

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DP PARTNERS, LTD,

Petitioner,

vs.

Case No. 14-1769

SUNNY FRESH CITRUS EXPORT AND  
SALES CO., LLC, AND HARTFORD  
FIRE INSURANCE COMPANY, AS  
SURETY,

Respondent.

\_\_\_\_\_ /

RECOMMENDED ORDER

A duly-noticed final hearing was held in this matter on August 27, 2014, in Lakeland, Florida, before Suzanne Van Wyk, a designated Administrative Law Judge of the Division of Administrative Hearings (Division).

APPEARANCES

For Petitioner: Bert J. Harris, Esquire  
Swaine, Harris, Sheehan and McClure, P.A.  
401 Dal Hall Boulevard  
Lake Placid, Florida 33852

For Respondent: Arthur C. Fulmer, Esquire  
Fulmer and Fulmer, P.A.  
1960 East Edgewood Drive  
Lakeland, Florida 33813

STATEMENT OF THE ISSUE

Whether Sunny Fresh Citrus Export and Sales, Co., LLC, is liable to Petitioner in the amount of \$44,032.00 for delivery of fruit which remains unpaid.

PRELIMINARY STATEMENT

On March 12, 2014, Petitioner filed an Amended Complaint against Sunny Fresh Citrus Export and Sales Co., LLC, and Hartford Fire Insurance Company with the Florida Department of Agriculture and Consumer Services (Department) seeking payment under two fruit purchase agreements. The Department provided Notice of the Amended Complaint to Sunny Fresh Citrus Export and Sales Co., LLC, and to Hartford Fire Insurance Company. Respondent answered the Amended Complaint on April 9, 2014; denied the validity of the complaint; asserted that Sunny Fresh Citrus Export and Sales Co., LLC, had no valid contract with Petitioner for purchase of fruit; and requested a hearing. The Department referred the matter to the Division on April 16, 2014, for conduct of the requested hearing. Hartford Fire Insurance Company did not respond to the Amended Complaint and did not appear in these proceedings.

The matter was initially assigned to Judge William F. Quattlebaum and scheduled for hearing on June 19, 2014, by video teleconference in Lakeland and Tallahassee, Florida. The final

hearing was continued at the request of the parties and rescheduled for August 26, 2014, by video teleconference. The matter was subsequently transferred to the undersigned and rescheduled to August 27, 2014, as a live hearing in Lakeland, Florida.

The final hearing commenced as scheduled. Petitioner offered the testimony of Daniel H. Phypers and Danielle Phypers Daum, limited partners in DP Partners, Ltd., and Robert Marinaro. Respondent offered the testimony of Joseph Paladin. The parties stipulated to the introduction of Joint Exhibits 1 and 2 and Petitioner's Exhibits 3 through 51 and 54 through 59.<sup>1/</sup> Respondent introduced Exhibits 1 through 5.

At the conclusion of the final hearing, the undersigned requested the parties to submit additional exhibits, which were timely provided, and are hereby designated as follows:

Petitioner's Exhibit 57 - Citrus Fruit Dealer's Bond No. 21BSBGH6607.

Respondent's Exhibit 6 - Florida Department of State, Division of Corporations Fictitious Name Filing for Sunny Fresh Citrus Export and Sales Co.

Respondent's Exhibit 7 - Florida Department of State, Division of Corporations filing for Sunny Fresh Citrus Export and Sales Co., LLC, as well as Articles of Organization therefore, and Annual Reports thereof.

Respondent's Exhibit 8 - Florida Department of State, Division of Corporations filing for Sunny Fresh Packing, LLC, Electronic

Articles of Incorporation, Resignation of Member, and Annual Reports related thereto.

Respondent's Exhibit 9 - Florida Department of State, Division of Corporations filing for Phoenix Packing, LLC, Electronic Articles of Organization and an Annual Report thereof.

Respondent's Exhibit 10 - Durable Power of Attorney executed by Kelly Marinaro on November 4, 2011.

The parties did not order a transcript of the proceedings. The parties timely filed Proposed Recommended Orders pursuant to the undersigned's Order on Post-Hearing Submissions, which have been considered in the preparation of the Recommended Order.

#### FINDINGS OF FACT

1. Petitioner, DP Partners, Ltd. (Partners), is a Florida Limited Partnership located in Lake Placid, Florida, engaged in the business of citrus production. Daniel H. Phypers and Danielle Phypers Daum, brother and sister, and their father Drew Phypers, are limited partners in the business.

2. Respondent, Sunny Fresh Citrus Export and Sales Co., LLC, (the LLC) is a Florida Limited Liability Company headquartered in Vero Beach, Florida, engaged in the business of exporting citrus for retail sale.

3. The LLC was organized and registered with the State of Florida Division of Corporations on November 3, 2011. The

members of the LLC are Kelly Marinaro and Jean Marinaro, husband and wife.

4. Kelly Marinaro (Marinaro) formerly conducted business in the name of Sunny Fresh Citrus Export and Sales Co. (the DBA), a fictitious-name entity registered with the Florida Department of State, Division of Corporations, on October 23, 2007. The fictitious-name entity registration expired on December 31, 2012.

5. Marinaro suffered a massive heart attack in November 2011 and was incapacitated. He did not return to work until the Spring of 2013.

6. On November 4, 2011, after suffering the heart attack, and one day after organizing and registering the LLC, Marinaro conveyed durable power of attorney to Joseph Paladin (Paladin) as his Agent. Among the authority granted to Paladin, was the following:

2. To enter into binding contracts on my behalf and to sign, endorse and execute any written agreement and document necessary to enter into such contract and/or agreement, including but not limited to . . . contracts, covenants . . . and other debts and obligations and such other instruments in writing of whatever kind and nature as may be.

\* \* \*

9. To open, maintain and/or close bank accounts, including, but not limited to, checking accounts . . . to conduct business

with any banking or financial institution with respect to any of my accounts, including, but not limited to, making deposits and withdrawals, negotiating or endorsing any checks . . . payable to me by any person, firm, corporation or political entity[.]

\* \* \*

12. To maintain and operate any business that I currently own or have an interest in or may own or have an interest in, in the future.

7. In Marinaro's absence, Paladin conducted the usual affairs of the business, including entering into contracts to purchase citrus from several growers.

8. On October 19, 2012, Paladin entered into contract number 2033 with Partners to purchase approximately 6000 boxes of Murcots (a tangerine variety) at \$12.00 per box.<sup>2/</sup> The contract is signed by Paladin as the Agent of "Sunny Fresh Citrus Export & Sales Company, Licensed Citrus Fruit Dealer (Buyer)."

9. On December 13, 2012, Sunny Fresh entered into contract number 2051 with Partners to purchase Hamlins (a different fruit variety) at \$6.50 per box.<sup>3/</sup> The contract price was for citrus "on the tree," meaning it was the buyer's responsibility to harvest the citrus. The contract is signed by Paladin as the Agent of "Sunny Fresh Citrus Export & Sales Company, Licensed

Citrus Fruit Dealer (Buyer).” (Contract 2033 and 2051 are hereinafter referred to collectively as “the contracts”.)

10. The contracts were prepared on pre-printed forms used by Marinaro’s businesses pre-dating Paladin’s involvement. The contract form is titled as follows:

Citrus Purchase Contract & Agreement  
Sunny Fresh Citrus Export & Sales Company  
Cash Fruit Crop Buyer  
2101 15th Avenue  
Vero Beach, Florida 32960

11. Paladin testified that he was not aware of more than one company for Marinaro’s fruit-dealing business. He testified that he was not aware of any difference between Sunny Fresh Citrus Export and Sales Company and Sunny Fresh Citrus Export and Sales Co., LLC. Paladin was not aware of when the LLC was created. Paladin’s testimony is accepted as credible and reliable.

12. Paladin testified that his intent was to enter into the contracts for the benefit of “Sunny Fresh.” “Sunny Fresh,” written in twelve-point bold red letters over an image of the sun in yellow outlined in red, is a trademark registered with the Florida Division of Corporations. Marinaro first registered the trademark in February 1998. In his trademark application, Marinaro entered the applicant’s name as “Kelly Marinaro D/B/A Sunny Fresh Citrus.” Marinaro renewed the trademark registration in 2007.

13. Marinaro testified that the "Sunny Fresh" trademark is "owned by the LLC."

14. On February 20, 2012, Paladin, Marinaro and a third partner, Gary Parris, formed another company, Sunny Fresh Packing, LLC, the purpose of which was to run a fruit-packing house in Okeechobee, Florida. Equipment for the packing house was obtained from a packing house in Ft. Pierce, Florida, which was indebted to Marinaro, in some capacity, and went "belly up."

15. In March 2013, the Okeechobee packing house was struck by lightning.

16. Shortly after the lightning strike, Marinaro, Paladin, and Mr. Parris, signed a letter addressed "To our valued Growers." The letter explained that, due to both the lightning strike, which shorted out all computers and electrical components at the packing house, and reduced demand for product due to severe weather in the northeastern United States, they had made a "business decision to end the year now and prepare for next year."

17. The letter further explained that, "rather than spending thousands of dollars all at once, we feel, it makes better sense to use our cash flow to pay our growers first . . . . We will be sending out checks every week or every other week until everyone is paid or until we receive



supplemental cash infusions that we are working on. In that case we would just pay everyone in full, from that.”

18. The letter was prepared on letterhead bearing the “Sunny Fresh” trademark logo.

19. Paladin made a number of payments to Partners on the contracts during 2012 and 2013. Each check shows payor name as “Sunny Fresh” with an address of 2101 15th Avenue, Vero Beach, Florida 32960. Mr. Phypers met with Paladin a number of times to collect checks and understood that Paladin was making concerted efforts to pay all the growers. However, Partners did not receive full payment on the contracts.

20. Paladin drafted a Release of Invoices Agreement (Agreement) by which creditor growers could receive partial payment on their outstanding contracts in exchange for a full release of liability from the buyer. The Agreement lists the following entities and persons as being released from liability: “Sunny Fresh Packing, LLC”; “Sunny Fresh Citrus Export and Sales Co., LLC”; and Kelly Marinaro.

21. Paladin presented the Agreement to Partners with an offer to pay \$36,449.45 in consideration for signing the Agreement. Partners did not sign the Agreement.

22. The parties stipulated that the amount owed Partners under both contracts is \$44,032.00.

23. Respondent contends that Petitioner's claim is filed against the wrong business entity. Respondent argues that Petitioner's contracts were with the DBA, and that Petitioner's claim is incorrectly brought against the LLC. Thus, Respondent reasons, the LLC is not liable to Petitioner for the monies owed.

24. The DBA was registered with the State of Florida in 2007 and held an active fruit dealer's license through July 31, 2012. Marinaro owned and operated the DBA at 2101 15th Avenue, Vero Beach, Florida 32960.

25. The DBA filed a citrus fruit dealer's bond with the Department of Agriculture for the 2008-2009 shipping season.

26. Marinaro registered the trademark "Sunny Fresh" logo in the name of the DBA in 2007, and was still using the logo on his business letterhead in 2013.

27. Marinaro formed the LLC in 2011, which holds an active citrus fruit dealer's license. Marinaro and his wife, Jean, are the only members of the LLC. The principal address is 2101 15th Avenue, Vero Beach, Florida 32960.

28. The LLC filed citrus fruit dealer's bonds with the Department of Agriculture on June 28, 2012, for the shipping season ending July 31, 2013, and on May 2, 2013, for the shipping season ending July 31, 2014. Marinaro did not refile a bond for the DBA after forming the LLC.

29. At all times relevant hereto, Marinaro's fruit dealer's business has been physically located at 2101 15th Avenue, Vero Beach, Florida 32960. The building at that address bears the name "Sunny Fresh."

30. Marinaro testified that he formed the LLC shortly after his heart attack to "protect his personal assets." Marinaro explained that he had little revenue in the LLC "for the next two years," and he planned for the LLC to conduct sales for the packing company. He expected the LLC would be purchasing fruit from other packing houses. In fact, he testified that, during his absence, he was not aware that either the DBA or the LLC were purchasing fruit.

31. Marinaro was clearly upset about the financial state of his business when he resumed control in the Spring of 2013. He testified that, prior to his heart attack, he was running a business with a typical \$10 to \$12 million yearly revenue, but that he returned to a business in debt to the tune of roughly \$790,000.00. Marinaro lamented that Paladin entered into contracts to buy citrus when that was not the plan for the LLC. Alternately, he blamed Paladin for taking too much money out of the LLC to set up the packing house.

32. Marinaro's testimony was inconsistent and unreliable. He first testified that Paladin had full authority to purchase fruit in his absence, but later professed to be "dismayed" that

his company was purchasing fruit in his absence. The evidence does not support a finding that the LLC was formed for any reason other than to continue his fruit dealings in a legal structure that would protect his personal assets.

33. Marinaro's explanation that the purpose of the LLC was to conduct sales for the packing company also lacks credibility. The LLC was organized in November 2011, but the packing house in Ft. Pierce from which he acquired the equipment to set up a packing house in Okeechobee did not go "belly up" until February 2012. Marinaro would have had to be clairvoyant to set up an LLC for the sole purpose of sales to a packing house about which he was not aware until four months later.

34. Marinaro's testimony that he was in the dark about the running of his business and that he was somehow duped by Paladin is likewise unreliable. Marinaro testified that, during his absence, he was "concerned that Paladin was entering into contracts where a bond was required, but not secured."<sup>4/</sup> He could not have been concerned about contracts to buy fruit without posting the required bond if he was not even aware that his company was purchasing fruit. Further, Marinaro neither questioned Paladin about entering into the citrus contracts, nor suggested Paladin use a different contract form for the LLC.

35. The evidence establishes that Marinaro knew Paladin was purchasing fruit during Marinaro's absence to continue the

regular fruit-dealer's business, and further, that Marinaro knew Paladin was entering into contracts on behalf of the LLC, the company formed just one day prior to Marinaro granting Paladin full power of attorney to run his business.

36. Finally, Marinaro knowingly participated in the formation of Sunny Fresh Packing, LLC, in February 2012, four months after he became incapacitated. This required his involvement in a complicated business scheme in which his company collected on a debt owed by a packing house in Ft. Pierce, and acquired the equipment to run the new packing house, with two partners, Parris and Paladin, located in Okeechobee on property owned by a third party, Mr. Smith, who is not a member of Sunny Fresh Packing, LLC. It is unlikely Marinaro was clueless as to the fruit dealings of the LLC in his absence. Further, it is disingenuous, at best, for Marinaro to suggest that the contracts entered into in 2012 are not with the LLC, the corporation he formed in 2011 to protect his personal assets from his business obligations.

#### CONCLUSIONS OF LAW

37. The Division has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 & 120.57(1), 604.21(6), Fla. Stat. (2014).

38. As the Petitioner, Partners bears the burden of proving the allegations of its 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., 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. Westchester Fire Ins. Co., 46 So. 3d 1014 (Fla. 4th DCA 2010).

39. There is no dispute that the contracts are valid. Likewise, there is no dispute that Partners is owed \$44,032.00 under the contracts. This dispute is about whether the LLC is responsible for paying Partners under the contracts. Respondent's sole argument is that the contracts are obligations of the DBA, an entity which no longer exists and for which no valid citrus bond is filed.

40. Contrary to Respondent's assertions, the contracts are with the LLC. Respondent's Agent, Paladin, was authorized to enter into contracts to purchase fruit one day after Marinaro organized and registered the LLC. Paladin made no distinction, with either Marinaro or the growers, between the DBA and the LLC. Paladin had one banking account and made payments to a host of growers. The company checks and company letterhead bore

the "Sunny Fresh" trademark logo, which Marinaro testified was owned by the LLC. Further, the LLC acknowledged the contracts were its obligations when it presented Partners with the Agreement to accept \$36,449.45 as full payment on the contracts and release the LLC from its obligations.

41. Assuming, arguendo, that Respondent is correct that the contracts were liabilities of the DBA, the LLC is a mere continuation of the business of the DBA and has assumed its obligations under the contracts.

42. Traditional corporate law holds that the liabilities of a predecessor corporation may not be imposed on the successor corporation unless:

- (1) The successor expressly or impliedly assumes obligations of the predecessor;
- (2) the transaction is a de facto merger;
- (3) the successor is a mere continuation of the predecessor; or
- (4) the transaction is a fraudulent effort to avoid the liabilities of the predecessor.

Bernard v. Kee Mfg. Co., 409 So. 2d 1047, 1049 (Fla. 1982);

Anders for Anders v. Jacksonville Elec. Auth., 443 So. 2d 330 (Fla. 1st DCA 1983).

43. The concept of continuation of business arises where the successor corporation is merely a continuation or reincarnation of the predecessor corporation under a different name. See Munim v. Azar, 648 So. 2d. 145, 154 (Fla. 4th DCA 1994) (newly-formed professional association with same sole

shareholder as former professional association is a continuation of business, and thus, liable for the judgment against former professional association). In Munim, the court stated, "For all intents and purposes, the new P.A. is the old P.A. dressed up with a new name and controlled by the same individual." Id.

44. To avoid liability as a successor corporate entity, the "purchasing corporation must not merely be a 'new hat' for the seller with the same or similar entity or ownership." Id. While having common attributes does not automatically impose liability on a successor corporation, merely repainting the sign on the door and using new letterhead certainly gives the appearance that the new corporation is simply a continuation of the predecessor corporation. See Lab. Corp. of Am. v. Prof'l Recovery Network, 813 So. 2d 266, 270 (Fla. 5th DCA 2002) (citations omitted) (de facto merger occurred where the corporations were governed by a sole officer and shareholder, shared the same attorney and registered agent, conducted the same business, had substantially the same employees and customers, the same telephone and fax numbers, and the same accounting system and computerized databases). The key element of a continuation is a common identity of the officers, directors, and stockholders in the two corporations. Munim, 648 So. 2d at 154.



45. In the case at hand, the LLC is a mere continuation of the citrus-dealing business formerly operated by Marinaro d/b/a Sunny Fresh Citrus Export and Sales Co. The LLC is operated out of the same office, at the same address, and using the same staff as the former DBA. Marinaro retains control of the business as a managing member of the LLC. Contrary to Marinaro's assertions at the final hearing, the LLC was engaged in the same business as the DBA.

46. In this case, the LLC is the DBA "dressed up with a new name and controlled by the same individual." Marinaro did not even bother to change the letterhead or the sign on the door.

47. Both parties seek an award of attorney's fees pursuant to the contracts.<sup>5/</sup> The plain language of the contracts provides for attorney's fees at "both trial and appellate court levels." The parties have not cited any authority for an award of attorney's fees in this administrative proceeding.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Agriculture and Consumer Services enter a final order approving the claim of DP Partners, Ltd., against Sunny Fresh Citrus Export and Sales Co., LLC, in the amount of \$44,032.00.

DONE AND ENTERED this 30th day of October, 2014, in  
Tallahassee, Leon County, Florida.

*Suzanne Van Wyk*

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Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 30th day of October, 2014.

ENDNOTES

<sup>1/</sup> Petitioner's Exhibits 52 and 53 were withdrawn and replaced by Joint Exhibit 1.

<sup>2/</sup> The contract defines "box" as 95 pounds net weight of tangerines.

<sup>3/</sup> The contract was not for a particular number of boxes, but rather for fruit "load by load." In this case, the buyer contracted to purchase all the fruit produced during the 2012-2013 growing season.

<sup>4/</sup> This testimony is likewise inconsistent with Marinaro's testimony that he was not aware that either the DBA or the LLC was purchasing fruit in his absence.

<sup>5/</sup> The contracts provide for an award of attorney's fees to the buyer in the event of seller's breach. Petitioner's request for attorney's fees relies upon section 57.105, Florida Statutes, governing award of attorney's fees in an action to enforce a contract.

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.