

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SUNRISE CITRUS GROVES, INC.,)
)
 Petitioner,)
)
vs.) Case No. 01-4830
)
TUXEDO FRUIT COMPANY AND)
CONTINENTAL CASUALTY 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 and completed a formal hearing of this matter by video teleconference on March 15, 2002. Petitioner, Respondent, and their witness appeared in West Palm Beach, Florida, while the Administrative Law Judge presided in Tallahassee, Florida.

APPEARANCES

For Petitioner: John Scarborough, General Manager
Sunrise Citrus Groves, Inc.
2410 Southeast Bridge Road
Hobe Sound, Florida 33455

For Respondent Tuxedo Fruit Company:

John A. Scotto, President
Tuxedo Fruit Company
1110 North 2nd Street
Fort Pierce, Florida 34950

For Respondent Continental Casualty Company:

No appearance

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent citrus dealer owes Petitioner citrus producer a sum of money for grapefruits that Respondent harvested from Petitioner's grove.

PRELIMINARY STATEMENT

On October 26, 2001, Petitioner Sunrise Citrus Groves, Inc. filed a Complaint with the Department of Agriculture and Consumer Services (the "Department") in which it alleged that Respondent Tuxedo Fruit Company had failed to pay for 5,808 boxes of grapefruits that Respondent had harvested from Petitioner's grove during the 2000-01 citrus shipping season pursuant to a contract between the parties. Petitioner claimed that Respondent owed a balance of \$23,232. Co-Respondent Continental Casualty Company was named in the Complaint as Respondent's surety.

In correspondence filed with the Department on December 10, 2001, Respondent requested a hearing. The body of this letter, in its entirety, stated: "Please note that we are in receipt of the Complaint, Sunrise Citrus Groves vs. Tuxedo Fruit Company and request a hearing on the above matter."

Shortly after receiving Respondent's request for hearing, the Department forwarded the matter to the Division of

Administrative Hearings, where it was assigned to an administrative law judge and set for final hearing.

At the final hearing on March 15, 2002, Petitioner was represented by its General Manager, John Scarborough, who testified on the company's behalf. Petitioner introduced three exhibits into evidence, and all were received.

On behalf of Respondent appeared its President, John A. Scotto. He testified as the company's only witness. Respondent offered two composite exhibits, numbered 1 and 2, which were admitted into evidence.

Although a court reporter recorded the proceeding, none of the parties ordered a transcript. Petitioner and Respondent each submitted proposed recommended orders, and the undersigned reviewed them carefully.

FINDINGS OF FACT

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

1. Sunrise Citrus Groves, Inc. ("Sunrise") is a producer of citrus, meaning that it grows citrus in this state for market. It is also a Florida-licensed citrus fruit dealer operating within the Department's regulatory jurisdiction.

2. Tuxedo Fruit Company ("Tuxedo") is a Florida-licensed citrus fruit dealer.

3. On or about October 18, 2000, Sunrise and Tuxedo entered into a contract under which Tuxedo agreed to harvest "flame" grapefruits from Sunrise's grove known as "Gulfstream."

are a variety of grapefruit; the varieties are distinguished by the color of the fruit's meat, e.g. red, ruby, pink.) Tuxedo agreed to pay \$4.00 per box of fruit harvested at the Gulfstream grove.

4. Between October 16, 2000 and March 14, 2001, Tuxedo harvested 5,808 boxes of flame grapefruits pursuant to its contract with Sunrise. Accordingly, Tuxedo was obligated to pay Sunrise \$23,232 for the fruit.

5. Tuxedo did not pay for the grapefruits harvested from the Gulfstream grove. On October 11, 2001, Sunrise sent Tuxedo an invoice for the past due amount of \$23,232. Tuxedo did not object to this statement of account.

6. At hearing, Tuxedo admitted the above facts. Tuxedo's position was that Sunrise had breached a separate contract relating to red grapefruits which Tuxedo had agreed to harvest from a grove called "Sun Rock." As a result of this alleged breach, Tuxedo claimed to have suffered damages exceeding the amount sought by Sunrise. It is not necessary to make detailed findings of fact concerning the Sun Rock transaction, however, because the undersigned has concluded that the alleged breach of

contract action that Tuxedo attempted to prove is not properly before the Division of Administrative Hearings ("DOAH").

Ultimate Factual Determination

7. Tuxedo failed to pay for the citrus fruit harvested from the Gulfstream grove that was the subject of a contract between Sunrise and Tuxedo. Sunrise performed all of its duties under that contract and is not in breach thereof. Tuxedo, therefore, is indebted to Sunrise in the amount of \$23,232.

CONSLUSIONS OF LAW

8. 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.

9. 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.

Additionally, the term "grapefruit" is defined to mean "the fruit *Citrus paradisi Macf.*, commonly called grapefruit and

shall include white, red, and pink meated varieties[.]” Section 601.03(22), Florida Statutes.

10. 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 Sunrise and Tuxedo are citrus fruit dealers under this definition. Sunrise also falls within the definition of "producer." See Section 601.03(29), Florida Statutes (defining the term as "any person growing or producing citrus in this state for market").

11. 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.

12. 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.

13. 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.

14. 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. If the complaining party proves its case, the Department shall "fix a reasonable time within which said

indebtedness shall be paid by the [citrus fruit] dealer."

Thereafter, 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.

15. Sunrise bore the burden of proving the allegations in its Complaint against Tuxedo 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.

16. Sunrise carried its burden of proving that Tuxedo has failed and refused to pay, as agreed, for citrus fruit that Tuxedo harvested from Sunrise's Gulfstream grove.

17. Tuxedo's allegation that Sunrise breached a contract unrelated to the one upon which Sunrise has based its demand for payment constitutes an independent cause of action and claim for relief. See Storchwerke, GMBH v. Mr. Thiessen's Wallpapering Supplies, Inc., 538 So. 2d 1382, 1383 (Fla. 5th DCA 1989). In the parlance of civil litigation, Tuxedo's contentions would be called a counterclaim. See Haven Federal Savings & Loan Ass'n v. Kirian, 579 So. 2d 730, 733 (Fla. 1991)("A counterclaim is a cause of action that seeks affirmative relief[.]"). Had Sunrise

elected to pursue its claim in circuit court pursuant to Section 601.65, Florida Statutes, rather than before the Department, then Tuxedo properly might have sought leave to bring its claim relating to the Sun Rock transaction as a permissive counterclaim. See Rule 1.170(b), Florida Rules of Civil Procedure. But this is an administrative proceeding, and there exists no procedural vehicle through which Tuxedo may assert a permissive counterclaim for breach of contract.

18. The question whether Tuxedo's claim of breach is properly before DOAH is not merely procedural, but touches the fundamental consideration of subject matter jurisdiction. To be entitled to administrative remedies for Sunrise's alleged breach of contract, Tuxedo must file a complaint with the agency having jurisdiction in the matter; it cannot directly initiate proceedings before DOAH. See Section 601.66, Florida Statutes. DOAH's jurisdiction does not attach until the agency refers the dispute to this tribunal for adjudication. Tuxedo has not filed a complaint against Sunrise with the Department, and thus (obviously) the Department has not referred the matter to DOAH. Therefore, DOAH does not have jurisdiction to entertain Tuxedo's claim for relief based on the alleged Sun Rock transaction.

19. In the alternative, Tuxedo's allegations arguably might be regarded—and reached—as an affirmative defense. See Kirian, 579 So. 2d at 733 (“[A]n affirmative defense defeats the

plaintiff's cause of action by a denial or confession and avoidance."). Specifically, Tuxedo's allegations, if established, might provide the basis for a set off, which is a recognized affirmative defense. See Kellogg v. Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A., 807 So. 2d 669, 26 Fla. L. Weekly D2811, 2001 WL 1504231, *4 n.2 (Fla. 4th DCA Nov. 28, 2001)("A set-off is an affirmative defense arising out of a transaction extrinsic to a plaintiff's cause of action."). It is concluded, however, that because DOAH does not have subject matter jurisdiction over Tuxedo's allegations as a counterclaim for breach of contract, the same allegations cannot simply be treated as an affirmative defense and adjudicated on that basis. To be heard, the defense of set off must be within the tribunal's jurisdiction. See Metropolitan Cas. Ins. Co. of New York v. Walker, 9 So. 2d 361, 363 (Fla. 1942). A contrary ruling would permit Tuxedo to bring in through the back door a claim that was turned away at the front.

20. Even if Tuxedo's claim were cognizable as an affirmative defense, notwithstanding Tuxedo's failure properly to initiate such claim pursuant to Section 601.66, Florida Statutes, the issue could not be reached for an independent reason: implied waiver. In the context of a civil suit, a party's failure to allege an affirmative defense in its responsive pleading effects a waiver thereof. See Gause v.

First Bank of Marianna, 457 So. 2d 582, 585 (Fla. 1st DCA 1984) ("Affirmative defenses must be raised in the pleadings or they are waived."). Since a dealer who disputes the allegations of a complaint filed with the Department under Section 601.66 is required by that statute to submit an answer in writing, it is concluded that a dealer-respondent, like a defendant in a civil lawsuit, waives any affirmative defenses not raised in his responsive pleading. Otherwise, a dealer-respondent could sandbag the claimant at final hearing.

21. Having failed to plead the Sun Rock matter in its response to Sunrise's complaint, Tuxedo waived the affirmative defense of set off.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department enter a final order awarding Sunrise the sum of \$23,232.

DONE AND ENTERED this 1st day of April, 2002, 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
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this 1st day of April, 2002.

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.