Florida Department of Agriculture and Consumer Services
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May 25, 2007

Judge Eleanor M. Hunter, ALJ
Division of Administrative Hearings
1230 Apalachee Parkway
Tallahassee, FL 32399

Re: Leonard Vito Mecca Farms v Emerald Packing Company, Inc. and Old Republic Surety Company, as Surety

Dear Judge Hunter.:

Enclosed is your copy of the Final Order for the above matter.

If you have any questions, do not hesitate to contact me.

Very truly yours,

Anissa D. James

Anissa D. James, Paralegal to William N. Graham, Senior Attorney
Senior Attorney

Enc.

STATE OF FLORIDA
DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

LEONARD VITO MECCA FARMS,

Petitioner,

vs.

DOAH Case No. 06-3725

EMERALD PACKING COMPANY, INC.
AND OLD REPUBLIC SURETY
COMPANY, AS SURETY,

Respondents.

FINAL ORDER

THIS CAUSE, arising under Chapter 601, Florida Statutes, "The Florida Citrus Code of 1949", came before the Commissioner of Agriculture of the State of Florida for consideration and final agency action after formal hearing at the Division of Administrative Hearings and entry of a Recommended Order by the Honorable Eleanor M. Hunter, Administrative Law Judge (or "ALJ"), on January 23, 2007. Petitioner timely filed Exceptions to the Recommended Order on February 7, 2007. A copy of the Recommended Order is attached hereto as Exhibit "A". The record consists of filings at the Division of Administrative Hearings and the Exceptions filed with Department on February 7, 2007.

The ALJ states preliminarily in her Recommended Order:

> Leonard Mecca, the owner of a Murcott tangerine grove, one of the Leonard Vito Mecca Farms groves (Petitioner or Mecca) contracted with Emerald Packing Company, Inc. (Respondent or Emerald) to buy, pick, haul, and sell fruit. The contract provided for the fruit ". . . to be moved from trees by April 10, 2006." The fruit, 500 boxes of it, was not picked until April 19, 2006, then

> failed inspection. Emerald terminated the contract by written notice on April 20, 2006, based on the condition of the fruit. Mecca then contracted with another company that picked 2,106 boxes of fruit, of which 69 percent passed inspection and was sold as fresh fruit. The remainder was sold for juice for approximately half the value of the fresh fruit. Mecca filed a Grower Complaint Form with the Office of Citrus License and Bond, Florida Department of Agriculture, on May 23, 2006, and an amended complaint on July 25, 2006, seeking compensation for the remaining fruit that was not picked. In a letter dated September 22, 2006, Emerald denied owing the debt.

The Recommended Order urges the entry of a Final Order denying any recovery by Petitioner.

The Agency finds as follows:

1. The Exceptions principally assert three grounds to overrule the Recommended Order. First, Petitioner asserts that the Petitioner, Leonard Vito Mecca Farms (hereafter "Mecca") did not waive performance due by Respondent, Emerald Packing Company, Inc. (hereafter "Emerald") on April 10, 2006. Second, Petitioner asserts that the Recommended Order did not properly determine the number of boxes of Murcott tangerines yielded by Petitioner's groves during the 2006 picking season. Finally, Petitioner contends that the Administrative Law Judge misapplied the applicable burden of proof and improperly determined Mecca's damages.

2. The Administrative Law Judge, at Section 31 and 39 of the Recommended Order, states:

> While Mr. Mecca had agreed to the two-week extensions in the past, his refusal to agree on or about April 20, 2006, resulted in Emerald's termination of the contract and his decision to use a different packing house.
>
> Mecca demonstrated that Emerald failed to meet the contract picking date, but at regular, two week intervals, Mecca waived the time for Emerald to perform. See *Shinn Groves v. H & R Packing And Sales and Old Republic Surety Company, DOAH Case No. 05-3540 (12/13/05), dismissed after settlement in Final Order (05/03/06).*

Mecca, at hearing, testified:

A. Back in 2004, Emerald Fruit purchased our Murcotts and harvested 9,000 boxes, and actually did a pretty good job. So we contracted them again in'06. They contacted us, and they made an offer to purchase the fruit for $14 a box on the trees if we could hold them until -- they wanted to pick them somewheres around the end of March where they thought the market. Page 12, L1

A. It had to be the day that Keith Emmett had has his man, Bill Turner, call me to tell me that he was not going to be able to use the fruit unless wanted -- I wanted to wait another two weeks. So --which would have been around the 20th of April. Page 38, L23

A. I was informed -- I was informed by Emerald that they didn't want to pick any more fruit unless I wanted to wait two more weeks and try again, which was the story I heard every two weeks. Page 39, L7 (Emphasis supplied)

Section 672.208, Florida Statutes, provides guidance as to the practical construction of the agreement of the parties. This Section provides:

(1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

(2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (s. 671.205).

(3) Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance.

As to waiver, Section 672.209, Florida Statutes, provides:

(1) An agreement modifying a contract within this chapter needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

> (3) The requirements of the statute of frauds section of this chapter (s. 672.201) must be satisfied if the contract as modified is within its provisions.
>
> (4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.
>
> (5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

Giving appropriate weight to the testimony of record, the express provisions of the contact as a whole, and the course of performance, there appears sufficient competent evidence to support the findings and conclusions of the ALJ. Moreover, the condition of the fruit justified the termination of the contract.

3. The Administrative Law Judge, at Section 26 of the Recommended Order, states:

> In the Mecca contract with Emerald in 2006, Mr. Emmett estimated the number of boxes at 5,000 merchantable boxes for the 2006 growing season. Although Emerald picked 9,000 boxes in 2004, it is reasonable to believe that the yield would be lower after some trees were damaged during the hurricanes of 2005. The estimate and agreement made prior to this contractual dispute, 5,000 boxes, is accepted as the most reasonable estimate for the 2006 growing season.

Mecca's concurrence in the written agreement as to the number of merchantable boxes existing in the grove (at $14 a box), obviously made prior to any dispute, is competent substantial evidence, especially where otherwise the amount of damages are subject to speculation and conjecture. While it may be debatable and while reasonable men may disagree as to which estimate may be superior given the existence of hurricane damage to the grove and given the condition of the fruit, where competent substantial evidence exists in the agreement itself, the Administrative Law Judge is not required to accept a guestimate as evidence to

support a finding as to the number of merchantable boxes existing in the grove. Here the guestimates were at best "sketchy, vague and inconclusive". See **George Hunt, Inc. v. Dorsey Young Const., Inc., 385 So.2d 732, (Fla. 4th DCA, 1980)**. The ALJ lacked sufficient information about the specific hurricane damage to the remaining fruit and the condition of the remaining fruit to permit her to breakdown those damage components to allow for a reasonable determination with certainty of Mecca's damages.

4. The Administrative Law Judge, at Section 37 of the Recommended Order, states:

> Mecca bore the burden of proving the allegations in the Complaint against Emerald by a preponderance of the evidence. See Florida Dept. of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981); Florida Dept. of Health and Rehabilitative Services v. Career Service Commission, 289 So. 2d 412, 415 (Fla. 4th DCA 1974); § 120.57(1)(j), Fla. Stat. (2006). Specifically, Mecca had to establish the existence of its contract with Emerald, a breach by Emerald, and the adequacy of its subsequent mitigation efforts. Emerald had the burden of establishing its rightful rejection of the fruit and adequate notice to Mecca.

Mitigation in this context means application of the doctrine of "avoidable consequence." Mecca cannot recover damages if through the exercise of reasonable care and diligence Mecca could have avoided the damages. Because Mecca contends that the ALJ erroneously cast the burden of proof on Petitioner as to the issue of mitigation, the transcript of the proceedings and evidence have been carefully reviewed and the conflicts in the testimony have been considered. Substantial competent evidence existed to show that the Murcotts were fit for juicing or canning, but the remaining unpicked fruit was allowed to fall to the ground. Emerald produced unrebutted testimony affirmatively showing that canning plants were reasonably available to Mecca as late as the middle of June following the April 20, 2006 notice of rejection. Page 135, L7 – Page 136-2; Plaintiff's Exhibit C. The Agency finds that the

issues presented by the parties as to mitigation have been correctly resolved by the Administrative Law Judge in her recommendation that is supported by competent substantial evidence. See **Easton v. Weir, 188 So. 2d 1 (Fla. 2nd DCA, 1966)**. Moreover, the Agency is unable to state that it has a more reasonable interpretation of the law of mitigation under the presented circumstances than that applied by the ALJ in the Recommended Order. See **Section 120.57(1)(l), Fla. Stat. (2006)**.

5. The Agency notes that the contract expressly provided an option to Emerald to cancel the contract due to the unmerchantability of the fruit in whole or in part.

6. Giving weight to all written provisions of the contract between the parties, the Agency also notes that the contract expressly provided that nothing would be owed Mecca from the Buyer, i.e. Emerald, if the fruit is not moved within 15 days following the agreed date. This contract clause appears to be a no pay for delay provision. Emerald was looking for good quality fruit to justify a price of $14 a box. When Emerald determined that the fruit did not justify the price, Emerald timely and promptly rejected the fruit.

7. The Administrative Law Judges' findings of fact should be adopted *in toto*.

8. Mecca's Exceptions should be rejected.

Upon the consideration of the foregoing and being otherwise fully advised in the premises, it is

ORDERED:

A. Mecca's Exceptions are hereby rejected.

B. As supplemented, the Judge's findings of fact are adopted *in toto* as this agency's findings of fact.

C. The Judge's conclusions of law are adopted *in toto* as this agency's conclusion of law.

Any party to these proceedings adversely affected by this Final Order is entitled to seek review of this Final Order pursuant to Section 120.68, Florida Statutes (2002) and Rule 9.110, Florida Rules of Appellate Procedure (2003). This order is final and effective on the date filed with the department's agency clerk. Review proceedings must be instituted by filing a petition or notice of appeal with the Agency Clerk, 5th Floor, Mayo Building, Tallahassee, FL 32399-0800 and a copy of same with the appropriate District Court of Appeal within thirty (30) days of rendition of this Order.

DONE AND ORDERED this 25th day of May, 2007.

CHARLES H. BRONSON
COMMISSIONER OF AGRICULTURE

TERRY L. RHODES
Assistant Commissioner of Agriculture

Filed with Agency Clerk this 25th day of May, 2007.

Agency Clerk for Paul Palmetto

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