

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

MICHAEL WARREN,

Petitioner,

vs.

Case No. 21-0136

LUXURY VACATIONS IN PARADISE, INC.,
AND AMERICAN CONTRACTORS INDEMNITY
COMPANY, AS SURETY,

Respondents.

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on March 12, 2021, via Zoom teleconference, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge (“ALJ”) of the Division of Administrative Hearings (“DOAH”).

APPEARANCES

For Petitioner: Michael Cole Warren, pro se
2869 Highland View Circle
Clermont, Florida 34711

For Respondent Luxury Vacations in Paradise, Inc.:

Blake Adams, Corporate Representative
Luxury Vacations in Paradise, Inc.
5379 Lyons Road, #219
Coconut Creek, Florida 33073

For Respondent American Contractors Indemnity, Co.:

Garen H. Kasparian, Esquire
American Contractors Indemnity Company
801 South Figueroa Street
Los Angeles, California 90017

STATEMENT OF THE ISSUE

The issue is whether Petitioner is entitled to his claim against Respondent's security deposit posted with the Department of Agriculture and Consumer Services.

PRELIMINARY STATEMENT

On July 30, 2019, Petitioner, Michael Warren, and his wife, Barbara Warren, attended a sales presentation and entered into a contract with Respondent, Luxury Vacations in Paradise, Inc. ("Luxury Vacations"), a seller of travel. The Warrens soon regretted their purchase and began attempting to cancel it and obtain the return of their money. Having failed in their attempts to cancel with the seller, the Warrens, on or about September 25, 2019, filed a claim against the performance bond that Luxury Vacations, as a seller of travel, was required to file with the Department of Agriculture and Consumer Services (the "Department") pursuant to section 559.929, Florida Statutes.

Luxury Vacations contested the bond claim and requested a formal hearing pursuant to sections 120.569 and 120.57(1), Florida Statutes, via an Election of Rights form filed with the Department. The form is undated but no party raised any issue as to the timing of its filing. On January 13, 2021, the Department forwarded the matter to DOAH for the assignment of an ALJ and the conduct of a formal hearing. The case was scheduled for hearing on March 12, 2021, on which date it was convened and completed.

At the hearing, Mr. Warren testified on his own behalf and presented the testimony of his wife, Barbara Warren. Petitioner's Composite Exhibit A was admitted without objection. Luxury Vacations presented the testimony of its corporate representative, Blake Adams. Respondent's Composite Exhibit A was admitted without objection. Respondent, American Contractors

Indemnity Company, offered no witnesses or exhibits; however, its corporate representative, Garen Kapsarian, offered legal argument.

Section 559.929(3) provides that the Department “shall act only as a nominal party” in these proceedings. Thus, the Department did not actively participate in the final hearing.

No Transcript of the final hearing was ordered. Respondent, American Contractors Indemnity Company, timely filed its Proposed Recommended Order on March 22, 2021. Petitioner filed a brief response to that Proposed Recommended Order on March 22, 2021. Respondent, Luxury Vacations, did not make any post-hearing filings.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following Findings of Fact are made:

1. On July 30, 2019, Michael and Barbara Warren, a retired couple living in Clermont, attended a “Vacation Seminar” sponsored by Vacations Plus Travel, a North Carolina based company that operates as an alter ego of Luxury Vacations, which is based in Florida. The seminar was staged in a conference room of the Hampton Inn in Clermont.

2. The Warrens were lured by the promise of a free cruise if they listened to a sales presentation by representatives of Vacations Plus Travel.

3. Mr. Warren testified that they were subjected to intense sales pressure to buy a software license that they were told would give them access to “true wholesale prices” on all their travel needs, from transportation to lodging, for the rest of their lives. The price of the license was in excess of \$7,000, but the salesman promised it would more than pay for itself in savings. Mr. Warren placed the full purchase amount of \$7,593.00 on a credit card.

4. The “Reservation Services License Agreement” signed by the Warrens stated in bold type:

Assuming the Licensee(s) has not accessed any benefits and has returned all materials delivered to them at closing, the Licensee(s) has the right to rescind this transaction within a period of three (3) days by sending notice of cancellation via certified mail, return receipt requested.

5. Almost immediately after leaving the seminar, the Warrens regretted their purchase. They began calling the toll free phone number listed in their purchase documents to cancel the contract. No one ever answered the phone. Ms. Warren testified that she managed to leave a voice message stating that they wished to cancel the contract but the call was never returned. The Warrens did not send a notice of cancellation via certified mail.

6. Mr. Warren testified that on August 19, 2019, he received an email from Luxury Vacations with instructions on using its website, including a password. Mr. Warren testified that he signed onto the website but that it was not functional. There was a home page, but clicking on any of the proffered links returned only a blank page.

7. Mr. Warren stated that he and his wife were away from home for a time after August 19, 2019, and took no further action either to cancel the contract or use the website.

8. When they came home, the Warrens again signed onto the Luxury Vacations website and this time found it to be functional. Mr. Warren testified that the website was not at all what was promised at the seminar in Clermont. The website was essentially a presentation of advertisements for vacation rentals, minus any information on price comparisons that would enable the Warrens to determine the savings they might realize by booking through the Luxury Vacations site. The properties themselves were also not to the Warrens’s liking.

9. Mr. Warren testified that he and his wife decided they would never recoup the cost of the license and again attempted to cancel by phoning the number provided with their contract materials. Again, they were unable to speak to anyone or get any kind of response from Luxury Vacations.

10. The Warrens sent a letter to Luxury Vacations, via certified mail, on August 27, 2019, informing the company of their inability to use the website and requesting cancellation of the contract. They heard nothing from the company.

11. Having failed to cancel the contract by direct means, the Warrens contacted their credit card company to dispute the transaction.

12. Blake Adams, the CEO of Luxury Vacations, testified that the company was “blindsided” by the Warrens’s dispute of the credit card charges because up to that point the company had heard nothing from the Warrens. As adamantly as Mr. Warren testified that he and his wife made repeated efforts to contact the company, Mr. Adams just as adamantly testified that the company had no record of any calls from the Warrens and no correspondence of any kind prior to receiving the notice of dispute from the credit card provider.

13. Luxury Vacations provided sufficient information to the credit card provider to uphold the purchase and receive the funds for the Warrens’s license purchase.

14. The Warrens’s cancellation letter had been misdelivered and did not reach Luxury Vacations until September 16, 2019. A December 31, 2020, letter to the Warrens from Stephanie Sorrentino, an employee of Luxury Vacations, states that upon receiving the cancellation letter, the company contacted the Warrens to explain that their account was active and to inform them of how to use the services they had purchased.

15. The Warrens denied ever being contacted by Ms. Sorrentino or anyone else from Luxury Vacations. Mr. Warren timely filed the claim for \$7,593.00

against the performance bond with the Department on or about September 25, 2019.

16. Mr. Adams testified that Mr. Warren's testimony about seeing only advertisements on the Luxury Vacations' website showed that Mr. Warren was never actually logged into the website. Mr. Adams stated that the splash page of the website includes advertising, but that once the user logs into the licensed portion of the site there are no advertisements.

17. Mr. Warren testified that he is a retired engineer and circuit designer and is perfectly capable of signing on to a website.

18. The parties also disputed the events of July 31, 2019, the day after the Warrens signed the contract with Luxury Vacations. Mr. Adams testified that his company was at the Hampton Inn in Clermont all day on July 31, 2019, presenting another sales seminar. He stated that the Warrens could have come to the Hampton Inn and discussed rescission of their contract with the on-site representative of the company.

19. Ms. Warren testified that she in fact went back to the Hampton Inn on July 31, 2019, and that no one from Luxury Vacations was there.

20. Mr. Adams testified that the Warrens have an active contract with Luxury Vacations and the company remains ready to assist the couple in achieving the savings promised at the sales seminar.

21. In summary, the Warrens present a sympathetic case. They were subjected to a high-pressure sales pitch and succumbed. Once away from the pressurized sales environment, they regretted their purchase and took some steps to rescind it. They repeatedly phoned the number provided by Luxury Vacations. However, the one thing they did not do was take the action specifically set forth in the contract they had just signed: send notice of cancellation within a period of three days via certified mail, return receipt requested. They waited until August 27, 2019, to send a written notice of cancellation to Luxury Vacations.

22. Section 559.929(2) provides that the performance bond at issue in this proceeding must be in favor of the Department and is for “the use and benefit of a consumer who is injured by the fraud, misrepresentation, breach of contract, or financial failure, or any other violation of this part by the seller of travel.” There is no evidence that Luxury Vacations committed fraud, misrepresentation, or that it breached its contract with the Warrens. Luxury Vacations did not fail financially. Therefore, the Warrens may only succeed in claiming against the bond by showing that Luxury Vacations violated part XI of chapter 559.

23. At the hearing, the undersigned raised the possibility that section 559.932, titled “Vacation Certificate Disclosure,” might apply in this case. Respondents argued that this statute did not apply because Luxury Vacations does not sell “vacation certificates,” which are defined in section 559.927(14) as:

any arrangement, plan, program, vacation package, or advance travel purchase that promotes, discusses, or discloses a destination or itinerary or type of travel, whereby a purchaser is entitled to the use of travel, accommodations, or facilities for any number of days, whether certain or uncertain, during the period in which the certificate can be exercised, and no specific date or dates for its use are designated. A vacation certificate does not include prearranged travel or tourist-related services when a seller of travel remits full payment for the cost of such services to the provider or supplier within 10 business days of the purchaser’s initial payment to the seller of travel. The term does not include travel if exact travel dates are selected, guaranteed, and paid for at the time of the purchase.

24. Respondents were correct that the software license at the heart of the contract between the Warrens and Luxury Vacations did not meet the definition of a “vacation certificate.” However, the undersigned raised the

possibility that the statutory language of section 559.932 reaches more than vacation certificates, in spite of its title:

(1) A seller of travel must provide each person solicited with a contract that includes the following information, which shall be in 12-point type, unless otherwise specified....

25. The quoted language does not appear confined to sales of vacation certificates but applicable to any solicitation by a “seller of travel” such as Luxury Vacations. Part of the information that must be included in the contract is the following:

(h) In immediate proximity to the space reserved in the contract for the date and the name, address, and signature of the purchaser, the following statement in boldfaced type of a size of 10 points:

“YOU MAY CANCEL THIS CONTRACT WITHOUT ANY PENALTY OR OBLIGATION WITHIN 30 DAYS FROM THE DATE OF PURCHASE OR RECEIPT OF THE VACATION CERTIFICATE, WHICHEVER OCCURS LATER.”

“YOU MAY ALSO CANCEL THIS CONTRACT IF ACCOMMODATIONS OR FACILITIES ARE NOT AVAILABLE PURSUANT TO A REQUEST FOR USE AS PROVIDED IN THE CONTRACT.”

“TO CANCEL THIS AGREEMENT, A SIGNED AND DATED COPY OF A STATEMENT THAT YOU ARE CANCELING THE AGREEMENT SHOULD BE MAILED AND POSTMARKED, OR DELIVERED TO (NAME) AT (ADDRESS) NO LATER THAN MIDNIGHT OF (DATE).”

26. Respondents conceded that if this provision were applicable in the instant case, and Luxury Vacations had been required to give the Warrens 30 days in which to cancel their contract, then the Warrens’s August 27, 2019, cancellation letter was timely. However, Respondents continued to

argue that section 559.932, taken as a whole, is plainly intended to apply only to contracts for vacation certificates.

27. After careful review of the statute and the Proposed Recommended Order of American Contractors Indemnity Company, the undersigned is persuaded that Respondents have read section 559.932 correctly. The statute provides ten discrete provisions that a contract must contain, most of which are clearly directed to the terms and conditions for stays at specific destinations. Nearly all of these provisions would be inapplicable to the software licensing contract but would nonetheless be mandatory if section 559.932 applied to this contract.

28. Further indication that the 30-day notice requirement is applicable only to vacation certificates is section 559.933, titled “Vacation certificate cancellation and refund provisions,” subsection (1)(a) of which provides:

(1) A seller of travel or an assignee must honor a purchaser’s request to cancel a vacation certificate if such request is made:

(a) Within 30 days after the date of purchase or receipt of the vacation certificate, whichever occurs later....

29. Section 559.933 is replete with references to the 30-day cancellation requirement and is clearly limited to vacation certificates.

30. Aside from the 30-day cancellation period for vacation certificates, part XI of chapter 559 appears to mandate no specific time period for cancellations of contracts.

31. Looking farther afield, the Federal Trade Commission’s “Cooling Off” rule, 16 C.F.R. § 429, gives a consumer in the Warrens’s position three days to cancel a sale. Sections 501.021-.055, Florida Statutes, provide substantially the same right to cancel a “home solicitation sale,” which by definition includes the transaction at issue in this proceeding. *See* § 501.021(1), Fla. Stat.

32. Luxury Vacations' notice of cancellation rights did not comply fully with the letter of section 501.031, which provides:

Every home solicitation sale shall be evidenced by a writing as provided in this section.

(1) In a home solicitation sale, the seller must present to and obtain from the buyer his or her signature to a written agreement or offer to purchase which designates, as the date of the transaction, the date on which the buyer actually signs and which contains a statement of the buyer's rights, which statement complies with subsection (2).

(2) The statement must:

(a) Appear under the conspicuous caption, "BUYER'S RIGHT TO CANCEL";

(b) Read as follows: "This is a home solicitation sale, and if you do not want the goods or services, you may cancel this agreement by providing written notice to the seller in person, by telegram, or by mail. This notice must indicate that you do not want the goods or services and must be delivered or postmarked before midnight of the third business day after you sign this agreement. If you cancel this agreement, the seller may not keep all or part of any cash down payment."

33. The Luxury Vacations' contract provision was not consistent with section 501.031. It did not include a "conspicuous caption" of "BUYER'S RIGHT TO CANCEL" in all capital letters. It did not include the statutory language verbatim. The cancellation language in the Luxury Vacations' contract was printed in bold type but no larger than the other language and was not on the page signed by the Warrens. The Luxury Vacations' cancellation clause limited the exercise of the cancellation right to written notice via certified mail; the statute provides that the buyer may cancel in person, by telegram, or by mail.

34. The relevant statutes provide that any person making home solicitation sales must first obtain a permit from the clerk of the court of the county in which the sales are to take place. § 501.022(2), Fla. Stat. The clerk of the court may revoke, suspend, or deny issuance of a home solicitation sales permit for failure to comply with any provision of sections 501.021-.055. § 501.022(4), Fla. Stat. The Attorney General or a state attorney may initiate proceedings to enjoin any person found to be violating the provisions of sections 501.021-.055. § 501.052, Fla. Stat. There are criminal penalties that attach to violations of the cited sections. *See* § 501.055, Fla. Stat.

35. However, the home solicitation sales statutes are silent as to any direct remedy that a consumer may pursue for the failure of a home solicitation seller to abide by the notice provision of section 501.031. Also, the terms of the performance bond statute limit consumer claims to violations of part XI of chapter 559. The undersigned was unable to find a provision of part XI that would encompass the home solicitation seller's cancellation notice requirements.¹

CONCLUSIONS OF LAW

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

37. Section 559.927(11) defines "seller of travel" to mean:

any 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

¹ Section 559.934, titled "Deceptive and unfair trade practice," provides that "[a]cts, conduct, practices, omissions, failings, misrepresentations, or nondisclosures which constitute a violation of this part also constitute a deceptive and unfair trade practice for the purpose of s. 501.201 and administrative rules promulgated thereunder." However, the statute does not provide for the reverse, i.e., that a violation of chapter 501 also constitutes a violation of part XI of chapter 559. Thus, Luxury Vacations' failure to comply fully with section 501.031 does not establish a ground to claim against the performance bond under section 559.929(2).

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. The term does not include third parties who may offer prearranged travel or tourist-related services, but do not participate in travel fulfillment or vacation certificate redemption.

38. It is undisputed that Luxury Vacations meets the definition of “seller of travel.”

39. Section 559.929 requires sellers of travel to submit a performance bond with the Department. Section 559.929 provides, in relevant part:

(2) The bond must be filed with the department on a form adopted by department rule and must be in favor of the department *for the use and benefit of a consumer who is injured by the fraud, misrepresentation, breach of contract, or financial failure, or any other violation of this part by the seller of travel*. Such liability may be enforced by proceeding in an administrative action as specified in subsection (3) or by filing a civil action. The bond must be open to successive claims, but the aggregate amount awarded may not exceed the amount of the bond....

(3) A consumer may file a claim against the bond. Such claim, which must be submitted in writing on an affidavit form adopted by department rule, must be submitted to the department within 120 days after an alleged injury has occurred or is discovered to have occurred or a judgment has been entered. The proceedings shall be conducted pursuant to chapter 120. For proceedings conducted pursuant to

ss. 120.569 and 120.57, the agency shall act only as a nominal party.

40. It is undisputed that Mr. Warren's claim against the performance bond was timely filed.

41. As explained in the Findings of Fact above, Mr. Warren failed to establish that he and his wife were "injured by the fraud, misrepresentation, breach of contract, or financial failure, or any other violation of this part" by Luxury Vacations. The Warrens allowed themselves to fall victim to a high-pressure sales pitch and then failed to cancel the contract according to the express terms provided by Luxury Vacations. They failed to establish that they suffered an injury contemplated by section 559.929(2).

42. This Recommended Order should not be read as a vindication or approval of Luxury Vacations' sales practices as described at the hearing. In their submissions, the Warrens included scores of Better Business Bureau complaints filed against Luxury Vacations that made allegations similar to those made by the Warrens in this case. These complaints were pure hearsay and were not considered as evidence in the writing of this Recommended Order. However, they should be read as fair warning to prospective customers of such businesses to perform their due diligence *before* paying thousands of dollars for a software license.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Agriculture and Consumer Services issue a final order denying Michael Warren's claim of \$7,593.00 against the performance bond of Luxury Vacations in Paradise, Inc.

DONE AND ENTERED this 9th day of April, 2021, in Tallahassee, Leon
County, Florida.



LAWRENCE P. STEVENSON
Administrative Law Judge
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Filed with the Clerk of the
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this 9th day of April, 2021.

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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.