may consider material." Section 601.66(6), Florida Statutes.

28. If the surety company fails to comply with the Department's demand for payment, the Department must "within a reasonable time file in the Circuit Court in and for Polk County, an original petition or complaint setting forth the administrative proceedings before the Department of Agriculture [and Consumer Services] and ask for final order of the court directing the surety company to pay the proceeds of the said

bond to the Department of Agriculture for distribution to the claimants." Section 601.66(7), Florida Statutes.

29. In the instant case, Petitioner timely filed a Complaint against A & J pursuant to Section 601.66, Florida Statutes, alleging that A & J owed Petitioner \$551.16 for "gift fruit" it had shipped for A & J during the 1999-2000 shipping season, an allegation that, in A & J's subsequently filed answer to the Complaint, A & J disputed. After receiving A & J's answer, the Department referred the matter to the Division for a Section 120.57(1), Florida Statutes, hearing.

30. At the hearing, it was Petitioner's burden to prove A & J's indebtedness by a preponderance of evidence.

31. Petitioner failed to meet its burden of proof.

32. Under its agreement with A & J, Petitioner was responsible for the delivery of the Intended Recipients in Question "gift fruit" orders to the Intended Recipients in Question at the locations specified in the orders. 2/
Accordingly, to show its entitlement to the relief requested in its Complaint, it was incumbent upon Petitioner to establish, by a preponderance of evidence, that such delivery was made.

33. Petitioner, however, failed to establish that any of the orders were delivered in accordance with its agreement with A & J. 3/

34. Its Complaint, therefore, must be dismissed.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

RECOMMENDED that the Department enter a final order dismissing Petitioner's Complaint.

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

STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of September, 2001.

ENDNOTES

1/ The record, however, is devoid of any competent substantial evidence that these orders were actually delivered to and received by the Intended Recipients in Question.

2/ The agreement was a "destination contract," not a "shipment contract," as those terms are used in the Uniform Commercial Code. (If it were a "shipment contract," Petitioner would have been obligated to "promptly notify" A & J of the shipment of the Intended Recipients in Question "gift fruit" orders, which Petitioner did not do.) See Pestana v. Karinol Corporation, 367 So. 2d 1096 (Fla. 3d DCA 1979)("There are two types of sales contracts under Florida's Uniform Commercial Code wherein a carrier is used to transport the goods sold: a shipment contract and a destination contract. A shipment contract is considered the normal contract in which the seller is required

to send the subject goods by carrier to the buyer but is not required to guarantee delivery thereof at a particular destination. Under a shipment contract, the seller, unless otherwise agreed, must: (1) put the goods sold in the possession of a carrier and make a contract for their transportation as may be reasonable having regard for the nature of the goods and other attendant circumstances, (2) obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of the trade, and (3) promptly notify the buyer of the shipment. . . . A destination contract, on the other hand, is considered the variant contract in which the seller specifically agrees to deliver the goods sold to the buyer at a particular destination and to bear the risk of loss of the goods until tender of delivery. . . . Under a destination contract, the seller is required to tender delivery of the goods sold . . . at the place of destination." Pestana v. Karinol Corporation, 367 So. 2d 1096 (Fla. 3d DCA 1979).

3/ While Petitioner presented proof that the Intended Recipients in Question "gift fruit" orders were shipped prior to Christmas day, 1999, it failed to establish that these orders were actually delivered to and received by the Intended Recipients in Question.

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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.