

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARY PAGE AND JOHN ELKINS,

Petitioners,

vs.

Case No. 18-2979

AXIS GETAWAYS SYSTEMS, LLC, AND
TRAVELERS CASUALTY AND SURETY
COMPANY OF AMERICA, AS SURETY,

Respondents.

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this matter on July 25, 2018, in St. Augustine, Florida, before Yolonda Y. Green, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (Division).

APPEARANCES

For Petitioner: John E. Elkins, pro se
Mary Page, pro se
Apartment 1605
7507 Beach Boulevard
Jacksonville, Florida 32216-3053

For Respondent: Bryan Greiner, owner, pro se
Axis Getaway Systems, LLC
912 Ocean Palm Way
St. Augustine, Florida 32020

STATEMENT OF THE ISSUE

Whether Respondent, a "seller of travel," owes Petitioners a refund for misrepresentation of travel services offered pursuant to an agreement between the parties.

PRELIMINARY STATEMENT

On April 10, 2018, Petitioners, John E. Elkins and Mary E. Page, filed a Sellers of Travel Claim Affidavit with the Florida Department of Agriculture and Consumer Services, Division of Consumer Services (Department), seeking payment on a surety bond by Travelers Casualty and Surety Company of America on behalf of Respondent, Axis Getaways Systems, LLC (Axis or Respondent), naming the Department as the obligee. Axis requested a formal hearing and this matter was referred to the Division.

This matter was scheduled for hearing on July 25, 2018, and it commenced as scheduled. During preliminary matters, Petitioners raised an issue regarding their account being deactivated. However, the issue was not the subject of Petitioners' complaint filed with the Department. Therefore, whether the account was active is not an issue properly before the undersigned and will not be considered herein. In addition, Respondent requested that this matter be dismissed. Respondent argued that Petitioners' complaint was closed by the Department and, thus, this matter should be dismissed. However, Respondent

did not offer sufficient evidence to support its claim that the case was closed. Therefore, the Motion to Dismiss is denied.

Petitioners testified on their own behalf. Petitioners offered Exhibits 1 through 4, which were admitted into evidence. Respondent presented the testimony of Jonicar Cruz. Respondent also offered Exhibits 1 through 3, which were admitted into evidence.

The proceeding was recorded by a court reporter, but the parties did not order a copy of the transcript. Petitioners timely filed a Proposed Recommended Order, which was considered in the preparation of this Recommended Order. Axis 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 2017 edition, which were in effect when the agreement was entered.

FINDINGS OF FACT

1. Axis is a "seller of travel" and at all times material to this matter, was located in St. Augustine, Florida.

2. On or about October 8, 2017, Petitioners attended a presentation that was conducted by Axis. Petitioners were enthusiastic about the travel service and were impressed by the presentation. Petitioners frequently traveled to trade shows and believed the services would help reduce travel costs. They

were particularly interested in vacation packages because they intended to travel to Cancun, Mexico. During the presentation, they were told of the bonus week fee of \$97.00. Ms. Page asked specific questions about the costs for a vacation package for Cancun and whether there would be any hidden or additional fees. The presenter assured Petitioners there would be no hidden or additional fees.

3. After the presentation, Petitioners jointly executed a Reservation Services Agreement (Agreement) for a non-exclusive license to access the travel network for a fee of \$4,394.00. The fee was paid in two installments of \$2,000.00 and one installment of \$394.00.

4. The agreement provides, in pertinent part, as follows:

Customer desires to enter into this Agreement reservation services applicable to vacation packages, nightly stays, bonus weeks, fantasy getaways, activities and excursions, cruises, car rentals, golf discounts, dining discounts, hotels and luxury condominium and villa rentals ("Network Benefits"). The Customer acknowledges that the Network Benefits may be changed from time to time.

* * *

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 through

the Network. Customer 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. Customer acknowledges that the value in this License is expected to be realized over time contingent on the frequency of the use and that the Purchase Price is not guaranteed to be recovered on a single vacation, the first year, if Customer does not take vacations, or if the vacation choices are not tailored offerings.

* * *

17. Member Best Price Guarantee

Customer shall receive the Best Price Guarantee if Customer finds lower prices on Equal Arrangements through a competing vendor. To access the guarantee, Customer must secure a confirmed reservation through the Network that displays the Member Price Guarantee checkmark, pay for the reservation in full and receive a valid confirmation number. The sections on the website included in the Best Price Guarantee are vacations (i.e. Accommodations, Cruises, Vacation Packages, and Worldwide Tours) and vacation add-ons (i.e. Car Rentals, Activities and Golf). Airfare not included. Eligible claims must be submitted within 24 hours from the time the original fully paid reservation is made and meet all the Terms and conditions listed in full on the Website, must be in US dollars, must be an identical comparison to what was purchased and must be publicly viewable via the internet (i.e. the general public must be able to view the rate on a website, as it does not apply to consolidator fares, fares that have been acquired through auction or bid, or any Internet fares that cannot be independently verified as to the price and exact itinerary) and available and bookable

(i.e. the rate is currently available and can be reserved online). Equal Travel Arrangements shall be defined as the exact same arrival and departure dates, the exact same property, the exact same room or cabin classification, the exact same room or cabin size, the exact same cruise line, and the exact same itinerary. Reservations excluded from the Best Price Guarantee include Non-Refundable reservations, Airfare and reservations made or purchased with Reward Credits in full or in part. If the claim is found to be valid, Customer will be credited with 110% of the difference to (sic) in the form of Reward Credits.

* * *

25. Entire Agreement

This instrument contains the entire agreement of the parties with respect to the subject matter hereof and supersedes all prior agreements, written or oral, with respect to such subject matter. It may not be changed orally but only by an agreement in writing signed by the party against whom enforcement of any waiver, change, modification, extension or discharge is sought.

* * *

By signing below, the parties to hereby execute this Agreement on the Execution Date of this Agreement as identified herein. The Licensee acknowledges and agrees that this Agreement is subject to all terms and conditions set forth herein. The Licensee further acknowledges having read the entire Agreement and agreed to each of its provisions prior to signing below.

* * *

**YOU HAVE THE RIGHT TO CANCEL THIS CONTRACT
AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD**

(3) CALENDAR DAY AFTER THE DATE OF THIS CONTRACT. UPON CANCELLATION, YOU WILL RECEIVE A FULL REFUND, WITHOUT ANY CHARGES OR PENALTY, WITHIN TEN (10) DAYS UNLESS SOONER REQUIRED BY APPLICABLE LAW. THIS RIGHT IS NONWAIVABLE. TO EXERCISE YOUR RIGHT TO CANCEL, YOU MUST SEND A WRITTEN NOTICE STATING THAT YOU DO NOT WISH TO BE BOUND BY THIS CONTRACT. THE NOTICE MAY BE SENT BY EMAIL, FACSIMILE: 713-535-9239, OR BY DEPOSIT FIRST-CLASS POSTAGE PREPAID, INTO THE UNITED STATES MAIL: 13416 SOUTHSORE DR. CONROE, TX 77304.

5. In November 2017, Petitioners used the network software for the first time. Petitioners searched for accommodations in Cancun, Mexico at an all-inclusive resort. The resort had a price of \$129.00 instead of \$97.00 and a mandatory resort fee in the amount of \$135.00 to \$185 per person per day. Petitioners found accommodations at three different all-inclusive resorts, which also required an additional mandatory resort fee. While rooms were available for the price offered by using the software, Petitioners were dissatisfied because the resorts required a resort fee.

6. At an unknown time after using the software, Petitioners called Respondent but did not receive a return call. On December 14, 2017, Petitioners sent text messages to Jonicar Cruz seeking a refund because the service was not what was represented to them at the presentation. Ms. Cruz offered to assist Petitioners with the software program. Ms. Cruz also directed Petitioners to contact another staff member, as she was

no longer an employee of the company at that time. Petitioners' calls and emails to the other Axis staff member were left unanswered.

7. On February 7, 2018, Petitioners filed a complaint with the Better Business Bureau, and on February 13, 2018, Petitioners filed a complaint with the Office of Citizen Services, Florida Attorney General's Office, and the Better Business Bureau. In April 2018, Petitioners filed a complaint with the Department.

8. Petitioners admitted that they did not submit a written letter of cancellation of the agreement during the three-day cancellation period. Ms. Cruz testified that she did not receive any written request to cancel the agreement during the cancellation period.

9. Ms. Cruz also testified that while she could not affirm certain representations made by the presenter, she explained to Petitioners the process for the price match guarantee, and that a resort fee may be associated with all-inclusive resorts.

CONCLUSIONS OF LAW

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

11. Section 559.926, et. seq., Florida Statutes, 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.

12. It is undisputed that Axis 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.

13. A consumer who is injured by a seller of travel may bring an action to recover against the bond pursuant to chapter 120. § 559.929(3) and (4). In this case, Petitioners

timely filed their claim against the bond seeking damages for fraudulent misrepresentation.

14. To prevail on a claim for fraudulent misrepresentation, Petitioners 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).

15. Petitioners assert that the fraudulent misrepresentation was the sales pitch regarding a certain amount for travel accommodations and no additional fees.

16. Petitioners attempted to reserve a room at an all-inclusive resort. While Petitioners were dissatisfied with the prices for rooms and comparative prices with other websites, they did not avail themselves of the discount guarantee. They then sought to cancel the contract when they learned about the additional resort fees for an all-inclusive resort. Ms. Cruz testified that she advised Petitioners about additional fees that may be charged by the individual hotels before they signed the agreement.

17. Notably absent from the hearing was the testimony of the presenter who pitched the travel services to Petitioners.

In the presenter's absence, Petitioners' testimony, that the presenter assured them that there would be no additional fees, is uncorroborated hearsay.

18. Petitioners also suggest that Respondent engaged in misrepresentation because they were offered prices that were not the discount they believed to be comparable to other rates. However, paragraph 8 of the Agreement is very clear that discounts are variable depending on multiple factors, and that the customer will enjoy more savings the more frequently they use the services provided by the software.

19. Furthermore, Petitioners' primary complaint was based on the additional resort fees. However, the travel service was not only for hotel stays, but it was for various other services e.g., car rentals, dining discounts, and golf discounts.

20. The evidence in this case does not demonstrate that Petitioners were induced to enter the Agreement. It seems unreasonable that Petitioners, who are frequent travelers, would rely on a statement made by a representative that a hotel would not have independent fees associated with a hotel stay. As for the price difference for the hotel room, Petitioners did not avail themselves of the price discount guarantee to obtain the best price. As a result, Petitioners claim does not rise to the level of fraudulent inducement in the sale of the Agreement.

21. Assuming arguendo that Petitioners were sold the Agreement through fraudulent misrepresentation, Petitioners failed to show any damages. The \$4,394.00 paid was for the software and concierge services that were available to Petitioners. No evidence was presented that they paid for any hotel or vacation package outside of the Axis network. Further, Petitioners did not utilize the price match guarantee available through Axis that would have compensated them for any price difference for a hotel.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioners, John Elkins and Mary Page's, claim against Axis and the surety bond be DENIED.

DONE AND ENTERED this 4th day of September, 2018, in Tallahassee, Leon County, Florida.



YOLONDA Y. GREEN
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of September, 2018.

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.