

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALICE KENYON,

Petitioner,

vs.

Case No. 17-0881

WHOLESALE INVENTORY NETWORK,
LLC,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Mary Li Creasy in Port St. Lucie, Florida, on April 26, 2017.

APPEARANCES

For Petitioner: Alice B. Kenyon, pro se
5668 Travelers Way
Fort Pierce, Florida 34982-3989

For Respondent: Kenneth Hamner, Esquire
The Entrepreneur Law Center, P.L.
250 North Orange Avenue, Suite 600
Orlando, Florida 32801

STATEMENT OF THE ISSUE

Whether Respondent, a "seller of travel," owes Petitioner \$5,400.00 for failing to provide services to Petitioner pursuant to a contract between the parties.

PRELIMINARY STATEMENT

On January 23, 2017, Petitioner filed a Hearing Information Request to the Florida Department of Agriculture and Consumer Services, Division of Consumer Services (the Department), seeking payment on a surety bond by National Specialty Insurance Company, on behalf of Respondent, Wholesale Inventory Network, LLC (WIN), naming the Department as obligee. The Hearing Information Request was forwarded to the Division of Administrative Hearings (DOAH) on February 10, 2017.

The final hearing was originally scheduled on March 22, 2017, but was continued until April 26, 2017, due to a requested change in location. The hearing went forward as scheduled. Petitioner testified on her own behalf and presented the testimony of one additional witness, Phyllis Grant. Petitioner's Exhibit, pages 2 through 17 and 21, and the supplemental telephone records were admitted.

WIN presented three witnesses: Jonathan Britt, Vice President of Sales; Dae Byun, Member Services Agent; and Deborah Brown, owner of WIN. WIN's Exhibits 1 through 4 and 6 were admitted.

The Transcript of the final hearing was filed on June 5, 2017. Petitioner timely filed a Proposed Recommended Order which was considered in the preparation of this Recommended Order. WIN did not file a post-hearing submittal. Unless

otherwise indicated, citations to the Florida Statutes or rules of the Florida Administrative Code refer to the 2016 versions.

FINDINGS OF FACT

1. WIN is a "seller of travel" as defined by section 559.927(11), Florida Statutes.

2. On January 31, 2016, Petitioner and her sister, Julie Loftus, attended an Italian festival in St. Lucie County where they both entered a drawing to win a free "getaway" vacation.

3. The sisters were contacted within a few days and told they had won, but to collect their prize, they had to attend a meeting at a Holiday Inn in Port St. Lucie.

4. On February 13, 2016, the sisters attended the presentation that was put on by WIN. They were provided a brochure regarding the travel services offered by WIN and were impressed by the presentation. WIN offered a "lifetime of worry-free travel at your fingertips" with travel software to provide 24/7 access to booking, and significant discounts on travel services, such as hotel stays, cruises, excursions, dining, car rentals, and access to a "live personal travel concierge." The software does not provide on-line booking for airfare, private homes, yacht, or recreational vehicle rentals.

5. Although neither sister is adept at using the Internet or computers, they were very interested in having a personal travel concierge, particularly because they intended to travel to

Rome later in the year. After the presentation, they jointly purchased and executed a "Reservation Services Software Licensing Agreement" (Agreement) for a "lifetime License Fee" of \$5,400.00. The price included a \$1,000.00 discount in lieu of a certificate for a free "getaway" that the sisters had won.

6. In pertinent part, the Agreement provides:

This Agreement is made with reference to the following facts:

A The Licensee desires to license software from the Licensor to obtain access to vacation packages, nightly stays, bonus weeks, fantasy getaways, activities and excursions, cruises, car rentals, golf discounts, hotels and luxury condominium and villa rentals. The Licensee acknowledges that the network benefits may be changed from time to time.

* * *

6 Annual Software Renewal Fee.

In addition to the purchase price, the Licensee does hereby agree to pay an Annual Software Renewal Fee of \$199 to SaveOn Resorts, LLC (whose phone number is 858-649-1481), with the first payment to be paid twelve (12) months from the purchase date of this Licensing Agreement. . . .

a. Freeze Option.

The Licensee acknowledges that they have the option to freeze their license. By doing so, they understand that although their License is Lifetime, during the freeze period, they will not have access to the website or Reservations Hotline. The Licensee may freeze their license without penalty by

contacting SaveOn Resorts at least 7 days prior to their Annual Renewal Fee due date.

* * *

8 Discount Variation.

All benefits and discounts conferred through this Agreement vary greatly based on the characteristics of the vacation unit or type, the time of year, space availability, and/or the rates charged by those parties listing the accommodations for rent. The Licensee acknowledges that he/she has been advised that while some discounts may be significant, these same accommodations may not enjoy deep discounts at other times and that deep discounts are not available for some vacation units or types at any time. The Licensee acknowledges that the value in this License is expected to be realized over time and that the License Fee is not guaranteed to be recovered on a single vacation, the first year, if the Licensee does not take vacations, or if the vacation choices are not tailored to deep discount offerings, but rather are contingent on the frequency of the use of the software.

9 Assistance of Personal Live Travel Concierge and Website Access.

The Licensee shall be provided 24 hour access to the internet website **www.planwithWIN.com** and may book travel arrangements through this website 24 hours a day, 7 days a week, with the exception of those travel arrangements which require the coordination of booking assistance with travel vendors, such as cruise lines. The Licensee shall also be provided access to a Personal Live Travel Concierge Agent at **1-858-649-1481** during the hours of 9am through 9pm EST, Mondays through Fridays, and 10am through 4pm EST, Saturdays, at no additional charge. The hours of availability for the Live Travel Concierge Agent are subject to change without notice.

11 Live Online Software Demonstration and Tutorial.

The Licensee acknowledges that he/she has had direct access to, including a live demonstration online, and a complete tutorial covering usage of the software program operation prior to the execution of this Agreement and was able to review the benefits with a sales agent of the Licensor. The Licensee acknowledges that they are comfortable with the operation of online software program. The Licensee acknowledges that the licensor has informed him/her that at any time during normal business hours, the Licensee may also call SaveOn Resorts at (858)649-1481 to schedule an additional tutorial for assistance with the operation of the software at no additional cost.

7. On February 18, 2016, Petitioner and her sister spoke by telephone to Dae Byun, WIN's Member Services Agent, who walked them through the online software tutorial. By the end of the call with Mr. Byun, the sisters were familiar with the software capabilities and how to use it.

8. Mr. Byun asked the sisters if they knew where their first trip would be. They explained that they intended to travel to Rome in August or September 2016 to attend a ceremony at the Vatican for a friend who was celebrating his 50th anniversary as a priest. Mr. Byun told the sisters that when they call to make travel arrangements, they should dial his direct line in Orlando because he had been a travel agent for over 30 years, was very familiar with Italy, and could easily assist them. Mr. Byun told

the sisters that when they called, they should speak exclusively with him and that he worked Monday through Friday, and was not available on weekends. Because both sisters are retired, these arrangements were fine with them.

9. During this same call, the sisters asked Mr. Byun to begin working on their flight from Philadelphia to Rome on August 31, 2016. They advised that they did not need hotels in Rome because a friend had made arrangements for them to stay in a convent bed-and-breakfast. However, they sought hotels in Venice and Florence on September 9 and September 18 through 22, 2016, respectively. Mr. Byun spoke knowledgeably about hotels and travel in Italy, and the sisters were pleased.

10. Petitioner used WIN's personal travel concierge to book a one-night hotel room stay at a Microtel in Leesburg, Florida, for \$65.00 during the week of February 27, 2016.

11. During the months of March and April 2016, the sisters made multiple calls to WIN's Orlando office in an attempt to speak with Mr. Byun to schedule their Rome trip. Most times they called, they were told he was out of the office or training new customers on the software. Because of Mr. Byun's initial instruction to speak only to Mr. Byun regarding the trip to Rome, they did not want to speak with another member services agent for this trip.

12. On or about March 23, 2016, Petitioner also called to arrange a rental cabin in the North Carolina Mountains for a girlfriends' gathering. Petitioner was told that WIN did not have access to discounts and reservations for private cabins, but she was provided information on a condominium and hotel room options in the area. Because Petitioner found the choices provided by WIN unsuitable for her group, she chose to make her own arrangements.

13. During March and April 2016, the sisters spoke to Mr. Byun regarding the Italy trip once or twice. WIN sent four e-mails to the sisters on April 15 with a tentative flight schedule, hotel options, and train information for Italy.

14. The sisters were not pleased with the initial flight itinerary because it called for a layover on the way from Philadelphia to Italy. They were concerned that their luggage was more likely to be lost with a layover and asked for a direct flight.

15. According to Petitioner, her sister had a follow-up conversation with Mr. Byun during which she selected a direct flight, provided credit card information, and asked him to book the flight.

16. Mr. Byun testified that he was told at that time that they were not sure of their travel dates. This was a preliminary search only. He has no notes reflecting credit card or any

additional information he would have needed to book the flight, such as dates of birth, passport numbers, frequent flyer account numbers, and seat preferences. Mr. Byun credibly testified that if he booked airline tickets, that would be done in one phone call with the client on the line because airfares change within minutes. Mr. Byun would not quote an airfare with the intention of booking a flight at a later time, even on the same date. Mr. Byun had no further conversation with the sisters regarding the Italy trip.

17. According to Petitioner, on May 24, 2016, her sister received her credit card statement and realized there was no charge for airline tickets. The sisters were panicked because they had learned Mother Teresa was being canonized a saint in Rome at the same time as their trip and flights and hotels were filling up quickly. The sisters attempted to reach Mr. Byun by telephone to demand an explanation. Although they did not reach Mr. Byun, another WIN employee explained that there was no record of reservations of the proposed trip to Italy. Within a few days, the sisters opted to use the services of AAA to book the trip to Italy.

18. The sisters sent a letter by e-mail on May 31, 2016, expressing their extreme disappointment and asked "What are we paying you for?" They received no response. They subsequently used the services of the Glanz law firm to send WIN a demand

letter seeking a refund of the \$5,400.00. They also filed a complaint with the Better Business Bureau and the Department. Petitioner and her sister traveled to Italy and Greece from August 31 through September 23, 2016, without the assistance of WIN.

19. Beginning in February 2017, Petitioner's sister began receiving correspondence and frequent automated calls from WIN that their annual maintenance fee of \$199.00 is due. Although Petitioner and her sister have made their intention clear that they do not wish to use the services of WIN going forward, they have not asked to "freeze" their account as is provided for in the Agreement.

CONCLUSIONS OF LAW

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

21. Section 559.926, et. seq., is the "Florida Sellers of Travel Act." A "seller of travel" is defined in section 559.927(11) as:

[a]ny resident or nonresident person, firm, corporation, or business entity that offers, directly or indirectly, prearranged travel or tourist-related services for individuals or groups, including, but not limited to, vacation packages, or vacation certificates in exchange for a fee, commission, or other valuable consideration. The term includes such person, firm, corporation, or business

entity who sells a vacation certificate to third-party merchants for a fee, or in exchange for a commission, or who offers such certificates to consumers in exchange for attendance at sales presentations. The term also includes any business entity offering membership in a travel club or travel services for an advance fee or payment, even if no travel contracts or certificates or vacation or tour packages are sold by the business entity.

22. It is undisputed that WIN is a "seller of travel." Sellers of travel are required to be registered with the Department in order to transact business in Florida. As part of the registration process, sellers of travel must provide a performance bond in an amount set by the Department. See § 559.929(1), Fla. Stat.

23. A consumer who is injured by a seller of travel may bring an action to recover against the bond to be conducted pursuant to chapter 120. § 559.929(3), (4), Fla. Stat. In this case, Petitioner timely filed her claim against the bond seeking damages for alleged breach of contract and fraudulent misrepresentation.

Breach of Contract

24. To prevail on a breach of contract claim, a claimant must prove: (1) a valid contract existed; (2) a material breach of the contract; and (3) damages. Deauville Hotel Mgmt., LLC v. Ward, 2017 Fla. App. LEXIS 7810 (Fla. 3d DCA 2017); Burlington &

Rockenbach, P.A. v. Law Offices of E. Clay Parker, 160 So. 3d 955, 960 (Fla. 5th DCA 2017).

25. Petitioner and her sister entered into a valid contract, the Agreement, with WIN for a software licensing agreement on February 13, 2016. Shortly thereafter, they received the on-line tutorial regarding the use of the software, and a toll-free number to use for personal concierge travel assistance.

26. As described by Petitioner, "We signed a contract and paid \$5400 and Wholesale Inventory Network, WIN, offered, what the contract said, that their duty was to provide access to a website, 24-hour access to a website and also access to a personal live travel concierge who would listen to what our requests were and produce a plan."

27. Petitioner alleges a "material breach" of the contract because her travel arrangements were not "worry free." Nor was Mr. Byun, her software trainer and Member Services Agent, readily available to plan her trip to Italy.

28. To establish a material breach, the party alleged to have breached the contract must have failed to perform a duty that goes to the essence of the contract and is of such significance that it relieves the injured party from further performance of its contractual duties. Burlington, id. (citing Covelli Family, L.P. v. ABG5, L.L.C., 977 So. 2d 749, 752 (Fla.

4th DCA 2008)); Sublime, Inc. v. Boardman's Inc., 849 So. 2d 470, 471 (Fla. 4th DCA 2003). Trivial noncompliance and minor failings do not constitute material breaches. Covelli Family, 977 So. 2d at 752.

29. Notably absent from the Agreement is a designation of a particular individual as a personal travel concierge. Rather, customers are directed to use the toll-free number for assistance. The sisters did not know Mr. Byun at the time of signing the Agreement. Although Mr. Byun represented he would be the best person to assist them with their Italy trip, the sisters unreasonably refused to plan the travel with anyone else at WIN despite Mr. Byun's limited availability.

30. WIN fulfilled the essence of the contract. Its software was available 24/7 for Petitioner's use. Petitioner used the services of WIN's travel concierge service to book a hotel night and to explore accommodations in North Carolina.

31. Although the sisters purchased the Agreement with the intention of first using it for booking their flights and accommodations to Italy, the fact that the trip ultimately was not booked through WIN does not evidence a material breach. WIN provided a proposed flight itinerary and possible hotel accommodations at a discount. It was the responsibility of Petitioner and her sister, not WIN, to take the necessary steps

to finalize their plans by providing credit card information and all other relevant booking information.

32. Notably absent from the hearing was the testimony of Petitioner's sister, Ms. Loftus, who Petitioner contends is the person who gave Mr. Byun the authorization and credit card to book the air travel to Italy. In Ms. Loftus' absence, Petitioner's testimony, that Mr. Byun had the information necessary to book the travel, is uncorroborated hearsay.

33. Petitioner also suggests that the Agreement was breached because she did not receive a discount of what she believes was the standard room rate for the Leesburg hotel stay. However, the Agreement, paragraph 8, is very clear that discounts are variable depending on multiple factors and the customer will enjoy more savings the more frequently they use the services provided by the software.

34. Petitioner complains that the one-night booking in Leesburg was not worth \$5,400.00. However, Petitioner testified that, "we paid WIN \$5,400 for them to plan our trips for the rest of our lives." If Petitioner and her sister are damaged, it is through their unilateral refusal to use WIN's services. If the sisters pay the \$199.00 annual fee, it is certainly possible for them to recoup the value paid by future discounts on travel, as is contemplated by the Agreement.

Fraudulent Misrepresentation

35. To prevail on a claim for fraudulent misrepresentation, Petitioner must prove the following elements: (1) a false statement concerning a material fact; (2) the representor's knowledge that the representation is false; (3) an intention that the representation induces another to act on it; and (4) consequent injury by the party acting on reliance on the representation. Johnson v. Davis, 480 So. 2d 625 (Fla. 1985).

36. Petitioner asserts that the fraudulent misrepresentation was the sales pitch, "a lifetime of worry-free travel" and the availability of a personal travel concierge.

37. If Petitioner and her sister use the services provided for by the software licensing agreement, it is possible they can enjoy "worry-free travel" for life. Unfortunately, they unilaterally attempted to cancel the contract when they did not get satisfactory assistance from Mr. Byun in finalizing their plans for the Italy trip. The fact that the sisters were worried about their travel arrangements was not due to any material misrepresentation that induced them to enter into the Agreement. As discussed above, there was no statement at the time of the purchase that Mr. Byun, or any other specific individual, would serve as the only point of contact for travel assistance.

38. It is indeterminable from the evidence in this case whether travel arranging with WIN is "worry-free" because

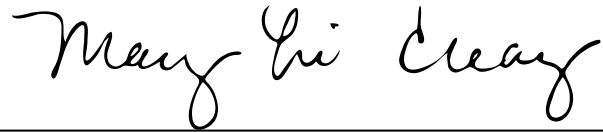
Petitioner and her sister failed to avail themselves of the services as offered and agreed upon. While it is understandable that someone who is not computer savvy would rely heavily on the concierge services offered by WIN, it is not understandable why Petitioner and her sister waited more than a month after they claim they had flights arranged with Mr. Byun to look for confirmation of those details. Nor does it make sense that they would insist only on speaking to Mr. Byun when they were having difficulty reaching him. It simply is not credible and does not amount to any fraudulent inducement in the sale of the Agreement.

39. Even assuming arguendo, that Petitioner was sold the Agreement through fraudulent misrepresentation, Petitioner failed to show any damages. The \$5,400.00 paid was not for any specific trip but rather the software and concierge services that were at all times available. Petitioner and her sister ultimately made alternative arrangements for their trip. No evidence was presented that they paid a premium to arrange travel outside of WIN. Further, Petitioner and her sister did not utilize the price match guarantee available through WIN that would have compensated them for any difference.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner Alice Kenyon's claim against WIN and the surety bond be DENIED.

DONE AND ENTERED this 8th day of August, 2017, in
Tallahassee, Leon County, Florida.



MARY LI CREASY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of August, 2017.

COPIES FURNISHED:

W. Alan Parkinson, Bureau Chief
Bureau of Mediation and Enforcement
Department of Agriculture and
Consumer Services
Rhodes Building, R-3
2005 Apalachee Parkway
Tallahassee, Florida 32399-6500
(eServed)

Tina Robinson
Bureau of Mediation and Enforcement
Department of Agriculture and
Consumer Services
Rhodes Building, R-3
2005 Apalachee Parkway
Tallahassee, Florida 32399-6500
(eServed)

Alice B. Kenyon
5668 Travelers Way
Fort Pierce, Florida 34982-3989
(eServed)

Kenneth Hamner, Esquire
The Entrepreneur Law Center, P.L.
250 North Orange Avenue, Suite 600
Orlando, Florida 32801
(eServed)

Tom A. Steckler, Director
Division of Consumer Services
Department of Agriculture and
Consumer Services
Mayo Building, Room 520
407 South Calhoun Street
Tallahassee, Florida 32399-0800

Stephen Donelan, Agency Clerk
Division of Administration
Department of Agriculture and
Consumer Services
Mayo Building, Room 509
407 South Calhoun Street
Tallahassee, Florida 32399-0800
(eServed)

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.