

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARK OLIVENBAUM, d/b/a AMR
GROVES, INC.,

Petitioner,

vs.

Case No. 15-1198

REITER CITRUS, INC., AND AUTO
OWNERS INSURANCE CO., AS SURETY,

Respondents.

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held in Bartow, Florida, on May 13, 2015, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mark Steven Olivenbaum, pro se
AMR Groves, Inc.
17290 Commonwealth Avenue, North
Polk City, Florida 33868

For Respondent: Bradley Reiter, pro se
Reiter Citrus, Inc.
1848 Woodpoint Drive
Winter Haven, Florida 33882

STATEMENT OF THE ISSUE

What amount, if any, is owed by Reiter Citrus, Inc., to Mark Olivenbaum, d/b/a AMR Groves, Inc., for oranges purchased pursuant to contract entered by the parties on November 5, 2014.

PRELIMINARY STATEMENT

Mark Olivenbaum, d/b/a AMR Groves, Inc. (Petitioner), filed with the Department of Agriculture and Consumer Services a Grower Complaint against Reiter Citrus, Incorporated (Respondent). The Grower Complaint alleges that Respondent owes Petitioner \$11,600 for Sunburst, Orlando, and tangelo variety oranges (collectively referred to as oranges) sold by Petitioner to Respondent pursuant to contract entered by the parties on or about November 5, 2014. Respondent claims that it was not obligated to perform under the contract because the oranges were damaged as a result of citrus greening.

On or about March 9, 2015, this matter was referred to the Division of Administrative Hearings (DOAH) for a disputed-fact hearing which, as previously noted, was held on May 13, 2015.

At the hearing, Mr. Mark Olivenbaum and Mrs. Kristin Olivenbaum testified on behalf of Petitioner. Mr. Bradley Reiter was the only witness to testify on behalf of Respondent. Petitioner's Exhibits 1, 5, and 7 through 9 were admitted into evidence. Respondent's Exhibits 1 and 2 were also admitted into evidence.

A transcript of the disputed-fact hearing was not filed in this matter. Petitioner filed a Proposed Recommended Order, and

the same was considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. A "dealer in agricultural products" is defined as a person, partnership, corporation, or other business entity, "engaged within this state in the business of purchasing, receiving, or soliciting agricultural products from the producer . . . for resale or processing for sale."

§ 604.15(2), Fla. Stat. (2014).^{1/} Respondent is licensed as a dealer in agricultural products.

2. Petitioner is a "producer" for purposes of sections 604.15 through 604.34, Florida Statutes. See § 604.15(9), Fla. Stat. (defining "producer" as "any producer of agricultural products produced in the state").

3. On November 5, 2014, Petitioner and Respondent entered into a written contract for the purchase of oranges from Petitioner's grove. The written contract provides that the Sunburst variety fruit would be purchased for \$16.00 "per on tree box." The written contract is silent as to the purchase price of the tangelos and the Orlando variety oranges. As for the price of these items, the parties verbally agreed to a price of \$4.00 per box. The verbal and written contracts are collectively referred to as the "contract."

4. Petitioner is an experienced producer of agricultural products. According to Petitioner, the fruit at issue was essentially ready for picking when the parties entered into their contract on November 5, 2014. Petitioner's testimony as to the maturity of his fruit is supported by information from the Horticultural Sciences Department, University of Florida/IFAS Extension (HS168), which states that Sunburst tangerines will, in most years, "reach maturity by mid-November and will remain acceptable through late December."

5. Respondent, prior to entering into the contract with Petitioner, inspected the oranges in Petitioner's grove. Respondent approved the oranges for purchase.

6. Within days of signing the contract, Petitioner spoke with Respondent about a schedule for the picking of the oranges. Respondent was non-committal as to an exact time-frame for picking the oranges but did inform Petitioner that he would send someone to Petitioner's grove to pick the oranges "within a few days." After a few days had passed, and the oranges remained unpicked, Petitioner again contacted Respondent and like before, Respondent told Petitioner that someone would be out to pick the oranges "within a few days." This pattern between Petitioner and Respondent continued for several weeks and at no time did Respondent arrange to have the oranges picked from Petitioner's grove.

7. The testimony from the final hearing establishes that Respondent intended to purchase Petitioner's fruit and then re-sell the fruit to other buyers. However, Respondent was unable to find a buyer for the fruit that he was contractually obligated to purchase from Petitioner because, according to Respondent, "the fruit was too small to pack due to citrus greening." Respondent claims that his contract with Petitioner provides that Respondent was obligated to purchase Petitioner's oranges only if Respondent found a buyer for the oranges. Contrary to Respondent's testimony, a review of the contract reveals no such contingency.

8. Respondent claims that he is relieved of his obligation to perform under the contract because the oranges were compromised due to citrus greening. Specifically, Respondent cites to the "HAZARDS" provision of the contract which provides, in part, that "in the event said fruit shall become damaged by cold, hail, fire, windstorm or other hazard, [Respondent] shall have the right to terminate th[e] contract." Respondent claims that citrus greening is a condition that falls within the "other hazard" provision of the contract. Respondent's reliance on this contractual provision is misplaced because, as previously noted, Respondent was well aware of the condition of the oranges when he entered into the contract with Petitioner for the purchase of the same. The credible evidence establishes that there was not a

material change in the condition of the oranges from the time of the execution of the contract to the time when the oranges should have been picked by Respondent.

9. Because Respondent did not pick any oranges from Petitioner's grove, Petitioner, in calculating his losses resulting from Respondent's non-performance, reasonably determined that Respondent, had he met his contractual obligations, would have picked 700 boxes of Sunburst tangerines and 100 boxes (combined) of the Orlando and tangelo fruit. Petitioner, in quantifying his likely crop yield for the oranges covered by the contract with Respondent, utilized results from previous crop yields as well as a general assessment of the state of his grove in November and December 2014.

CONCLUSIONS OF LAW

10. DOAH has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569, 120.57(1), and 604.21(6), Fla. Stat.

11. The Florida Department of Agriculture and Consumer Services is the state agency responsible for licensing dealers in agricultural products and investigating and taking action on complaints against such dealers. §§ 604.15 through 604.34, Fla. Stat.

12. The definition of "agricultural products" includes "the natural products of the . . . farm, nursery, grove, orchard,

vineyard, [and] garden . . . produced in the State."

§ 604.15(1), Fla. Stat. The oranges grown by Petitioner in his grove are "agricultural products" within the meaning of section 604.15(1).

13. The complainant in a proceeding initiated pursuant to section 604.21(1) has the burden of proving by a preponderance of the evidence entitlement to the amounts sought to be recovered.

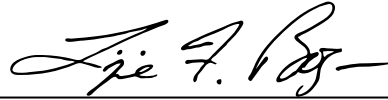
14. Petitioner has satisfied its burden of proof. As set forth in the Findings of Fact, Respondent owes Petitioner \$11,600 ((700 boxes x \$16.00 = \$11,200) + (100 boxes x \$4.00 = \$400)) for the fruit at issue.^{2/}

15. Section 604.21(1)(a) provides in part that "[b]efore a complaint can be processed, the complainant must provide the department with a \$50.00 filing fee" that shall be reimbursed to the complainant "[i]n the event the complainant is successful in proving the claim." Having prevailed in this matter, Petitioner is entitled to recoup its filing fee from Respondent.

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 finding that Reiter Citrus, Inc., is indebted to Mark Olivenbaum, d/b/a AMR Groves, Inc., in the amount of \$11,650 (includes filing fee).

DONE AND ENTERED this 9th day of June, 2015, in Tallahassee,
Leon County, Florida.



LINZIE F. BOGAN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of June, 2015.

ENDNOTES

^{1/} All subsequent references to Florida Statutes will be to 2014,
unless otherwise indicated.

^{2/} Respondent claims that Petitioner's recovery is limited by the
liquidated damages provision of the contract. This provision
provides that "[i]t is further expressly understood that if for
any reason the fruit is not picked or taken by [Respondent], that
amount of the advance payment shall be forfeited to [Petitioner]
as sole liquidated damages hereunder, except as agreed in other
paragraphs of this contract." Because the damages resulting from
Respondent's breach of the contract are "readily ascertainable,"
coupled with the fact that there is no evidence that Respondent
gave Petitioner an advance payment towards the purchase of the
oranges, the liquidated damages provision in the instant contract
is not enforceable. See Lefemine v. Baron, 573 So. 2d 326 (Fla.
1991); Hutchison v. Tompkins, 259 So. 2d 129 (Fla. 1972); Hyman
v. Cohen, 73 So. 2d 393 (Fla. 1954).

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.