STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VERO BEACH LAND COMPANY, LLC, Petitioner, vs. IMG CITRUS, INC., AND WESTCHESTER FIRE INSURANCE COMPANY, AS SURETY, Respondents.	)	Case No. 08-5435

RECOMMENDED ORDER

Pursuant to notice, a hearing was held in this case on January 26, 2009, in Vero Beach, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Larmarcus Hornbuckle, Owner
Rebecca Hornbuckle, Owner
Vero Beach Land Company, LLC
6160 First Street Southwest
Vero Beach, Florida 32968

For Respondent: Melanie Sallin Ressler, COO
IMG Citrus, Inc.
2600 45th Street
Vero Beach, Florida 32967

Michel Sallin, President
IMG Citrus, Inc.
2600 45th Street
Vero Beach, Florida 32967

For Respondent: Westchester Fire Insurance Company
No Appearance

STATEMENT OF THE ISSUE

Whether Respondent, IMG Citrus, Inc. (Respondent), owes Petitioner, Vero Beach Land Company, LLC, (Petitioner) the sum of $63,318.50 for citrus that was purchased but not harvested.

PRELIMINARY STATEMENT

On or about July 14, 2008, Petitioner filed a Complaint Form with the Florida Department of Agriculture and Consumer Services, Division of Fruit and Vegetables (Department) that alleged Respondent had failed to comply with a written contract resulting in damages to Petitioner in the amount of $63,318.50. The citrus described in the contract pertained to a claim for the season beginning December 2007 and ending April 2008. According to the Complaint and the Amended Complaint later filed, Respondent owed for fresh fruit that was to be harvested and marketed by Respondent in accordance with a variety and volume depicted on the purchase contract. Westchester Fire Insurance Company was identified in the Complaint as the surety for Respondent.

Thereafter, Respondent filed an answer to Petitioner's claim and maintained that the fruit was not merchantable for the purpose of fresh fruit marketing due to the "presence of severe rust mite damage." Respondent denied it was indebted to

Petitioner for the fruit and claimed it had attempted to pack and market the fruit but ceased harvesting when it determined the fruit was unsuitable for the fresh market. The Department determined that the Amended Complaint was timely filed and that Respondent's answer denying the claim was also timely filed. Consequently, the Department referred the matter to the Division of Administrative Hearings to conduct formal proceedings in accordance with Section 601.66, Florida Statutes (2008).

Notice of the hearing was provided to all parties of record. At the hearing, David Broadaway, Ralph Viamontes, Brian Randolph, Melanie Sallin Ressler, and Larmarcus Hornbuckle testified. Petitioner's exhibit book, marked for identification as Petitioner's Composite 1, was received in evidence. Respondent's exhibits, marked for identification as Respondent's Composite 1, were also admitted into evidence.

At the close of the evidentiary portion of the hearing, the undersigned announced on the record that proposed recommended orders had to be filed within 10 days of the hearing or within 10 days of the filing of the transcript. The parties were uncertain at that time as to whether a transcript would be ordered. A transcript was not filed. Both parties timely filed Proposed Recommended Orders that have been fully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times material to the instant case, Petitioner and Respondent were involved in the growing and marketing of citrus fruit in the State of Florida. For purposes of this Order, Petitioner is also described as "the seller"; Respondent is described as "the buyer."

2. On October 26, 2007, Respondent agreed to purchase fruit from Petitioner. The terms of their agreement were reduced to writing. The “Fresh Fruit Purchase Agreement” provided that Respondent would purchase from Petitioner all of the citrus fruits of the varieties of merchantable quality as delineated in the contract.

3. More specifically, Respondent was entitled to purchase the following described citrus from Petitioner:

Block Name	Variety	Est Field Boxes	Price	Unit of Measure	Rise	Movement Date
Pepper Grove	Red Grapefruit	16,000	$4.50 Floor	FB	½ Rise to Grower	March 15th, 2008
Pepper Grove	White Grapefruit	20,000	$2.00 Floor	FB	All Rise to	March 15th,

					Grower	2008
Pepper Grove	Navels	2,500	$5.00 Floor	FB	All Rise to Grower	January 1, 2008

4. The contract recognized that "only that fruit produced as the result of normal seasonal bloom" and not late maturing or out of season bloom would be included. Additionally, all of the fruit was to be for fresh shipment. Citrus intended for the fresh market must be visually appealing as well as having other attributes associated with the fresh fruit market. Discolorations or damage to the fruit makes it unsuitable for the fresh fruit market.

5. In anticipation of the crop the buyer expected to harvest, Respondent advanced to Petitioner the sum of $34,500.00.

6. Additional payments were to be made to Petitioner as described in paragraph 2 of the contract.

7. Critical to this matter, however, were the terms of the contract set forth in paragraph 3. That paragraph provided:

> Merchantability of Fruit: Seller represents to Buyer that all fruit sold under this Agreement shall be sound and merchantable, in conformance with industry standards, and fit for their intended purpose of fresh packing and marketing. Grower shall keep said fruit sprayed sufficiently to keep the

> fruit bright and free from rust mite, disease and insect damage and shall not fertilize or cultivate the grove upon which the fruit is grown, during the term of this Agreement, in anyway that will deteriorate the quality of the fruit. In the event such fruit is rendered not merchantable by virtue of damage from cultivation, fertilization, re-greening, cold, hail, fire, windstorm, or other hazard, the Buyer shall have the right to terminate this Agreement and the Seller shall refund to the Buyer the advance payment this day made, or that portion thereof not applied in the payment for fruit picked prior to termination. The buyer shall have four weeks from the occurrence of such cold, hail, fire, windstorm or other hazard within which to notify Seller that the fruit has been rendered non merchantable and of the termination of this agreement. Seller shall reimburse the Buyer for all deposits and advances made on unpicked fruit within thirty (30) days of notification by Buyer.

8. Paragraph 6 of the parties' Fresh Fruit Purchase Agreement provided:

> Default: Should the Buyer, without lawful excuse, fail or refuse to pick and remove the fruit subject to this Agreement within the time specified or any extension thereof, the Seller hereby accepts and agrees to retain the deposit this day made less portion thereof applied and deducted as aforesaid, as his liquidated damages for such failure without any other claim for damage against the Buyer.
>
> In the event of any sale or attempted sale of the crop to a third party or other unexcused failure to deliver, Buyer shall be entitled to avail itself of all available legal and equitable remedied [sic] including injunctive relief.

> If either party fails to materially comply with the provisions of the agreement, the other party must give written notice of non-compliance, stating the nature of the violation or non-compliance and giving the other party thirty (30) days to bring themselves into compliance. If a disagreement exists regarding the interpretation of this Agreement, the parties agree to discuss the issues and negotiate in good faith to resolve the dispute. No waiver of any breach, right or remedy, shall constitute a continuing waiver, nor shall it be construed as a waiver of any other breach, right or remedy.

9. Paragraph 7 of the contract provided, in pertinent part, that the agreement could be "supplemented or modified only by written agreement between the parties." The parties did not provide any written supplements or modifications to their agreement.

10. Petitioner wanted to have his fruit removed in a timely manner as he did not want the fruit left to potentially interfere with the next year's crop. It was Petitioner's desire to have the fruit picked as early and as quickly as possible. Nevertheless, the contract provided for a pick or "movement date." With regard to the navel oranges, the movement date was January 1, 2008. The movement date for the grapefruit was March 15, 2008. Presumably, these dates were negotiated and agreed to by the parties. Had Petitioner wanted earlier movement dates, that was within a contractual option available at the time of contract negotiations.

11. The "Pepper Grove" that is described in the parties' agreement is a 120 acre grove sectioned into four blocks. The white grapefruit are located on two interior blocks with the red grapefruit on the two outer blocks. The navels were located on a portion of one of the outer blocks adjacent to the roadway. All of the blocks border 122nd Avenue. Presumably, as the four blocks adjoin one another it would be fairly easy to move from one block to the next to complete picking the crop.

12. The contract specified that Respondent would purchase 2,500 boxes of navels. Respondent picked 2,928 boxes of navels from Petitioner's grove. This fruit was harvested between December 6, 2007 and January 10, 2008. Respondent did not meet the "movement date" specified in the contract and Petitioner apparently did not complain, in writing, regarding this technical violation. Moreover, the buyer did not allege that the navels were not acceptable quality or merchantable. This fruit was in the same block as the grapefruit. The contract price for the navels was $5.00 with 100 percent of the rise to go to the seller.

13. On or about December 19, 2007, Petitioner inquired as to whether Respondent wanted to be released from the contract. This request was not reduced to writing and Respondent did not accept the verbal offer.

14. On or about December 22, 2007, Respondent started harvesting the Pepper Grove grapefruit. In total Respondent harvested 4,266 boxes of the white grapefruit.

15. Respondent harvested 5,400 boxes of red grapefruit from the Pepper Grove. In total, Petitioner's Pepper Grove produced 13,077 boxes (out of the contract volume of 16,000) of red grapefruit.

16. In total, Petitioner's Pepper Grove produced 19,289 boxes (out of the contract volume of 20,000) of white grapefruit.

17. Based upon the volumes produced by the Pepper Grove and the contract prices with the rise going to Petitioner for the navels, Respondent owed Petitioner $25,034.40 for the navels harvested, $24,300 for the red grapefruit, and $8,532.00 for the white grapefruit. These amounts total $57,866.40. As of the date of the hearing, Respondent had paid Petitioner $59,126.48.

18. Of the unpicked fruit left on the trees by Respondent, Petitioner was able to market 15,023 boxes of white grapefruit that went to the cannery and yielded $7,965.46. The red grapefruit that went to the cannery yielded $4,162.21. Red grapefruit that was harvested by Minton yielded 1,056 boxes, but only $168.96. Thus, Petitioner recovered only $12,296.63 for the 22,700 boxes of fruit that Respondent left on the Pepper Grove.

19. Respondent maintained that it did not pick Petitioner's fruit because it was damaged by rust mite. If true, Respondent claimed that the fruit would not meet fresh fruit standards. Although Petitioner acknowledged that some of the fruit did have damage, Mr. Hornbuckle maintained that he offered fruit from another grove to make-up the difference in volume. None of the conversations that allegedly occurred regarding the rust mite issue were reduced to writing at the time. Petitioner maintains he had more than sufficient fruit to meet the amounts due under the parties' agreement.

20. On March 6, 2008, Respondent issued a letter to Petitioner that provided, in part:

> We are very sorry however we are unable to continue to harvest the grapefruit from your groves due to the lack of merchantability of the fruit for the fresh market. Due to the disease and insect damage present on the fruit, the return on the fruit is unable to cover harvesting and packing charges for the fresh channel.

21. On March 11, 2008, Petitioner wrote back to Respondent and stated, in part:

> Please be advised that refusal to harvest any additional fruit constitutes a breach of the contract, which requires IMG Citrus to harvest all of the red and white grapefruit no later than March 15, 2008. All of the navel fruit was to have been harvested by January 1, 2008.
>
> Contrary to your letter, the fruit is merchantable, and does not have disease or

> insect damage which unreasonably reduces the merchantability of the crop.

22. At the time of the allegations of rust mite or other damage, Petitioner took pictures of his crop to demonstrate that it appeared to be healthy fruit. Respondent did not have pictures to demonstrate its claim that the fruit was not merchantable. Moreover, Respondent did not formally document that the fruit was unacceptable until March 6, 2008. Under the terms of the contract, the harvesting of the grapefruit was to be completed March 15, 2008.

23. Respondent's claim that it purchased fruit from Duda Products, Inc. (Duda) to demonstrate the market price for grapefruit is not persuasive. The contract with Duda named a variety of "Ruby Reds." There is no evidence that the "Ruby Red" variety is comparable to the whites and reds depicted on Petitioner's contract.

24. Respondent claims that the packout percentage for Petitioner's fruit did not support the harvesting of the crop. That is to say, that the percentage of fruit meeting a fresh fruit quality did not justify the harvesting and packing expense associated with Petitioner's fruit. If the fruit were not marketable in the fresh market, the fruit had no value to Respondent. The parties' agreement did not, however, specify what would be an acceptable packout percentage to support a

notion that the fruit was merchantable. Taken to extreme, Respondent could claim any percentage short of 100 percent demonstrated fruit that was not merchantable. No evidence of an industry standard for an acceptable packout percentage was presented.

CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.57, 120.60, Fla. Stat. (2008).

26. Chapter 601, Florida Statutes (2008), is known as the "The Florida Citrus Code of 1949" (the Code).

27. The Code, among other things, regulates the activities of "citrus fruit dealers."

28. "Citrus fruit," as that term is used in the Code, is defined in Section 601.03(7), Florida Statutes (2008), as follows:

> "Citrus fruit" means 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[.]

The grapefruit and oranges referenced in the parties' agreement are "citrus fruit," as defined in Section 601.03(7), Florida Statutes.

29. A "citrus fruit dealer," as that term is used in the Code, is defined in Section 601.03(8), Florida Statutes (2008), as follows:

> "Citrus fruit dealer" means 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[.]

Respondent is a "citrus fruit dealer" as that term is defined.

30. Pursuant to Section 601.55(1), Florida Statutes,(2008), a "citrus fruit dealer," as defined in Section 601.03(8), Florida Statutes, (2008), must be licensed by the Department of Citrus to transact business in the State of Florida. At all times material to the instant case, Respondent was licensed as required by Section 601.55(1), Florida Statutes (2008).

31. With certain exceptions not applicable to the instant case, "prior to the approval of a citrus fruit dealer's license,

the applicant therefor must deliver to the Department of Agriculture and Consumer Services a good and sufficient cash bond, appropriate certificate of deposit, or a surety bond executed by the applicant as principal and by a surety company qualified to do business in this state as surety, in an amount as determined by the Department of Citrus." See § 601.61(1), Fla. Stat. (2008).

32. "Said bond shall be to the Department of Agriculture [and Consumer Services], 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. (2008).

33. Section 601.64, Florida Statutes (2008), describes "unlawful acts" in which "citrus fruit dealers" may not engage "in connection with, any transaction relative to the purchase, handling, sale, and accounting of sales of citrus fruit." Among these "unlawful acts" is the failure to "make full payment promptly in respect of any such transaction in any such citrus fruit to the person with whom such transaction is had."

34. "Any person may complain of any violation of any of the provisions of [the Code] by any citrus fruit dealer during any shipping season, by filing of a written complaint with the Department of Agriculture and Consumer Services at any time

prior to May 1 of the year immediately following the end of such shipping season." § 601.66(1), Fla. Stat. (2008).

35. A hearing held in accordance with Section 120.57(1), Florida Statutes, on the complaint must be conducted if there are disputed issues of material fact. The complainant has the burden of proving the allegations of the complaint by a preponderance of the evidence. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996)("'The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue'"); Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981).

36. If the Department determines that the complainant has met its burden of proof, the Department must "make its findings of fact accordingly and thereupon adjudicate the amount of indebtedness or damages due to be paid by the dealer to the complainant. The administrative order [must] fix a reasonable time within which said indebtedness shall be paid by the dealer." See § 601.66(5), Fla. Stat. (2008).

37. If the dealer fails to comply with the order, the Department must:

> . . . call upon the surety company to pay over to the Department of Agriculture and Consumer Services, out of the bond

> theretofore posted by the surety for such dealer, the amount of damages sustained but not exceeding the amount of the bond. The proceeds to the Department of Agriculture and Consumer Services by the surety company shall, in the discretion of the Department of Agriculture and Consumer Services, be either paid to the original complainant or held by the Department of Agriculture and Consumer Services for later disbursement, depending upon the time during the shipping season when the complaint was made, when liability was admitted by the dealer, when the proceeds were so paid by the surety company to the Department of Agriculture and Consumer Services, the amount of other claims then pending against the same dealer, the amount of other claims already adjudicated against the dealer, and such other pertinent facts as the Department of Agriculture and Consumer Services in its discretion may consider material.

See § 601.66(6), Fla. Stat. (2008).

38. If the surety company fails to comply with the Department's demand for payment, the Department must "within a reasonable time file in the Circuit Court in and for Polk County, an original petition or complaint setting forth the administrative proceedings before the Department of Agriculture [and Consumer Services] and ask for final order of the court directing the surety company to pay the proceeds of the said bond to the Department of Agriculture for distribution to the claimants." § 601.66(7), Fla. Stat. (2008).

39. In the instant case, Petitioner timely filed a Complaint against Respondent.

40. At the hearing, Petitioner met its burden of proof to establish that Respondent failed or refused to harvest the fruit from the Pepper Grove and to remit the funds as contemplated by the parties' written agreement. Additionally, Petitioner has demonstrated that the return on the fruit he was able to harvest after Respondent abandoned the contract was significantly less than the price provided for in the parties' agreement. It is concluded that Petitioner is entitled to recover as noted below:

A. For red grapefruit--based upon the quantity of 13,077 boxes less the volume harvested by Respondent (5,400), a volume of 7,677 boxes at $4.50 per box equals $34,546.50.

B. For white grapefruit--based upon the quantity of 19,289 boxes less the volume harvested by Respondent (4,266), a volume of 15,023 boxes at $2.00 per box equals $30,046.00.

C. Petitioner did receive payment for the fruit harvested from the Pepper Grove. That amount, $12,296.63, must be subtracted from the amount owed by Respondent. Accordingly, $34,546.50 plus $30,046.00 less $12,296.63 results in an amount due from Respondent equal to $52,295.87.

D. From the $52,295.87 the overpayment amount ($1,274.00) for the fruit harvested by Respondent should also be subtracted. Therefore, the final amount due to Petitioner is $51,021.87.

41. Respondent maintains that, as matter of law, Petitioner may not recover under the provision of their

agreement that addresses the default of the buyer. That provision, paragraph 6 of the contract, does not apply to the facts of this case. Liquidated damages for a breach are available when the damages resulting from a breach are not readily ascertainable and when "the sum stipulated to be forfeited must not be so grossly disproportionate to any damages that might reasonably be expected to follow from a breach as to show that the parties could have intended only to induce full performance, rather than to liquidate their damages." See LeFemine v. Baron, 573 So. 2d 326 (Fla. 1991). In this case, the so-called liquidated damages were only available had Respondent not harvested any fruit. Once Respondent harvested more than $34,500 worth of fruit, the provision was meaningless to Petitioner. The provision was intended to benefit the seller for the buyer's breach. In this case the actual damages have been calculated.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

RECOMMENDED that the Department enter a final order approving Petitioner's complaint against Respondent in the amount of $51,021.87.

DONE AND ENTERED this 4th day of March, 2009, in Tallahassee, Leon County, Florida.

J. D. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 4th day of March, 2009.

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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.