

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. 01-2920A
)
CLARK'S COUNTRY FARMERS MARKET,)
INC., AND CONTRACTORS BONDING &)
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 October 25, 2001. Petitioner appeared in Fort Lauderdale, Florida. Respondent Clark's County Farmers Market, Inc. appeared, and the Administrative Law Judge presided, in Tallahassee, Florida.

APPEARANCES

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

For Respondent Clark's County Farmers Market, Inc.:

Denise B. Clark, pro se
Clark's Country Farmers Market, Inc.
18440 U.S. Highway 19, North
Hudson, Florida 34667

For Respondent Contractors Bonding & Insurance Company:

No appearance

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent Clark's Country Farmers Market, 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 Clark's Country Farmers Market, Inc. ("Clark's") had failed to pay 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 Clark's owed a balance of \$4,803.55. Respondent Contractors Bonding & Insurance Company was named in the Complaint as Clark's' surety.

In an Answer filed with the Department on July 19, 2001, Clark's 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 October 25, 2001, Spyke's Grove was represented by its president, Barbara Spiece, who testified on the company's behalf, as did her husband, Robert Spiece. Spyke's Grove introduced Petitioner's Exhibits 1-4; 6-10; 11; 13; 14-17; 19-22; 27; 28; and 30 into evidence, and all were received. (Most of Spyke's Grove's exhibits were composite exhibits comprising numerous separate documents.)

On behalf of Clark's appeared an officer of the company, Denise B. Clark. She testified, as did employees Denise Bosse and Milia Julian. Clark's offered exhibits, mostly composites, alphabetically identified as Respondent's Exhibits A-I; L-N; T; and U. All were admitted into evidence.

Although a court reporter recorded the proceeding, none of the parties ordered a transcript. Spyke's Grove and Clark's 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 Clark's 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 Clark's submit. The packages typically are labeled with the retail seller's name, 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 Clark's placed with Spyke's Grove between October 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 Clark's, to ship a gift fruit box or basket to the donee designated by Clark's retail customer, for which fruit shipment Clark's agreed to pay Spyke's Grove.

4. Spyke's Grove alleges that Clark's failed to pay in full for all of the gift fruit packages that Clark's ordered and Spyke's Grove duly shipped. Clark's contends (though not precisely in these terms) that Spyke's Grove materially breached the contracts, thereby discharging Clark's from further performance thereunder.

The Transactions

5. From mid-October 1999 until around December 12, 1999, Clark's faxed or e-mailed to Spyke's Grove approximately 350 individual orders for gift fruit packages. Among other

information, each order consisted of a shipping label that identified the product (e.g. the type of gift box or basket), the intended recipient, and the destination. Spyke's Grove manifested its intent to fill these orders by faxing statements of acknowledgment to Clark's, by telephoning Clark's, or both.

6. Although the many contracts that arose from these transactions were thus documented, the writings left much unsaid. For example, the parties did not explicitly 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.¹

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 Clark's 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 many weeks, until early December 1999, Clark's placed orders, and Spyke's Grove filled them, under the arrangement just described. The relationship was not completely trouble-free, for the parties had some problems with duplicate orders. Most, if not all, of these difficulties stemmed from

the implementation of a computerized ordering system which allowed Clark's to "export" orders directly to Spyke's Grove's electronic database. The parties recognized at the time that errors were occurring, and they attempted contemporaneously to identify and purge unintended duplicates. Pursuant to the course of dealing between these parties, Spyke's Grove filled orders that were not affirmatively identified as errors prior to the scheduled shipment date.

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.

The Aftermath

10. Meantime, Clark's contends, customers had begun calling Clark's on December 10, 1999, to complain that gift fruit packages were not being received as promised. None of the customers testified at hearing, however, and therefore no competent, non-hearsay evidence establishes the contents of their alleged out-of-court statements.

11. On December 14, 1999, following several unsuccessful attempts to communicate with Spyke's Grove shortly after the fire (about which Clark's remained unaware), Denise Clark, acting on behalf of Clark's, reached Robert Spiece, a representative of Spyke's Grove, on his cell phone. At hearing, Ms. Clark and Mr. Spiece gave conflicting accounts as to the substance of their December 14, 1999, telephone conversation. Neither disputed, however, that during this conversation Ms. Clark and Mr. Spiece agreed, at Ms. Clark's request, that all orders of Clark's not yet shipped by Spyke's Grove would be canceled, effective immediately, as a result of the fire. Although Ms. Clark claimed that Mr. Spiece further informed her that Spyke's Grove could not identify which orders had been shipped, the factfinder does not believe that Mr. Spiece made such a sweeping negative statement. Rather, as Mr. Spiece explained at hearing, Ms. Clark probably was told that information regarding the filled orders would not be available that day.

12. Without waiting for further information from Spyke's Grove, Clark's began calling its retail customers to ascertain whether they had received packages that were supposed to have been shipped by Spyke's Grove. Employees of Clark's who had participated in this process—which took four to five days—testified at hearing about conversations between themselves and

various customers. As uncorroborated hearsay, however, the out-of-court statements attributed to these customers were not competent substantial evidence upon which a relevant finding of fact, e.g. that any particular customer or customers had not received their gift fruit, could be based. Moreover, this hearsay evidence, even if competent, would still have been too anecdotal to establish persuasively any widespread failure on the part of the carriers to deliver the packages shipped by Spyke's Grove.

13. On December 15, 1999, Spyke's Grove prepared three draft invoices for the gift fruit packages that Clark's had ordered and which Spyke's Grove had shipped before December 12, 1999. Numbered 1999113001, 1999121101, and 1999121201, the invoices sought payment of \$688.72, \$2,415.48, and \$298.66, respectively. On the first page of Invoice #1999121201, Barbara Spiece, the President of Spyke's Grove, wrote:

Some of these were lost in the fire. "A" day left in the morning. "Springfield" was on the floor to go out that night. I realize there are many duplicates in these shipped reports. We tried to watch for them but with different order numbers it was very difficult. Just cross them out [and] you will not be charged for them. I apologize for all of the problems we have had this season [illegible] wish you luck.

These bills were faxed to, and received by, Clark's on December 16, 1999.

14. Clark's did not pay the invoices, or dispute them, or cross out the unintended duplicate orders (as it had been invited to do) to effect a reduction in the outstanding balance. Instead, Clark's ignored Spyke's Grove's requests for payment. Not only that, in disregard of its existing contractual obligations and with no advance notice to Spyke's Grove, Clark's proceeded on its own to fill all of the orders that it had placed with Spyke's Grove before December 12, 1999—including those orders that Spyke's Grove, through its draft invoices, claimed to have shipped.

15. Even after the fact, Clark's failed to inform Spyke's Grove that it had, in effect, repudiated its contractual promises to pay Spyke's Grove for the gift fruit packages already shipped as of December 12, 1999 (i.e. the orders not canceled on December 14, 1999).

The Inevitable Dispute

16. Having heard nothing from Clark's in response to its December 16, 1999, fax, Spyke's Grove sent its invoices out again, in final form, on January 25, 2000.² This time, Ms. Spiece did not inscribe any instructions to cross out duplicates for a discount. Numbered 11063001 (\$688.72), 11063002 (\$2,449.14), and 11063003 (\$195.52), these bills totaled \$3,333.38.

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

Net 14 days prompt payment is expected and appreciated. A 1 ½% 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.

18. Clark's 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. Clark's was provided a copy of this letter. Shortly thereafter, Spyke's Grove filed a Complaint with the Department, initiating the instant proceeding.

Ultimate Factual Determinations

19. Clark's refusal to pay for the goods ordered from and shipped by Spyke's Grove constituted a breach of the contracts between the parties. Spyke's Grove did not materially breach the agreements.

20. Further, Clark's did not object, within a reasonable period of time, to the statements of account that Spyke's Grove rendered preliminarily on December 16, 1999, and finally on January 25, 2000. Accordingly, these invoices amount to an account stated concerning the transactions between the parties. Clark's failed to overcome the presumption of correctness that

attaches to an account stated, either by proving fraud, mistake, or error.

21. Spyke's Grove has suffered an injury as a result of Clark's' breach. Spyke's Grove's damages consist of the principal amount of the debt together with pre-award interest at the statutory rate.

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

<u>Principal</u>	<u>Due Date</u>	<u>Statutory Interest</u>
\$3,333.38	2/08/99	\$ 298.66 (2/08/00 - 12/31/00)
		<u>\$ 335.56</u> (1/01/01 - 11/30/01)
<u>\$3,333.38</u>		<u>\$ 634.22</u>

Interest will continue to accrue on the outstanding balance of \$3,333.38 in the amount of \$1.00 per day from December 1, 2001, until the date of the final order.

CONCLUSIONS OF LAW

23. 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.

24. 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.

25. 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 Clark's are citrus fruit dealers under this definition.

26. 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.

27. 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.

28. 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.

29. 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.

30. The contracts at issue between Spyke's Grove and Clark's 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").

31. 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.

32. 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).

33. 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.

34. Spyke's Grove bore the burden of proving the allegations in its Complaint against Clark'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. Clark's, 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 Clark's, which had failed to object to Spyke's Grove's invoices within a reasonable time after having received them, to overcome the presumption of correctness with which an account stated is cloaked. E.g. Home Health Services of Sarasota, Inc. v. McQuay-Garrett, Sullivan & Co., 462 So. 2d 605, 606 (Fla. 2d DCA 1985); see also Robert C. Malt & Co. v. Kelly Tractor Co., 518 So. 2d 991, 992 (Fla. 4th DCA 1988)("Generally, an account stated is established where a

debtor does not object to a bill from his creditor within a reasonable period of time."); Rauzin v. Kupper, 139 So. 2d 432, 432 (Fla. 3d DCA 1962)("The account stated generally arises from the rendition of a statement of transactions between the parties with a failure on the part of the party to whom the account was rendered to object within a reasonable time").

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

36. Clark's 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, Clark's 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.

37. Clark's did not demonstrate that Spyke's Grove had breached the contracts relating to the accepted goods. See Section 672.607(4), Florida Statutes. Moreover, Clark's 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.

38. Clark's failed to prove fraud, mistake, or error in connection with Spyke's Grove's invoices. As a result, the presumed correctness of these invoices was not defeated, and became conclusive.³ Gendzier v. Bielecki, 97 So. 2d 604, 608 (Fla. 1957)("This presumed correctness [of an account stated] may be overcome by proof of fraud, mistake, or error. However, the burden of establishing [these defenses] is upon the party asserting [them] and unless he disposes of this burden, the presumptive correctness of the stated account becomes conclusive."); Home Health Services of Sarasota, 462 So. 2d at 606.

39. Thus, Clark's is indebted to Spyke's Grove in the principal amount of \$3,333.38. See Section 672.607(1), Florida Statutes.

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

41. 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 percent 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 percent, 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 \$3,333.38, together with pre-award interest in the amount of \$634.22 (through November 30, 2001), plus additional interest from December 1, 2001, until the date of the final order, which will accrue in the amount of \$1.00 per day.

DONE AND ENTERED this 29th day of November, 2001, in Tallahassee, Leon County, Florida.

JOHN G. VAN LANINGHAM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of November, 2001.

ENDNOTES

^{1/} The promises that Clark's made to its retail customers must, of course, be distinguished from those made by Spyke's Grove to Clark's. That Clark's, in a separate contractual undertaking with a retail buyer, may have obligated itself to deliver a package before a certain date (e.g. by guaranteeing delivery by Christmas) is not determinative of whether Spyke's Grove concomitantly committed itself to such a promise; rather, Spyke's Grove's obligations are governed by the various contracts between Spyke's Grove and Clark's.

^{2/} Spyke's Grove sent seven other invoices to Clark's at around the same time. Four of these were bills for catalogs that Clark's had purchased from Spyke's Grove, and a settlement was reached at the final hearing with respect to them. Also at hearing, Spyke's Grove withdrew its claims concerning three additional invoices. Thus, the three invoices discussed in the text are the only statements presently in dispute.

^{3/} The UCC displaces the common law to the extent the latter conflicts with the statutory provisions; unless displaced, common law principles of law and equity supplement the code. See Section 671.103, Florida Statutes; Burtman v. Technical Chemicals and Products, Inc., 724 So. 2d 672, 676 (Fla. 4th DCA 1999). None of the parties took a position, one way or the other, as to whether the UCC displaces any action on an account stated in transactions involving the sales of goods. Although the discussion in the text assumes that the common law of accounts supplements the UCC, that premise was not outcome determinative; rather, it gave rise to an alternative rationale in support of a result that would have been reached regardless.

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.