

DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

SCHILLER INVESTMENTS, d/b/a
SHELL CREEK GROVES,

Petitioner,

vs

GULF CITRUS MARKETING, LLC,

And

SUNTRUST BANK, as Co-Respondent,

Respondents.

DOAH CASE NO. 12-0161
CLB CASE NO.: 2010-11 .095
FINAL ORDER
AGENCY CLERK #A80280

DIVISION OF
ADMINISTRATIVE
HEARINGS

12 SEP 5 PM 12 29

FILED

FINAL ORDER

THIS CAUSE arising under the Florida Citrus Code, Sections 601.64 and 601.66, Florida Statutes, came before the Commissioner of Agriculture of the State of Florida for consideration and final agency action. The Commissioner of Agriculture, as head of the Department of Agriculture and Consumer Services, has jurisdiction over the subject matter and the parties.

I. BACKGROUND

The Recommended Order relates in pertinent part:

On November 28, 2011, Schiller Investments, d/b/a Shell Creek Groves (Schiller Investments), filed an Amended Complaint against Gulf Citrus Marketing, LLC (Gulf Citrus) and SunTrust Bank with the Florida Department of Agriculture and Consumer Services (Department) seeking payment under a fruit purchase agreement. The Department provided Notice of the Complaint and the amendment to Gulf Citrus and SunTrust Bank. Gulf Citrus answered the complaint; denied the validity of the complaint; asserted that Schiller Investments was not a party to the agreement and,

therefore, did not have standing to bring the complaint; asserted that Schiller Investments could not proceed on account of failure to comply with Florida's Fictitious Name Act; and requested an administrative hearing. The Department referred the matter to the Florida Division of Administrative Hearings (DOAH) on January 12, 2012, for conduct of the requested hearing. SunTrust Bank did not respond to the complaint or appear in this proceeding.

On January 24, 2012, the matter was scheduled for final hearing to be held on April 3, 2012. On March 13, 2012, Gulf Citrus filed a Notice of Related Case and Motion to Raise Counterclaims. During a pre-hearing telephone conference conducted on March 13, 2012, the undersigned asked the parties to provide memoranda addressing the issue of whether the law permitted counter-claims in this proceeding. Neither party filed a memorandum. On March 15, 2012, Gulf Citrus filed a Withdrawal of Motion to Raise Counterclaims.

The hearing convened as scheduled by video teleconference at locations in Tallahassee and Ft. Myers, Florida. Gulf Citrus immediately moved to abate the proceeding on the basis of Schiller Investments' alleged failure to comply with Florida's Fictitious Name Act. The undersigned reserved ruling. This Recommended Order addresses the issue.

Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 (also accepted as Respondent's 2), and 20 of Schiller Investments were admitted into evidence. Schiller Investments presented the testimony of Friedrich Schiller and George Winslow.

Gulf Citrus Exhibits 2 (also accepted as Petitioner's 19) and 20 were admitted into evidence. Gulf Citrus also presented the testimony of Friedrich Schiller and George Winslow.

The parties ordered a transcript. It was filed with DOAH on May 4, 2012. The parties timely filed proposed recommended orders. They have been considered in preparation of this Recommended Order. The parties have a number of other disputes involving the fruit purchase agreement. They include setoff claims, disputes about payment for grove maintenance, and arguments about whether the Fruit Purchase Agreement is canceled. At least some of these issues are the subject of circuit court litigation. They are not the subject of this proceeding or resolved by it.

The Administrative Law Judge, John D.C. Newton, II (hereafter "ALJ"), entered the Recommended Order on May 24, 2012. On June 8, 2012, Respondent, Gulf Citrus Marketing, LLC ("Gulf Citrus") filed exceptions to the Recommended Order. On June 15,

2012, Petitioner filed a Memorandum in Opposition to Respondent's exceptions, but did not file any exceptions itself.

The Record consists of all notices, pleadings, motions, intermediate rulings, evidence admitted and matters officially recognized, the transcript of the proceedings, proposed findings and exceptions, stipulations of the parties and the Recommended Order.

The Recommended Order recommending the entry of a Final Order approving the claim of Schiller Investments against Gulf Citrus Marketing, LLC, in the amount of \$259,817.41, is attached hereto and incorporated herein.

II. EXCEPTIONS TO THE RECOMMENDED ORDER

Gulf Citrus filed eight exceptions to the Recommended Order. Petitioner did not file any exceptions. The Department's rulings in regard to the written exceptions filed by Respondent on June 8, 2012, are as follows:

Exception 1: Gulf Citrus takes exception to the Recommended Order's finding that the signature block of the Purchase Agreement plainly shows that each signatory was signing on behalf of an entity. In opposing this finding, Gulf Citrus references other portions of the Purchase Agreement which it argues contradicts the finding in the Recommended Order that Schiller Investments, rather than Friedrich Schiller individually, was the signing party to the Purchase Agreement. Specifically, Gulf Citrus argues that provisions of the Purchase Agreement stating that "Seller owns good title to the Groves," when title was held by Friedrich Schiller, undermines the ALJ's ruling on this point. Gulf Citrus also contends that Petitioner's failure to comply with the Fictitious Name Act prevents a finding that Petitioner was a party to the contract.

Ruling on Exception 1: The Department cannot disrupt the ALJ's finding of fact on this point as it is supported by competent substantial evidence. In paragraph 6 of the Recommended Order, the ALJ references the signature block of the Purchase Agreement as evidence that Petitioner was the signing party to the Purchase Agreement. The Purchase Agreement was entered into evidence as Petitioner's Exhibit 5. Other evidence was provided throughout the hearing regarding the long relationship between the parties, and Gulf Citrus's and George Winslow's knowledge of Petitioner's existence as a partnership at the time the Purchase Agreement was entered into. Friedrich Schiller testified at the hearing that the contracting party was Schiller Investments, d/b/a Shell Creek Groves (Transcript, P. 25, lines 11-13), that Schiller Investments is a general partnership (Transcript, P.25, lines 14-15), that Schiller Investments operates under a general partnership agreement (Transcript, P.26, line 19 through P.27, line 14), that the partnership agreement was provided to George Winslow (Transcript, P.29, lines 15-22; P.74, line 14 through P.75, line 16) and that George Winslow was well aware of the existence of Schiller Investments as a partnership at the time the Purchase Agreement was signed (Transcript, P.29, line 23 through P.30, line 5). This evidence supports the ALJ's finding that the Purchase Agreement was between Petitioner and Gulf Citrus. The ALJ specifically found with regard to conflicting testimony, as stated in endnote 5 to the Recommended Order:

This factual finding and others in this Recommended Order require some determination of the credibility of Mr. Schiller and Mr. Winslow. When their testimony conflicted in material ways, Mr. Schiller was judged more credible based upon his demeanor, the rationality of his testimony, and consistency of his testimony with documents in evidence.

Although Gulf Citrus identifies its dispute with the ALJ's interpretation of the contract as a finding of fact, rulings on contractual interpretation constitute conclusions of law. WSOS-FM, Inc. v. Hadden, 951 So. 2d 61, 63 (Fla. 5th DCA 2007). As contractual interpretation is not an area of law over which the Department has substantive jurisdiction, the Department is not in a position to disrupt the ALJ's ruling on this matter as a conclusion of law. As to the applicability of the Fictitious Name Act, this also involves a conclusion of law over which the Department lacks substantive jurisdiction. Gulf Citrus's first exception is overruled.

Exception 2: "Gulf Citrus takes exception to the Order's finding that the Purchase Agreement was a contract between Gulf Citrus and Schiller Investments, to the extent this finding intended Schiller Investments to mean a general partnership, and not Fred Schiller individually." In support of this contention, Gulf Citrus again references portions of the Purchase Agreement which it contends supports its position that Petitioner was not a party to the Purchase Agreement.

Ruling on Exception 2: The Department is not in a position to disrupt this finding of fact as it is supported by competent substantial evidence. The ALJ's finding of fact in this matter was supported by the Purchase Agreement, as well as by testimony at the hearing as specifically cited in the Ruling on Exception 1 above. In addition, to the extent that the ALJ's interpretation of the contract constitutes a conclusion of law, the Department cannot disrupt said conclusion as it is not an area over which the Department has substantive jurisdiction. Gulf Citrus's second exception is overruled.

Exception 3: "Gulf Citrus takes exception to the Order's finding that George Winslow proposed that Schiller Investments enter into a new fruit purchase agreement with Johanna

Foods and that Mr. Winslow 'did not propose to assign the agreement to Johanna Foods.'" In support of this contention, Gulf Citrus refers to other testimony provided at the hearing which it alleges supports its contention.

Ruling on Exception 3: The Department cannot disrupt this finding of fact as it is supported by competent substantial evidence. The ALJ's finding of fact in this matter was supported by the testimony of Friedrich Schiller in which he stated that the proposed relationship with Johanna Foods was for a new agreement and not merely an assignment of the Purchase Agreement (Transcript, P.113, lines 15-22). Gulf Citrus's third exception is overruled.

Exception 4: "Gulf Citrus takes exceptions to the Order[']s conclusions of law in regard to the standing of Schiller Investments, a General Partnership, to assert claims under the Purchase Agreement." In support of this contention, Gulf Citrus refers to other provisions of the Purchase Agreement which it alleges support its argument that Petitioner was not a party to the Purchase Agreement.

Ruling on Exception 4: Respondent challenges the finding of the ALJ based on contractual provisions which they assert contradict the finding that Schiller Investments is the party to the Contract. As discussed above, there was competent substantial evidence to support the ALJ's findings in this matter to the extent such determination involved a finding of fact. The conclusions of law challenged by Respondent in this exception relate to principles of contractual interpretation and the status of business entities which are not areas over which the Department has substantive jurisdiction. The Department does not have authority to disrupt this conclusion of law. Gulf Citrus's fourth exception is overruled.

Exception 5: “Gulf Citrus takes exceptions to the Order's conclusion of law that the Fictitious Name Statute does not apply to administrative proceedings.”

Ruling on Exception 5: The conclusion of law challenged by Respondent relates to interpretation and application of the Fictitious Name Act which is not an area over which the Department has substantive jurisdiction. The Department does not have authority to disrupt this conclusion of law. Gulf Citrus’s fifth exception is overruled.

Exception 6: “Gulf Citrus takes exceptions to the Order's conclusion of law that Gulf Citrus failed to demonstrate prejudice[~~d~~] if Schiller Investments, a General Partnership, is permitted to enforce the Purchase Agreement in this proceeding because Gulf Citrus had not identified any authority for bringing counterclaim in this proceeding.”

Ruling on Exception 6: Respondent in their exceptions cite Florida Fruit Sales, Inc. v. Kingfisher Groves, 343 So.2d 840 (Fla. 2d DCA 1976), as support for its proposition that under Section 601.66, Florida Statutes (2012), counterclaims are allowed in citrus bond claim proceedings. Even assuming counterclaims are allowed in this proceeding, and the Department has substantive jurisdiction over Section 601.66, Florida Statutes (2011), the ALJ’s basis for finding that there is no prejudice in this matter is found in paragraph 36. Paragraph 36 specifies that Respondent was not prejudiced because there was no confusion as to the fact that Schiller Investment was the contracting and performing party under the Purchase Agreement. This conclusion is based on principles of contractual interpretation and the fictitious name statute which are not areas over which the Department has substantive jurisdiction. In any case, Gulf Citrus voluntarily withdrew its Motion to Raise Counterclaims. Gulf Citrus’s sixth exception is overruled.

Exception 7: “Gulf Citrus takes exceptions to the Order's conclusion of law that the Purchase Agreement demonstrates that ownership of the citrus groves was not ‘dispositive’ because it permits cancellation if ownership of the groves changes but does not require[d] cancellation.”

Ruling on Exception 7: This exception again relies on contractual interpretation, and cites provisions of the Purchase Agreement which Respondent alleges supports its position in this matter. Conclusions of law regarding contractual interpretation are outside of the substantive jurisdiction of the Department; therefore this conclusion will not be disrupted by the Department. Gulf Citrus’s seventh exception is overruled.

Exception 8: “Gulf Citrus takes exceptions to the Order[’s] conclusions of law based on Gulf Citrus' assertion that Fred Schiller is the real party [in] interest under the Purchase Agreement (*See* exception to Page 11-13, ¶¶2527) and the fact that Gulf Citrus has already filed a state court action against Fred Schiller, which would deprive the Department of jurisdiction over claims asserted against Fred Schiller. *See Lloyd Citrus Trucking, Inc. v. Dept. of Agriculture & Consumer Servs.*, 572 So. 2d 977, 978 (Fla. 4th DCA 1990) (Department of Agriculture precluded from accepting jurisdiction of petition for breach of contract when suit already filed on same claim in state court).”

Ruling on Exception 8: The first part of this exception relating to the proper party to the Purchase Agreement and this issue has already been addressed numerous times above. As to the second issue, the ALJ concluded that the court in Lloyd Citrus Trucking, Inc. v. State Dep’t of Agric. & Consumer Serv., 572 So.2d 977 (Fla. 4th DCA 1990) held that s. 601.65, Florida Statutes (2011), creates alternative remedies, and that if a party brings an action in

state court before bringing an action with the Department, the Department does not have jurisdiction to hear a later complaint based on the same liability. The ALJ noted that no evidence had been presented that Petitioner had brought a state court action against Respondent. The Department agrees and adopts the ALJ's conclusion of law that the holding in Lloyd Citrus Trucking, Inc. could only deprive a party of filing a claim with the Department if that party had previously filed a judicial suit at law in a court of competent jurisdiction. The ALJ found that there was no evidence that Schiller Investments had filed a judicial suit in this matter and the Department adopts this finding of fact. Gulf Citrus's eighth exception is overruled.

III. FINDINGS OF FACT

1. The Commissioner of Agriculture adopts the ultimate findings of fact set forth in the attached Recommended Order of the ALJ.

2. Respondent, Gulf Citrus Marketing, LLC, is an LLC whose address is P.O. Box 512116, Punta Gorda, Florida 33951. At the time of the transaction(s) involved, Respondent was licensed as a citrus fruit dealer in citrus products supported by Certificate of Deposit No. 17544791185/200000001 in the amount of \$69,000.

3. Co-respondent, SunTrust Bank, 1225 S. Tamiami Trail, Punta Gorda, Florida 33950, holds the Certificate of Deposit for Respondent which has been assigned to the Department as security pursuant to the provisions of Section 601.61, Florida Statute. The conditions and provisions of the Certificate of Deposit assignment are to assure proper accounting and payment to producers or with other citrus fruit dealers for citrus products purchases by the Respondent.

IV. CONCLUSIONS OF LAW

4. The Commissioner of Agriculture adopts the conclusions of law set forth in the attached Recommended Order of the ALJ.

5. Section 601.61 (1), Florida Statutes (2011), provides: "Except as hereinafter provided, prior to the approval of 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 the amount as determined by the Department of Citrus."

6. Section 601.61 (2), Florida Statutes (2011), provides: "Said bond shall be in the form approved by the Department of Agriculture and Consumer Services and shall be conditioned as provided in s. 601.66 (9), and also to fully comply with the terms and conditions of all contracts, verbal or written, made by the citrus fruit dealer with producers or with other citrus fruit dealers, relative to the purchasing, handling, sale and accounting of purchases and sales of citrus fruit, and upon the dealer accounting for the proceeds from, and paying for, any citrus fruit purchased or contracted for, in accordance with the terms of the contracts with producers, and upon the dealer accounting for any advance payments or deposits made, and delivering all citrus fruit contracted for, in accordance with the terms of the contracts with other citrus fruit dealers..."

7. Section 601.66 (1), Florida Statutes (2011), provides: "Any person may complain of any violation of any of the provisions of this chapter 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. Said complaint shall briefly state the facts, and the Department of Agriculture and Consumer Services shall thereupon, if the facts alleged prima facie warrant such action, forward true copies of said complaint to the dealer in question and also to the surety company on the dealer's bond. The dealer at such time shall be called upon, within a reasonable time to be prescribed by the Department of Agriculture and Consumer Services, either to satisfy the complaint or to answer the complaint in writing, either admitting or denying the liability."

8. Section 601.66 (9), Florida Statutes (2011), provides: "The bond required to be posted by citrus fruit dealers under s. 601.61 shall be subject, and so conditioned therein, only to payment of claims duly adjudicated by the Department of Agriculture. All proceeds from such bond shall be paid over by the surety company directly to the Department of Agriculture, to be disbursed by it to successful claimants in whose favor the Department of Agriculture has entered administrative order or orders. Such funds shall be considered trust funds in the hands of the Department of Agriculture for the exclusive purpose of satisfying orders of indebtedness duly adjudicated. Cash bonds which may be posted by citrus fruit dealers in lieu of surety company bonds shall occupy the same legal status as funds paid over by the surety company to the Department of Agriculture for payment of claims..."

9. Upon failure of Gulf Citrus to pay Petitioner the \$269,817.41, SunTrust Bank is required to make payment out of Certificate of Deposit No. 17544791185/200000001.

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

ORDERED AND ADJUDGED:

1. Respondent, GULF CITRUS MARKETING, LLC, is indebted to Petitioner/Claimant, SCHILLER INVESTMENTS, d/b/a SHELL CREEK GROVES, in the amount of \$269,817.41. This is in violation of the conditions and provisions of the assignment of the Certificate of Deposit that has been assigned to the Department as required by Section 601.61(2), Florida Statutes.

2. Respondent, GULF CITRUS MARKETING, LLC, shall pay to Petitioner/Claimant, SCHILLER INVESTMENTS, d/b/a SHELL CREEK GROVES, \$269,817.41, to be paid within thirty (30) days from the date of this Final Order. In the event that Respondent does not comply with this Final Order within thirty (30) days, SunTrust Bank, as Co-Respondent, is hereby ordered to provide payment under the conditions and provisions of the assignment of Certificate of Deposit No. 17544791185/200000001, to **ADAM H. PUTNAM, COMMISSIONER OF AGRICULTURE**. Should responsibility for payment evolve to the Co-Respondent, SunTrust Bank will be notified by the Department. **This Final Order is effective on the date filed with the Clerk of the Department.**

NOTICE OF RIGHT TO APPEAL

Any party to these proceedings adversely affected by this Final Order is entitled to seek judicial review of this Final Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Florida Rules of Appellate Procedures. Judicial review proceedings must be instituted by filing a Notice of Appeal with the Department's Agency Clerk, 407 South Calhoun Street, Suite 509, Tallahassee, Florida, 32399-0800, within thirty (30) days of rendition of this order. A copy of the Notice of Appeal must be filed with the Clerk of the appropriate District Court of Appeal accompanied by any filing fees prescribed by law.

DONE AND ORDERED this 30th day of August, 2012.

ADAM H. PUTNAM
COMMISSIONER OF AGRICULTURE



Michael A. Joyner
Assistant Commissioner of Agriculture

Filed with Agency Clerk this 31st day of August, 2012.



Agency Clerk

COPIES FURNISHED TO:

John D. C. Newton, II
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

Patti Herndon
SunTrust Bank, Inc.
1225 South Tamiami Trail
Punta Gorda, Florida 33950

George A. Winslow
Gulf Citrus Marketing, LLC
5377 Duncan Road Punta Gorda, Florida

Alice Wiggins
Florida Department of Citrus
Post Office Box 9010
Bartow, Florida 33831-9010

Brian Michael Beason, Esquire
Wilkins Frolich, P.A.
18501 Murdock Circle, 6th Floor
Port Charlotte, Florida 33948

Robin S. Trupp, Esquire
Arnstein and Lehr, LLC
Two Harbor Place
302 Knights Run Avenue, Suite 1100
Tampa, Florida 33602

Jim Ellis
Office of Citrus License and Bond