

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHERYL KOZIARSKI,

Petitioner,

vs.

Case No. 18-5655

PONTE VEDRA A1A, INC., d/b/a
PONTE VEDRA FITNESS AND HUDSON
INSURANCE COMPANY, AS SURETY,

Respondents.

RECOMMENDED ORDER

Pursuant to agreement of the parties, the undersigned issues this Recommended Order based on a stipulated record submitted by the parties.

APPEARANCES

For Petitioner: Scott A. Cleary, Esquire
Cleary Law
2029 North Third Street
Jacksonville Beach, Florida 32250

For Respondent Ponte Vedra A1A, Inc.:

Bernard M. Wohltmann, pro se
Ponte Vedra A1A, Inc.
571 Huffner Hill Circle
St. Augustine, Florida 32092

For Respondent Hudson Insurance Company:

No representative appeared on behalf of
the company.

STATEMENT OF THE ISSUES

Whether Respondent, Ponte Vedra AlA, Inc., d/b/a Ponte Vedra Fitness, is liable to Petitioner for the balance of funds paid to Respondent for a fitness center membership; and, if so, in what amount.

PRELIMINARY STATEMENT

On September 19, 2018, Petitioner filed a claim with the Department of Agriculture and Consumer Services (Department) against Ponte Vedra AlA, Inc., d/b/a Ponte Vedra Fitness, alleging money owed on a health studio contract. The claim was preceded by a request for administrative hearing filed by Petitioner's counsel on August 23, 2018.

Both the claim and request for hearing were forwarded to the Division of Administrative Hearings on October 23, 2018.

In response to the undersigned's Initial Order, Petitioner filed a request for an informal hearing. The undersigned conducted a telephonic hearing on the request, during which the parties clarified their agreement to forego a disputed fact-finding hearing. The parties requested the undersigned to issue a recommended order based solely on the pre-filed evidence and written argument of the parties.

Following the telephonic conference, the undersigned issued an Order on Conduct of Proceedings, setting a deadline of November 30, 2018, for the parties to submit exhibits (along

with any objection to the opposing party's exhibits), and December 14, 2018, to submit their written argument to the undersigned. Petitioner timely filed exhibits and a Proposed Recommended Order, which has been taken into consideration by the undersigned. Respondent did not file either exhibits or written argument.

FINDINGS OF FACT

1. On December 5, 2017, Petitioner entered into a fitness membership contract with Respondent's facility located at 830 A1A North in Ponte Vedra Beach, Florida (the facility). She paid the contract in full in the amount of \$850.94.

2. The contract was a 24-month membership ending December 5, 2019. However, when Petitioner enrolled, she received three additional months free. Thus, the contract term ends on March 5, 2020.

3. Respondent is the owner and operator of the facility.

4. On or about July 6, 2018, Respondent closed the facility. On July 8, 2018, Respondent posted a sign at the facility informing customers that the facility was closed and that their memberships were "being honored at Baileys Health and Fitness: 1352 Beach Blvd. for the next 30 days."

5. Petitioner's contract with Respondent reads, in pertinent part, as follows:

This contract may be cancelled if the contracting business location of the health studio goes out of business, or moves its facilities more than 5 driving miles from the business location designated in such contract and fails to provide, within 30 days, a facility of equal quality located within 5 driving miles of the business location designated in such contract at no additional cost to the buyer.

6. Petitioner submitted evidence to document that Bailey's Fitness is located more than five driving miles from her home address.

7. However, pursuant to the contract, Respondent's duty to reimburse Petitioner is triggered if Respondent "fails to provide similar facilities . . . located within five (5) driving miles from the business location designated in such contract."

(emphasis added). The business location designated in the contract is the location of the facility, not Petitioner's home address.

8. The record contains no evidence to support a finding that Bailey's is located more than five driving miles from the facility.^{1/}

9. Further, the contract notes in bold and all capital letters as follows:

SHOULD YOU (THE BUYER) CHOOSE TO PAY FOR MORE THAN ONE (1) MONTH OF THIS AGREEMENT IN ADVANCE, BE AWARE THAT YOU ARE PAYING FOR FUTURE SERVICES AND MAY BE RISKING LOSS OF YOUR MONEY IN THE EVENT THIS HEALTH STUDIO AND/OR THIS BUSINESS LOCATION CEASES TO

OPERATE. THIS HEALTH STUDIO IS NOT REQUIRED BY LAW TO PROVIDE ANY SECURITY, AND THERE MAY NOT BE OTHER PROTECTIONS TO YOU SHOULD YOU CHOOSE TO PAY IN ADVANCE.

10. The evidence demonstrates that Petitioner attempted to cancel the contract and pursue a refund by notifying Respondent of her request for refund in writing, pursuant to the terms of the agreement. Petitioner's written request was returned as unclaimed and unable to be forwarded.

11. The evidence does not support a finding that Respondent violated the terms of contract such that Petitioner is due a refund.^{2/}

CONCLUSIONS OF LAW

12. The Division has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2018).

13. The Department serves as a clearinghouse for matters relating to consumer protection, and has the duty and authority to receive complaints from consumers and to seek resolution of those complaints through formal or informal means. See § 570.544, Fla. Stat. (2018).

14. Respondent is a "health studio," as that term is defined in section 501.0125, Florida Statutes, regulated by the Department pursuant to section 501.012-.019.^{3/}

15. Petitioner bears the burden of proving the allegations in her 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).

16. Petitioner failed to carry her burden of proof. Respondent did not violate the contract by failing to provide a similar facility located within five driving miles of the facility at no additional cost to the member.

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 dismissing Case No. 1809-43450 against Ponte Vedra A1A, Inc., d/b/a Ponte Vedra Fitness, and Hudson Insurance Company, as Surety.

DONE AND ENTERED this 11th day of January, 2019, in
Tallahassee, Leon County, Florida.



SUZANNE VAN WYK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of January, 2019.

ENDNOTES

^{1/} Petitioner asserts in her Proposed Recommended Order that "the proposed replacement facility is over 5 miles from the subject facility." However, there is no record evidence to support that factual allegation.

^{2/} Petitioner maintains in her Proposed Recommended Order that the additional three free months on her current contract were inducement to re-enroll when her existing contract expired in December 2017, and that the terms of the offer required her to pay the contract in full. There is no record evidence to support that allegation. If true, the undersigned sympathizes with Petitioner's plight and acknowledges that Respondent may have taken advantage of Petitioner in that respect. Even if true, that fact would be insufficient to support a finding that Respondent violated the terms of the contract Petitioner entered into with Respondent.

^{3/} The Department has the authority to find whether a health studio has intentionally defrauded the public through dishonest or deceptive means, and impose penalties for doing so. See § 501.019(4), Fla. Stat.

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.