

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. 01-2846A
)
ALILEV CORPORATION, d/b/a BAY)
HARBOR FINE FOODS, AND TRAVELERS)
CASUALTY & SURETY COMPANY)
OF AMERICA,)
)
Respondents.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on August 29, 2001, by video teleconference, with the parties appearing in Fort Lauderdale, Florida, before Patricia Hart Malono, a duly-designated Administrative Law Judge 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 Alilev Corporation/Bay Harbor Fine Foods:

Arthur C. Bergen, Owner
Alilev Corporation
1077 95th Street
Bay Harbor, Florida 33154

For Respondent Traveler's Casualty & Surety Company:

No appearance.

STATEMENT OF THE ISSUE

Whether the Respondent Alilev Corporation 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 Spyke's Grove, d/b/a Fresh Fruit Express ("Fresh Fruit Express"), filed a Complaint with the Department of Agriculture and Consumer Services ("Department") alleging that Alilev Corporation, d/b/a Bay Harbor Fine Foods ("Bay Harbor Fine Foods"), had failed to pay Fresh Fruit Express for "gift fruit" that it had shipped during the 1999-2000 citrus shipping season pursuant to instructions from Bay Harbor Fine Foods. Fresh Fruit Express alleged that Bay Harbor Fine Foods owed \$1,034.62 for the "gift fruit" in question. Traveler's Casualty & Surety Company of America was named in the Complaint as the surety for Bay Harbor Fine Foods.

On or about July 5, 2001, Arthur C. Bergen, as an owner of Bay Harbor Fine Foods, filed an answer on behalf of Bay Harbor Fine Foods denying that it was indebted to Fresh Fruit Express and requesting 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 August 29, 2001. At the hearing, Barbara Spiece testified on behalf of Fresh Fruit Express, and Petitioner's Exhibits 1 through 11 were offered and received into evidence. Arthur C. Bergen testified on behalf of Bay Harbor Fine Foods, and Respondent's Exhibits 1 and 2 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 12, 2001. On August 31, 2001, and September 6, 2001, respectively, Bay Harbor Fine Foods and Fresh Fruit Express filed their proposals, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. At all times material to this proceeding, Fresh Fruit Express and Bay Harbor Fine Foods were "citrus fruit dealers" licensed by the Department.

2. Bay Harbor Fine Foods is a retail grocery store. As part of its business, it sells to its retail customers "gift fruit" consisting of oranges and grapefruit for shipment to third persons identified by the customers. Arthur C. Bergen is an owner of Bay Harbor Fine Foods and acted on its behalf with respect to the transactions that are the subject of this proceeding.

3. Fresh Fruit Express 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 Fresh Fruit Express and acted on its behalf with respect to the transactions that are the subject of this proceeding.

4. In November and December 1999, Fresh Fruit Express received via facsimile transmittal a number of orders for "gift fruit" from Bay Harbor Fine Foods. Most of the orders were for single shipments of fruit, although a few orders were for 12 monthly shipments of fruit. This was the first year Bay Harbor Fine Foods had done business with Fresh Fruit Express, and Bay Harbor Fine Foods and Fresh Fruit Express did not

execute a written contract governing their business relationship.

5. On the night of Sunday, December 12, 1999, Fresh Fruit Express'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. Fresh Fruit Express was able to move into temporary offices and to obtain the use of a 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 its had received.

6. Mr. Bergen, the owner of Bay Harbor Fine Foods, learned of the fire at Fresh Fruit Express and attempted to contact its offices for an update on the orders Bay Harbor Fine Foods had placed for shipment during the holidays. Mr. Bergen was unable to contact anyone at Fresh Fruit Express 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.¹ Mr. Bergen called two other packinghouses and placed orders duplicating some of the orders Bay Harbor Fine Foods had placed with Fresh Fruit Express. Mr. Bergen directed these packinghouses to ship the duplicate orders via expedited Federal Express and United

Parcel Service shipping, and Bay Harbor Fine Foods incurred extra costs for the expedited shipping.

7. Meanwhile, Fresh Fruit Express was giving priority to its smaller wholesale customers such as Bay Harbor Fine Foods, and it shipped all of the orders it had received from Bay Harbor Fine Foods.

8. Bay Harbor Fine Foods did not cancel its orders with Fresh Fruit Express or otherwise notify Fresh Fruit Express that it should not ship the fruit; Mr. Bergen assumed that Fresh Fruit Express would contact him if it intended to ship the fruit ordered by Bay Harbor Fine Foods.

9. Fresh Fruit Express prepared invoices for Bay Harbor Fine Foods dated January 24, 2000, in the amounts of \$60.01, \$599.43, and \$511.80, respectively, for "gift fruit" shipments made in November and December 1999; it prepared an invoice for Bay Harbor Fine Foods dated February 18, 2000, in the amount of \$92.00 for "gift fruit" shipments made in January and February 2000; it prepared an invoice for Bay Harbor Fine Foods dated March 21, 2000, in the amount of \$69.34 for "gift fruit" shipments made in February and March 2000; and it prepared an invoice for Bay Harbor Fine Foods dated April 17, 2000, in the amount of \$44.40 for "gift fruit" shipments made in April 2000. According to the invoices, Bay Harbor Fine Foods owed Fresh Fruit Express \$1,376.98 as of April 17, 2000.

10. All of the invoices to Bay Harbor Fine Foods that were submitted by Fresh Fruit Express 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. . . ."

11. By late April 2000, Fresh Fruit Express had not received payment for any of the "gift fruit" shipped pursuant to the orders placed by Bay Harbor Fine Foods. Ms. Spiece contacted Bay Harbor Fine Foods in late April 2000 and inquired about payment of the amounts owing. Ms. Spiece was told that Bay Harbor Fine Foods had no invoices from Fresh Fruit Express. Ms. Spiece sent duplicate invoices to Bay Harbor Fine Foods, and she called to confirm that the invoices had been received.

12. After several attempts by Fresh Fruit Express to collect the amounts invoiced to Bay Harbor Fine Foods, Mr. Bergen tendered a check dated July 11, 2000, to Fresh Fruit Express on the Bay Harbor Fine Foods account in the amount of \$591.90. The check was accompanied by a letter signed by Mr. Bergen, in which he stated:

Enclosed is a check in the amount of \$591.90 covering the shipments that we know were not duplicated due to your fire in late December.

This amount reflects a deduction of \$341.95 in freight charges paid by us to U.P.S. and Fed. Ex. to make our promised Christmas deadline.

13. In the statement attached to the complaint filed with the Department, Fresh Fruit Express claims that Bay Harbor Fine Foods owes it a total of \$1,034.62, which amount includes a credit for the \$591.90 paid by Bay Harbor Fine Foods in July 2000 and amounts shown as "Finance" charges for the months of February 2000 through April 2001.

14. Bay Harbor Fine Foods does not dispute Fresh Fruit Express's claim that \$1,376.98 worth of "gift fruit" was shipped by Fresh Fruit Express pursuant to orders Bay Harbor Fine Foods placed in November and December 1999. Bay Harbor Fine Foods' position is that it need not pay Fresh Fruit Express for the fruit because Fresh Fruit Express did not notify it after the December 12, 1999, fire that it would ship the orders and because Bay Harbor Fine Foods had to make sure that its customers' orders were filled.

15. The uncontroverted evidence establishes that Bay Harbor Fine Foods was, at the times material to this proceeding, a Florida-licensed and -bonded citrus fruit dealer; that, in November and December 1999, Bay Harbor Fine Foods submitted orders to Fresh Fruit Express for the shipment of "gift fruit" consisting of oranges and grapefruit; that Fresh Fruit Express shipped all of the "gift fruit" ordered by Bay Harbor Fine Foods in November and December 1999; that the price of the "gift

fruit" shipped by Fresh Fruit Express pursuant to Bay Harbor Fine Foods' orders totaled \$1,376.98; that Bay Harbor Fine Foods paid Fresh Fruit Express \$591.90 on its account on July 11, 2000; and that Fresh Fruit Express timely filed its complaint alleging that Bay Harbor Fine Foods failed to promptly pay its indebtedness to Fresh Fruit Express for citrus products shipped pursuant to orders placed by Bay Harbor Fine Foods. Fresh Fruit Express is, therefore, entitled to payment of the principal amount of \$785.08, plus pre-judgment interest.

16. Fresh Fruit Express presented no evidence to establish that it actually sent the invoices to Bay Harbor Fine Foods on or about the dates stated on the invoices. Therefore, payment of the \$1,376.98 was due on May 1, 2000, after Ms. Spiece sent duplicate invoices to Bay Harbor Fine Foods and confirmed that they had been received, and pre-judgment interest on this amount would begin accruing on May 1, 2000. The payment of \$591.90 on July 11, 2000, reduced the principal balance owing to Fresh Fruit Express to \$785.08, and pre-judgment interest on this amount would begin accruing on July 12, 2000.

CONCLUSIONS OF LAW

17. 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 (2000).

18. Fresh Fruit Express has the burden of proving the allegations in its complaint against Bay Harbor Fine Foods 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 Fresh Fruit Express has the ultimate burden of proving the truth of the claim, once it has made a prima facie case of entitlement to recover from Bay Harbor Fine Foods, Bay Harbor Fine Foods has the obligation to come forward with evidence to refute the entitlement. See J.W.C., 396 So. 2d at 787.

19. 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.

20. 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.

Bay Harbor Fine Foods is a "citrus fruit dealer" under this definition.

21. 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. Based on the findings of fact herein, Bay Harbor Fine Foods is licensed and bonded pursuant to Florida law.

22. 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."

23. 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.

24. 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.

25. Based on the findings of fact herein, Fresh Fruit Express has met its burden of proving that Bay Harbor Fine Foods was indebted to Fresh Fruit Express in the principal amount of \$1,376.98 from May 1, 2000, through July 11, 2000, and in the principal amount of \$785.08 (\$1,376.98 - \$591.90) subsequent to July 11, 2000.

26. Fresh Fruit Express included monthly "finance charges" of one and one-half percent of the balance owing as part of the \$1,034.62 that it seeks to recover from Bay Harbor Fine Foods. However, such "finance charges" should not be included in the calculation of Bay Harbor Fine Foods' indebtedness to Fresh Fruit Express because they are not part of the amounts owed Fresh Fruit Express for shipping the "gift fruit" ordered by Bay Harbor Fine Foods.

27. Rather, because the claims of Fresh Fruit Express are based in contract, see Florida Fruit Sales, Inc. v. Kingfisher Groves, 343 So. 2d 840 (Fla. 2d DCA 1976), Fresh Fruit Express is entitled to pre-judgment interest if the Department determines that Bay Harbor Fine Foods is indebted to Fresh Fruit Express, 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.").

28. The evidence establishes that there was no written contract governing the dealings between Fresh Fruit Express and Bay Harbor Fine Foods. Fresh Fruit Express 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 Fresh Fruit Express 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 Alilev Corporation, d/b/a Bay Harbor Fine Foods, to pay \$785.08 to Spyke's Grove, Inc., d/b/a Fresh Fruit Express, Emerald Estate, and 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 2nd day of October, 2001, in Tallahassee, Leon County, Florida.

PATRICIA HART MALONO
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of October, 2001.

ENDNOTE

^{1/} Fresh Fruit Express did not offer into evidence all of the orders it received from Bay Harbor Fine Foods, but Petitioner's Composite Exhibit 9 contains five of the nine orders Bay Harbor Fine Foods placed. The Bay Harbor Fine Foods' order form contains several choices for when the shipment of fruit was to arrive: "Soon as possible"; "Honeybell season"; "Thanksgiving"; "Christmas"; "Hanukkah"; and "Arrive week beginning Monday:". With the exception of one order form on which it was noted that the two shipments should arrive by "Thanksgiving," the order forms either had no "Ship to arrive" choice marked or "Soon as possible" was the "Ship to arrive" choice indicated.

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.