

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SCHILLER INVESTMENTS, d/b/a)
SHELL CREEK GROVES,)
)
Petitioner,)
)
vs.) Case No. 12-0161
)
GULF CITRUS MARKETING, LLC, AND)
SUNTRUST BANK, INC., AS SURETY,)
)
Respondents.)
_____)

RECOMMENDED ORDER

Administrative Law Judge John D. C. Newton, II, of the Division of Administrative Hearings heard this case, as noticed, on April 3, 2012, by video teleconference at locations in Ft. Myers and Tallahassee, Florida.

APPEARANCES

For Petitioner: Brian Michael Beason, Esquire
Wilkins Frohlich
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Port Charlotte, Florida 33948

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

STATEMENT OF THE ISSUES

A. Is the general partnership, Schiller Investments, a party to the fruit purchase agreement that is the subject of this proceeding with standing to bring a claim for payment?

B. Does the failure of Schiller Investments to register "Shell Creek Groves" as a fictitious name require abating this proceeding?^{1/}

C. Does the election of remedies provision of section 601.65, Florida Statutes (2011)^{2/} prohibit the Florida Department of Agriculture and Consumer Services and the Division of Administrative Hearings from taking jurisdiction of this matter?

D. Is Gulf Citrus Marketing, LLC, liable to Schiller Investments in the amount of \$259,817.41?

PRELIMINARY STATEMENT

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^{3/}, 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.

FINDINGS OF FACT

1. Schiller Investments is a general partnership formed by Friedrich Schiller and his wife, Barbara Ann Schiller, in Kansas on February 1, 2005. In the transactions involved in this matter, Mr. Schiller acted on behalf of Schiller Investments with full authority as a general partner.

2. Although Schiller Investments has sometimes used the name Shell Creek Groves in business transactions, Schiller Investments has never registered Shell Creek Groves as a fictitious name in Florida.

3. Schiller Investments and Mr. Schiller also used the name Shell Creek Citrus interchangeably with Shell Creek Groves. They also did not register Shell Creek Citrus as a fictitious name.

4. Respondent, Gulf Citrus Marketing, LLC (Gulf Citrus), is a licensed fruit dealer in Florida. George Winslow is the managing member of Gulf Citrus and acted on behalf of Gulf Citrus in all of the communications and transactions with Mr. Schiller and Schiller Investments involved in this matter.

5. On September 23, 2009, Schiller Investments and Gulf Citrus entered into Gulf Citrus Marketing Fruit Purchase Agreement No. 936 (Purchase Agreement). Mr. Winslow drafted the agreement with the assistance of a lawyer. Mr. Winslow has a college degree in agronomy. In contrast, Mr. Schiller's formal education ended with completion of the eighth grade.

6. Mr. Schiller executed the Purchase Agreement on behalf of Schiller Investments. Mr. Winslow executed it on behalf of Gulf Citrus. The signature blocks in the document, drafted by Mr. Winslow and Gulf Citrus's lawyer, do not state the position either man held in the entities on whose behalf they signed, as

shown below. But it is plain they are signing on behalf of an entity not as individuals.

SELLER:

SCHILLER INVESTMENTS dba
Shell Creek Groves

By: _____
Name: Friedrich Schiller

BUYER:

GULF CITRUS MARKETING, LLC

By: _____
Name: George Winslow

7. The Purchase Agreement was a contract between Gulf Citrus and Schiller Investments.

8. The Purchase Agreement provided for Gulf Citrus to purchase all oranges grown in the Prairie Grove and Shell Creek Grove for four consecutive citrus seasons, beginning with the 2009-2010 season and ending with the 2012-2013 season. The Purchase Agreement provides specific descriptions by survey coordinates of the Charlotte County locations of the groves. Shell Creek Grove is much larger than Prairie Grove. It produced the vast majority of the oranges.

9. From 2009 to present day, Mr. Schiller has owned Shell Creek Grove. Mr. Winslow always knew that Mr. Schiller owned Shell Creek Grove. Mr. Winslow brokered the foreclosure sale of the grove to Mr. Schiller from Metropolitan Life. Before then,

Mr. Winslow was one of three co-owners of Shell Creek Grove. From May 17, 2002, until January 25, 2012, Prairie Groves, LLC, owned the Prairie Grove.

10. Throughout the course of their various dealings, Mr. Winslow was aware that Mr. Schiller controlled both groves and business dealings involving them. He regularly communicated with Mr. Schiller about the groves and dealt exclusively with him on matters involving the groves.

11. The Purchase Agreement provides that in the event of the sale of the groves, Gulf Citrus has the right, but not the obligation, to terminate the agreement. It contains other clauses that give Gulf Citrus the right to terminate the contract in certain circumstances. The Purchase Agreement also gives Gulf Citrus the right to assign or transfer the Purchase Agreement to any third party or successor in interest.

12. Schiller Investments timely delivered the oranges from both groves for the 2010-2011 season, as provided in the Purchase Agreement. The oranges satisfied all of the quality standards and other requirements of the Purchase Agreement. Gulf Citrus accepted the oranges. It in turn sold the oranges and received payment for them. Gulf Citrus has not paid \$259,817.41 owed for the oranges.

13. During this time, Mr. Winslow experienced financial difficulties. Mr. Schiller allowed Mr. Winslow time to cure his

problems and pay the debt. In September and October, 2011, Mr. Schiller communicated regularly with Mr. Winslow and his staff about the unpaid amount and Gulf Citrus's plan to pay it. Mr. Winslow promised payment several times and explained various plans to raise the money, including re-financing real estate. But he never delivered.

14. One scheme Mr. Winslow proposed was for Schiller Investments to enter into a new fruit purchase agreement with a New Jersey company named Johanna Foods. Mr. Schiller chose not to do this. He had reasonable concerns. They were the fact that Johanna Foods was not a licensed Florida Fruit dealer^{4/}, that he was unfamiliar with the company, and that the proposal included an unexplained payment described as a "bonus" that was to make up for the money Gulf Citrus had not paid.

15. Mr. Winslow did not propose to assign the agreement to Johanna Foods. And Gulf Citrus never assigned the agreement.^{5/}

16. Mr. Winslow acknowledged the failure to pay in writing on October 25, 2011. The letter he wrote and signed that day in Mr. Schiller's presence reads:

Fred Schiller

1. It is my intent to pay Shell Creek Grove \$259,818.00, of past due fruit proceeds due; on or about Nov 10th subject to refinancing of property owned by George Winslow. In the interim I will advise you weekly of the progress beginning November 1st.

George Winslow [signature]

2. In the event payment is not tendered to Shell Creek Grove by Nov 15th Gulf Citrus Marketing will cancel the Fruit Purchase agreement between Gulf Citrus Mkt. and Shell Creek Grove.

George Winslow [signature]

17. On October 28, 2011, Mr. Schiller sent Mr. Winslow a handwritten letter stating he was terminating the Purchase Agreement. The letter quoted verbatim below states:

Dear George,

Due to your financial difficulties and your inability to meet your obligations in a timely manner I am terminating the agreements between "Prairie Grove-Shell Creek Citrus" and your companies at Gulf Citrus effective Nov. 30th 2011. I like to thank your staff especially Lori for everything they have done in the past years.

Thank you

Fred Schiller
Prairie Creek Groves
Shell Creek Citrus

Cc: Lory
Sabrina

18. Mr. Schiller and Mr. Winslow have done business with each other since 2001. They and the entities that they controlled were engaged in other business relationships, including ones involving Prairie Grove and Shell Creek Grove. They included business relationships with Citrus Sweet, Inc., and Florida Gulf Citrus Management, Inc.

19. The relationships included an agreement between Mr. Schiller and Gulf Citrus Management, a Mr. Winslow entity, for management of the Shell Creek Grove.

20. In the course of their business dealings, Mr. Schiller twice provided Mr. Winslow with copies of the Schiller Investments partnership agreement. He provided it personally to Mr. Winslow in 2002. He provided it to Mr. Winslow's staff in 2008 or 2009.^{6/} Through Mr. Winslow, Gulf Citrus was fully aware of the parties that it was dealing with in all the business relationships including the Purchase Agreement.

21. Gulf Citrus has sued Mr. Schiller in circuit court for claims involving the Purchase Agreement. There is no evidence that Schiller Investments has filed suit in circuit court. There is also no evidence that Gulf Citrus filed its circuit court action before the Department took jurisdiction of the claim of Schiller Investments.

CONCLUSIONS OF LAW

Preliminary Matters

22. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 & 120.57(1), Fla. Stat. (2012).

23. As the complainant, Schiller Investments bears the burden of proving the allegations of the complaint by a preponderance of the evidence. See Dep't. of Banking & Fin.,

Div. of Sec. & Inv. Prot. v. Osborne Stern & Co., 670 So. 2d 932, 934 (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"); Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981); Vero Beach Land Co., LLC v. IMG Citrus, Inc., Case No. 08-5435 (Fla. DOAH Mar. 4, 2009; Dep't Agric. & Consumer Serv. July 20, 2009), aff'd IMG Citrus, Inc. v. Vero Beach Land Co., LLC, Case No. 4D09-3353 (Fla. 4th DCA 2010).

24. Although this is a dispute about whether Gulf Citrus is responsible for paying for oranges delivered to it and sold by it, there is no dispute about delivery of the oranges or the money owed for them. There is no question that Gulf Citrus owes \$259,817.41 for the oranges. Instead, Gulf Citrus relies upon the theories raised in its response that Schiller Investments does not have standing to bring this action and that the action must be abated because Schiller Investments did not register Shell Creek Groves as a fictional name. In its post-trial papers, Gulf Citrus also advances the argument that DOAH lacks jurisdiction because of a pending related circuit court proceeding.

Standing

25. Gulf Citrus's argument that Schiller Investments does not have standing to bring this action rests on Mr. Winslow's

assertion that he thought he was doing business with Mr. Schiller individually, the fact that the signature block on the purchase agreement does not identify Schiller Investments as a partnership, and the fact that Mr. Schiller's signature for Schiller Investments on the Purchase Agreement does not state that he is a partner.^{7/}

26. Gulf Citrus's standing argument, which is really an argument that Mr. Schiller is an indispensable party, fails for several reasons. Mr. Winslow's claim that Mr. Schiller, not Schiller Investments, is the proper party is contrary to the facts. The Purchase Agreement states in the introductory paragraph and in the signature block that Schiller Investments is the party selling the oranges. Nothing in the document supports a conclusion that it is a contract of Mr. Schiller individually. The claim is also not credible since Mr. Schiller previously provided Mr. Winslow copies of the Schiller Investments partnership agreement.

27. Gulf Citrus's argument is nothing more than a claim that the Purchase Agreement is unenforceable because the signature block did not say "Schiller Investments, a general partnership," and Mr. Schiller's signature did not include the designation "general partner." The position is disingenuous in that Mr. Winslow did not indicate his position or the nature of

his authority to bind Gulf Citrus when he signed the Purchase Agreement.

28. The position is also incorrect. Gulf Citrus cites no authority for its position. Florida's partnership laws and court interpretations of them do not support the argument.

29. Florida law requires that limited liability partnership names end with a designation indicating that they are a limited liability partnership. § 620.9002, Fla. Stat. The general partnership statutes do not impose a similar requirement. See Ch. 620, Part II, Fla. Stat. Florida courts apply the statutory construction canon expressio unius est exclusio alterius; the mention of one thing implies the exclusion of another. See Pro-Art Dental Lab, Inc. v. V-Strategic Grp., L.L.C., 986 So. 2d 1244 (Fla. 2008); State v. Hearns, 961 So. 2d 211 (Fla. 2007). The express requirement for one type of partnership to designate its nature in its name and the absence of a similar requirement for the other type leads to the conclusion that the legislature did not intend to require general partnerships to include in their name something identifying them as partnerships.

30. Partnerships may be held liable for obligations if they do not identify themselves as partnerships, even if they do not have an express partnership agreement. Evidence can establish that parties are partners from actions and statements

even if there is no partnership agreement and the parties deny that they are partners. Perez v. Hernandez, 323 So. 2d 4 (Fla. 3d DCA 1975). This further establishes that nothing requires a partnership to identify itself as a partnership in order to act as one or be held to account as one.

31. Gulf Citrus's argument also fails because under Florida and Kansas law, as a general partner, Mr. Schiller's signature binds Schiller Investments. Each partner of a partnership is an agent of the partnership for purpose of its business. § 620.8301, Fla. Stat.; Kan. Stat. Ann. § 56a-301 (2011).

32. At this stage in the fulfillment of the Purchase Agreement, assertions about whether Mr. Schiller is the responsible individual are immaterial. Under Florida and Kansas law, all partners to a partnership are jointly and severally liable for all partnership obligations. § 620.8306 Fla. Stat.; Kan. Stat. Ann. § 56a-306 (2011). Consequently, Mr. Schiller was also personally bound by the Purchase Agreement, just as Mr. Winslow claims he relied upon Mr. Schiller being.

Fictitious Name Registration

33. Gulf Citrus's effort to apply the fictitious name statute fails from the outset. Application of existing law to the undisputed material facts does not support the effort. A person or entity using a fictitious name is required to register

it with the Division of Corporations of the Department of State. § 865.09(3), Fla. Stat. Gulf Citrus relies upon the statute's penalty provision. It states that a business which has not registered its fictitious name "may not maintain any action, suit, or proceeding in any court of this state until this section is complied with." § 865.09(9)(a), Fla. Stat. Under well-established law, an agency is not a court. Art. V, § 1, Fla. Const.; Chs. 25, 26, & 34, Fla. Stat.; § 120.52(1), Fla. Stat.; § 20.22(2), Fla. Stat.; Fla. Dep't of Rev. v. WHI Ltd. P'shp, 754 So. 2d 205, 206 (Fla. 1st DCA 2000); Rice v. Dep't of HRS, 386 So. 2d 844, 850 (Fla. 1st DCA 1980). The fictitious name statute does not apply in this proceeding.

34. The facts, also, do not support application of the fictitious name statute. The name of the complainant here, Schiller Investments, is on the Purchase Agreement, as well as the purported fictitious name, Shell Creek Groves. Consequently, from the beginning of the relationship, Gulf Citrus and Mr. Winslow knew the identity of the party with which they were doing business. This is not a situation in which someone is doing business using only a fictitious name and thus obscuring or concealing the identity or location for the real party in interest. A tribunal may waive compliance with the fictitious name statute and imposition of its penalty when the purposes of the statute are met and non-compliance does not

prejudice the opposing party. Jackson v. Jones, 423 So. 2d 972 (Fla. 4th DCA 1982); Pinellas Cnty. v. Lake Padgett Pines, 333 So. 2d 472 (Fla. 2nd DCA 1976); Dr. Fred Hatfield's Sportstrength Training Equip. Co. v. Balik, 174 F.R.D. 496 (M.D. Fla. 1997).

35. Gulf Citrus argues that it is prejudiced because it would have brought various counterclaims against Mr. Schiller if he was a party. But Gulf Citrus has not identified any authority for bringing counterclaims in this proceeding.

36. The penalties of the fictitious name statute should not be applied because the purpose of the fictitious name statute was always fulfilled in the transactions involved here. There was no confusion about who the agent for Schiller Investments was or where the responsibility for delivering the oranges from Prairie Grove and Shell Creek Grove rested.

37. The Purchase Agreement is for Schiller Investments to provide the oranges from the two groves to Gulf Citrus. The oranges were delivered. Who owned the groves is not dispositive. The Purchase Agreement demonstrates this. It permits cancelation if ownership changes, but does not require it. This is not surprising since the whole purpose of the Purchase Agreement is for one party, Gulf Citrus, to purchase the oranges produced from two specific groves from another party, Schiller Investments. Changes in ownership matter only

if they affect delivery of the oranges or their condition. Here there is no question that the oranges produced from those groves were delivered timely and in good condition.

Election of Remedies

38. Gulf Citrus relies upon Lloyd Citrus Trucking, Inc. v. State Dep't of Agric. & Consumer Serv., 572 So. 2d 977 (Fla. 4th DCA 1990), to argue that Schiller Investments may not bring this claim. That opinion holds that section 601.65, Florida Statutes, creates alternative remedies. It also holds that if a party brings suit in circuit court before bringing an administrative complaint with the Department, the Department does not have jurisdiction to hear a later complaint based on the same liability. The record does not support the argument.

39. There is no evidence that Schiller Investments brought a circuit court action. Consequently, there is no evidence that it elected a circuit court remedy instead of the administrative remedy. The only circuit court action established in the record is one by Gulf Citrus. And there is no evidence of when that action was filed. So, even if it would trigger the holding of Lloyd Citrus, there is no proof that the action was filed before this administrative proceeding.

Gulf Citrus's Liability to Schiller Investments

40. Florida law establishes a comprehensive structure of regulation and enforcement for the citrus industry. It includes

registration, quality criteria, contract requirements, bond requirements, and an administrative contract enforcement process. Ch. 601, Fla. Stat.; Vero Beach Land Co., LLC v. IMG Citrus, Inc., Case No. 08-5435 (Fla. DOAH March 4, 2009; Dep't Agric. & Consumer Serv. July 20, 2009), aff'd IMG Citrus, Inc. v. Vero Beach Land Co., LLC, Case No. 4D09-3353 (Fla. 4th DCA 2010). Section 601.64(4), Florida Statutes, makes it unlawful for any citrus fruit dealer:

to fail or refuse truly and correctly to account and make full payment promptly in respect of any such transaction in any such citrus fruit to the person with whom such transaction is had, or to fail or refuse on such account to make full payment of such amounts as may be due thereon, or to fail without reasonable cause to perform any specification or duty express or implied arising out of any undertaking in connection with any such transaction;

41. Gulf Citrus received the fruit produced from Prairie Grove and Shell Creek Grove in the 2010-2011 season, as provided in the Purchase Agreement. Gulf Citrus did not make full payment for the fruit. It committed an unlawful act prohibited by section 601.64(4).

42. Section 601.65 makes a fruit dealer like Gulf Citrus liable to any person injured by any violation of chapter 601, Florida Statutes, for the full amount of damages sustained as consequence of the violation. The facts here show that Schiller Investments suffered damages of \$259,817.41 as a consequence of

the violation. Gulf Citrus is liable to Schiller Investments for the amount of \$259,817.41.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is Recommended that the Department enter a final order approving the claim of Schiller Investments against Gulf Citrus Marketing, LLC, in the amount of \$259,817.41.

DONE AND ENTERED this 24th day of May, 2012, in Tallahassee, Leon County, Florida.



JOHN D. C. NEWTON, II
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of May, 2012.

ENDNOTES

^{1/} Gulf Citrus does not argue that Schiller Investments must be registered as a fictitious name, only Shell Creek Groves.

^{2/} All citations to the Florida Statutes are to the 2011 edition unless otherwise noted.

^{3/} Page 44, lines 15-20, of the transcript erroneously identify the exhibit being admitted as 15.

^{4/} Florida law requires non-retail purchasers of citrus fruit to be licensed. §§ 601.03(8) & 601.55, Fla. Stat.

^{5/} 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.

^{6/} See footnote 5.

^{7/} Gulf Citrus does not argue that all partners of Schiller Investments must be parties to this proceeding.

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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.