

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IMG CITRUS, INC.,

Petitioner,

vs.

Case No. 14-3092

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

Respondents.

RECOMMENDED ORDER

This case came before Administrative Law Judge Darren A. Schwartz for final hearing by video teleconference on September 19, 2014, with sites at Port St. Lucie and Tallahassee, Florida.

APPEARANCES

For Petitioner: Matt Kastensmidt, pro se
IMG Citrus, Inc.
2600 45th Street
Vero Beach, Florida 32967

For Respondent: Kelly Marinaro, pro se
Sunny Fresh Citrus Export
and Sales Co., LLC
2101 Fifteenth Avenue
Vero Beach, Florida 32960

For Respondent Hartford Insurance Company, as surety:

(No appearance)

STATEMENT OF THE ISSUE

Whether Petitioner, IMG Citrus, Inc. ("Petitioner"), is entitled to recover the sum of \$40,075.65, as alleged in the Amended Complaint.

PRELIMINARY STATEMENT

This case commenced with the filing of a citrus "Complaint Form" by Petitioner with the Department of Agriculture and Consumer Services ("Department"), on May 1, 2014. In its initial complaint, Petitioner sought to recover the sum of \$41,179.50. On June 4, 2014, Petitioner filed an Amended Complaint with the Department, seeking to recover the sum of \$40,075.65. Subsequently, Respondent, Sunny Fresh Citrus Export and Sales Co., LLC ("Respondent"), filed its answer with the Department. On July 2, 2014, the Department referred this matter to the Division of Administrative Hearings ("DOAH"), pursuant to section 601.66, Florida Statutes (2013),^{1/} to assign an Administrative Law Judge to conduct the final hearing.

On July 11, 2014, the undersigned issued a Notice of Hearing by Video Teleconference ("Notice"), setting this matter for final hearing on September 19, 2014. At the final hearing, Petitioner presented the testimony of Matt Kastensmidt and Melanie Ressler, and Petitioner's Exhibits 1 through 7 were received into evidence. Respondent presented the testimony of Robert Marinaro

and Melanie Ressler, and Respondent's Exhibits 1 through 6 were received into evidence.

The final hearing was recorded, but no transcript was filed. At the conclusion of the final hearing, the parties agreed that their proposed recommended orders would be filed by October 10, 2014. Petitioner and Respondent timely filed proposed recommended orders, which were given consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner sold Respondent grapefruits, oranges, and tangerines following the 2012-2013 citrus season. The citrus was shipped by Petitioner to Respondent in April-May 2013, and the sales were evidenced by numerous invoices between the parties.

2. Petitioner contacted Respondent on various occasions to request payment on the outstanding invoices, to no avail. On June 30, 2013, Respondent wrote to Petitioner apologizing for "falling in arrears." At that time, Respondent indicated it would make partial payments, without prejudice, as frequently as possible.

3. On September 7, 2013, Respondent again wrote to Petitioner, acknowledging, at that time, an outstanding balance of \$43,543.40. Respondent requested that Petitioner allow it to enter into a promissory note for \$43,543.40, with monthly payments of \$800.00 per month for 54 months, and one final

balloon payment at the end of the term to satisfy the outstanding amount due. Respondent also offered a bagging machine as security for the proposed promissory note. Petitioner rejected Respondent's offer. Contrary to Respondent's contention, no settlement agreement was reached between the parties.

4. At hearing, the parties agreed that there is no dispute as to the amount sought by Petitioner in the Amended Complaint: \$40,075.65. This amount reflects some partial payments made by Respondent on the outstanding invoices after the filing of the initial complaint. Respondent does not deny its failure to pay the outstanding invoices. Respondent does not dispute that the product he received was of acceptable quality.

5. Respondent's principal argument is that Petitioner's claim is untimely because the complaint was not filed with the Department prior to May 1, 2014, as required by section 601.66, Florida Statutes.

6. The evidence adduced at hearing demonstrates that Petitioner's complaint was shipped by Petitioner to the Department via federal express overnight delivery on April 30, 2014. The federal express package containing the complaint was not received by the Department until May 1, 2014. The complaint was not filed with the Department until May 1, 2014, when it was received by the Department. Because the complaint was not filed with the Department before May 1, 2014, it is untimely.

7. At hearing, Petitioner attempted to defend its late filing by contending that the April 30, 2014, shipping date of the federal express package to Respondent is the correct filing date--not May 1, 2014, when the federal express package containing the complaint was received by the Department. In support of Petitioner's position, Mr. Kastensmidt testified, based on hearsay, that he was told by an unidentified employee of the Department, on some unidentified occasion, that the federal express shipping date is what counts, not the date the complaint is actually received by the Department.

8. No one on behalf of the Department testified at the hearing. Furthermore, Petitioner did not identify the person who allegedly made the statement or when the statement was made. The purported statement by an unidentified Department employee, on some unidentified date, is rejected as hearsay and unpersuasive.

CONCLUSIONS OF LAW

9. DOAH has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2014).

10. Section 601.66(1), Florida Statutes, provides, in pertinent part:

(1) Any person may complain of any violation of this chapter by any citrus fruit dealer during any shipping season by filing of a written complaint with the Department of Agriculture at any time before May 1 of the

year immediately after the end of such shipping season. Such complaint shall briefly state the facts, and the Department of Agriculture shall thereupon, if the facts alleged prima facie warrant such action, forward true copies of such 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, either to satisfy the complaint or to answer the complaint in writing, either admitting or denying the liability.

11. Section 601.66(1) clearly and unambiguously requires that a complaint, such as the one in the instant case, be filed with the Department "at any time before May 1 of the year immediately after the end of such shipping season." The statute does not say filed "on" May 1, or provide any indication that the Legislature intended anything other than what it said--that the complaint be filed "at any time before May 1 of the year immediately after the end of such shipping season."

12. Moreover, the statute does not contain any language indicating that the shipping date of a complaint by federal express is deemed the filing date with the Department, even if the complaint is not received by the Department until later. Had the Legislature chosen to require citrus complaints be filed "by" or "on" May 1 of the year immediately after the end of such shipping season, it would have said so. Had the Legislature intended that the shipping date of a federal express package

containing a citrus complaint control the date the complaint is actually received by the Department, the Legislature would have said so. It did not. Accordingly, the complaint is untimely and should be dismissed.

13. Petitioner's argument at hearing that its complaint should be deemed timely filed based on the purported statement of an unidentified employee of the Department, on an unspecified date, is presumably based on the doctrine of equitable tolling. Under the doctrine of equitable tolling, a late-filed complaint should be accepted as timely filed "when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum." Machules v. Dep't of Admin., 523 So. 2d 1132, 1134 (Fla. 1998).

14. In the present case, Petitioner failed to present persuasive evidence that it was misled or lulled into inaction, was in some extraordinary way prevented from asserting its rights, or timely asserted its rights in the wrong forum. Rather, Petitioner merely testified, based on hearsay, that it was told by some unidentified person from the Department, on some unidentified date, that the shipping date is what counts. Petitioner failed to demonstrate that it is entitled to rely on the doctrine of equitable tolling to avoid the deadline to file its complaint before May 1.^{2/}

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner's Amended Complaint be dismissed as untimely.

DONE AND ENTERED this 28th day of October, 2014, in Tallahassee, Leon County, Florida.



DARREN A. SCHWARTZ
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of October, 2014.

ENDNOTES

^{1/} References to Florida Statutes are to the 2013 version, unless otherwise indicated.

^{2/} Notably, section 604.21(1)(a), Florida Statutes, applicable to complaints involving non-citrus agricultural products, provides that:

(1)(a) Any person, partnership, corporation, or other business entity claiming to be damaged by any breach of the conditions of a bond or certificate of deposit assignment or agreement given by a dealer in agricultural products may enter complaint thereof against the dealer and against the surety company, if any, to the department, which complaint shall

be a written statement of the facts constituting the complaint. Such complaint shall be filed within 6 months from the date of sale in instances involving direct sales or from the date on which the agricultural product was received by the dealer in agricultural products, as agent, to be sold for the producer"

Unlike section 601.66(1), however, section 604.21(1)(b), Florida Statutes, allows for the shipping date of a federally expressed complaint to constitute the date of filing of the complaint. Section 604.21(1)(b) provides that:

(1)(b) To be considered timely filed, a complaint together with any required affidavits or notarizations must be received by the department within 6 months after the date of sale by electronic transmission, facsimile, regular mail, certified mail, or private delivery service. If the complaint is sent by a service other than electronic mail or facsimile, the mailing shall be postmarked or dated on or before the 6-month deadline to be accepted as timely filed.

The instant case is governed by section 601.66(1), not section 604.21(1)(b).

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.