STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LEONARD VITO MECCA FARMS, Petitioner, vs. EMERALD PACKING COMPANY, INC. AND OLD REPUBLIC SURETY COMPANY, AS SURETY, Respondents.	)	Case No. 06-3725

RECOMMENDED ORDER

This case came before Administrative Law Judge Eleanor M. Hunter of the Division of Administrative Hearings, by video teleconference at sites in Orlando and Tallahassee, Florida, on November 28, 2006.

APPEARANCES

For Petitioner: Louis L. Hamby, III, Esquire
Eric Severson, Esquire
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For Respondent Emerald Packing Company, Inc.:

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For Respondent Old Republic Surety Company:

No appearance

STATEMENT OF THE ISSUE

Whether Respondent, a citrus dealer, owes Petitioner, a citrus producer/grower, compensation for breach of a contract to buy, pick, haul, and sell fruit from Petitioner's grove. If so, what is the reasonable amount of compensation.

PRELIMINARY STATEMENT

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. On October 2, 2006, the Department of Agriculture, Office of Citrus License and Bond, referred the matter to the Division of Administrative Hearings (DOAH) to assign an administrative law judge to conduct a hearing pursuant to Section 120.57, Florida Statutes (2006), as provided by Chapter 601.66, Florida Statutes (2006).

At the formal hearing, Petitioner presented the testimony of Leonard Mecca, Donald Owens, and Bill Turner. Petitioner's Exhibits A, C, F, and G were received in evidence.

Respondent presented the testimony of Keith Emmett and Stuart Arost. Respondent's Exhibit A was received in evidence.

The transcript of the hearing was filed on November 28, 2006. Petitioner's and Respondent Emerald's Closing Arguments and Proposed Recommended Orders were filed on January 8, 2007.

FINDINGS OF FACT

1. Mecca includes a thirty-six acre Murcott tangerine grove in Lakeworth, Florida, purchased by Leonard Mecca in 2003. Murcott tangerines are primarily sold as fresh fruit.

2. Through its owner, Mr. Mecca, Petitioner entered into a contract, on January 3, 2006, Emerald to pick fruit from the grove by April 10, 2006.

3. Old Republic Surety Company is surety on the contract performance bond for $59,000.00, the maximum amount of compensation that can be recovered, if any.

4. On behalf of Emerald, Keith Emmett, a fruit buyer with 25 years of experience, personally visited the Mecca grove and, on January 3, 2006, estimated the number of boxes of fruit at 5,000 boxes and sales price at $14.00 a box. Mr. Emmett's estimate was the basis for the terms of the contract that was accepted by Mr. Mecca.

5. Mr. Mecca also testified that he contracted with another organization, River Citrus, to be the caretaker of the grove. Mr. Mecca's contract with Emerald included the statement that "[g]rower agrees to keep said fruit clean and to protect said fruit against fire, and to dust, spray and fertilize the same in such a manner that will not cause injury to said fruit or groves." Emerald was, under the terms of the contract, required to pay for all "merchantable" fruit at picking time.

6. At sometime in February or March, Mr. Mecca (not his caretaker) discovered that the irrigation system at the grove was not working. Mr. Mecca testified that he had the

system repaired within two days. Weed control at the grove was to be done by the use of herbicides and mowing. Mr. Mecca testified that he had a conversation about the condition of the grove with Mr. Emmett, but only about water.

7. Mr. Emmett visited the Mecca grove in late February or early March to see if the fruit was ready to pick to fill pending orders. He described the condition of the grove as having a "hard wilt," meaning leaves curled, with soft, spongy green fruit. The weeds indicated to him an absence of mowing and herbicides.

8. Mr. Emmett returned to the grove in April and described the fruit as still soft to the touch with a green cast. He also testified that he notified Mr. Mecca, in conversations through the month of March, that the grove needed watering and that the fruit was soft and needed more time.

9. Mr. Mecca testified that he contacted Mr. Emmett several times in March and April to find out when the fruit would be picked because he believed it was getting overripe. Mr. Mecca testified that Mr. Emmett was waiting to pick the fruit late in the season when market prices rose enough to justify the $14.00 a box contract price.

10. Mr. Mecca also testified regarding when he decided to stop negotiating with Emerald and to use another packing house, as follows:

> It had to be the day that Keith Emmett had his man, Bill Turner, call me to tell me that he was not going to be able to use the fruit unless I wanted -- to wait another two weeks. So -- which would have been around the 20th of April.
>
> Q. So that would have been the -- on or about the time that the -- you were informed that the fruit couldn't be used as fresh fruit; is that correct? By Emerald?
>
> 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.

11. Bill Turner, who was in charge of harvesting the fruit for Ridge Harvesting, previously had visited and inspected the Mecca grove in February, after Emerald received a report that the well was broken. He testified that he found wilted trees and lots of weeds. By the time he talked to Mr. Mecca about the condition of the grove, he recalled that the well had already been fixed.

12. One load of 500 boxes of Mecca fruit was picked by Ridge Harvesting for Emerald on April 19, 2006, but failed to pass state inspection.

13. Emerald, nevertheless, paid Mecca $14.00 a box for the 500 boxes, or $7,000.00, and on April 20, 2006, sent a letter to Mecca releasing the fruit back to Mecca and, in effect, terminating the January contract based on the poor condition of the fruit. The letter specified that the fruit was ". . . spongy, soft and indented from the weight of the fruit in the box."

14. Mr. Emmett testified that he suggested that Mr. Mecca agree to sell the fruit at lower prices for juice, rather than as fresh fruit. He testified that Mr. Mecca declined the offer and notified Mr. Emmett that he was going to use a different packing house.

15. Donald Owens, a field buyer for Rio Citrus (Rio) had driven by the Mecca grove some time in April, and noticed that the fruit had not been picked. He was familiar with the grove, having picked it in prior years before it changed ownership.

16. Mr. Owens searched out the new grower and called Mr. Mecca about picking the fruit, but was told that the fruit was under contract with another picker.

17. On or about April 20, 2006, after Emerald's representative notified him that they were not going to use the fruit, Mr. Mecca called Donald Owens back, met him at the grove and entered into a verbal contract for Rio to

pick the fruit in what Mr. Mecca and Mr. Owens described as a “salvage operation.”

18. When Donald Owens saw the grove, on or about April 20, 2006, he testified that the grass was high, the fruit was small but, he believed, within the criteria that you can pack as fresh fruit and otherwise merchantable. He testified that he told Mr. Mecca that, before he did anything, the grass had to be mowed.

19. Mr. Owen’s company picked a total of 2,106 boxes of tangerines on April 24, April 25, May 1, and May 4, 2006, based on the dates on the trip tickets. Of those, according to Donald Owens and his settlement statements, 69 percent passed inspection and were packed to sell as fresh fruit, but 31 percent were so-called “eliminations” and had to be taken to a canning processing plant to be juiced.

20. Mr. Owens testified that his company, Rio, stopped picking fruit because the canning processing plant stopped taking Murcotts. If Rio had continued, then he estimated that from 25 to 30 percent of the fruit would have ended up in cow pastures at a significant financial loss, considering the expense of picking, loading, hauling, separating, and hauling fruit by grade to a cow pasture.

21. Rio paid Mecca approximately $12,000 for the fruit it picked and sold.

22. The remaining fruit in the grove fell to the ground.

23. In 2004, Emerald picked 9,000 boxes of fruit from the Mecca grove.

24. Donald Owens, whose Rio company picked 2,106 boxes from a part of one of the three divisions of the grove, estimates that each of the three sections could have provided about 3,000 boxes each, or an approximate total of 9,000 boxes of fruit from the Mecca grove, of which approximately 6,000 remained after Rio stopped picking the fruit.

25. In 2005, Mecca produced only 600 boxes of fruit due to hurricane damage and also because Murcott tangerines produce in large volumes every other year.

26. 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.

27. Stuart Arost, the owner of Emerald, testified that he had contracts to sell elimination Murcott tangerines through April and into the first part of May to canning plants in Umatilla and Haines City. One of those plants, he testified, is cooperative-owned and will take Murcotts as long as the owners are still harvesting the fruit, even into June. Emerald, more likely than not, could have sold the fruit for juice for $10.00 a box with net proceeds to Mecca of $8.00 a box if allowed to further revise the contract or mitigate damages.

28. Mr. Arost testified that further damages could have been mitigated if Don Owens and Rio had continued to pick fruit and used the available processors for the elimination, but there is no evidence that Mr. Owens was aware of the alternative.

29. The evidence, based on the testimony of all of the witnesses who entered the grove, supports a conclusion that some of the fruit in the grove was damaged due to lack of proper care, and that, more likely than not, resulted in the initial failure to pass inspection and the subsequent rate of eliminations.

30. Although 500 boxes taken by Emerald failed USDA inspection, the fact that 2,106 boxes subsequently passed inspection indicates that Emerald correctly advised Mr. Mecca to wait another two weeks until about the time that Rio harvested the fruit rather than insisting that Emerald resume harvesting before the fruit was firm.

31. 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.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction over the parties and subject matter over the parties and subject matter in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2006).

33. Chapter 601, Florida Statutes (2006), is known as "The Florida Citrus Code of 1949." See § 601.01, Fla. Stat. (2006). "Citrus fruit" is defined in Section 601.03(7), Florida Statutes (2006), 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.

34. The term "citrus fruit dealer" is defined in Section 601.03(8), Florida Statutes (2006), to mean:

> 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.

Emerald is a citrus fruit dealer under this definition.

35. Citrus fruit dealers are required to be licensed by the Department in order to transact business in Florida. See § 601.55(1), Fla. Stat. (2006). 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." § 601.61(3), Fla. Stat. (2006).

36. The term "producer" is also defined in Section 601.03(29), Florida Statutes (2006), to mean "any person growing or producing citrus in this state for market."

37. 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.

38. Under the terms of the contract, Mecca, as the producer, had a duty to care for the fruit so that it would be merchantable at picking time. The evidence indicates Mecca failed to meet the requirements of contract concerning care of the fruit and the grove.

39. 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).

40. Section 672.606, Florida Statutes (2006), describes what constitutes acceptance of goods as follows:

> (1) Acceptance of goods occurs when the buyer:
> (a) After a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that the buyer will take or retain them in spite of their nonconformity; or
> (b) Fails to make an effective rejection (s. 672.602(1), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or
> (c) Does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by her or him. (Emphasis added.)

41. An effective or rightful rejection is also described in the Statutes:

> [Section] 672.602 Manner and effect of rightful rejection.--
> (1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

42. As distinguished from the packing house in Shinn, after hauling one load of the tangerines that failed inspection on April 19, 2006, Emerald properly, promptly, and effectively notified Mecca of their rejection on

April 20, 2006, as required by Sections 672.606(1)(b) and 672.602(1), Florida Statutes (2006).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law it is RECOMMENDED that a final order be entered denying any recovery by Petitioner Mecca Farms from Respondents Emerald Packing Company, Inc. and Old Republic Surety Company, as Surety.

DONE AND ENTERED this 23rd day of January, 2007, in Tallahassee, Leon County, Florida.

ELEANOR M. HUNTER
Administrative Law Judge
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Filed with the Clerk of the
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this 23rd day of January, 2007.

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.