

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

MARIA E. DICHOV,

Petitioner,

vs.

Case No. 22-0076

HAT TOURS, LLC, AND AMERICAN
CONTRACTORS INDEMNITY COMPANY, AS
SURETY AND CAPITOL INDEMNITY
CORPORATION, AS SURETY,

Respondents.

RECOMMENDED ORDER

On February 24, 2022, Administrative Law Judge (“ALJ”) Yolonda Y. Green of the Florida Division of Administrative Hearings (“DOAH”) conducted a duly-noticed hearing by Zoom technology pursuant to sections 120.569 and 120.57(1), Florida Statutes (2021).

APPEARANCES

For Petitioner: Maria E. Dichov, pro se
1755 Filbert Street, Apartment 2B
San Francisco, California 94123

For Respondent HAT Tours:

Steven W. Moore, Esquire
8240 118th Avenue North, Suite 300
Largo, Florida 33773

For Respondent American Contractors Indemnity Company:

(No appearance)¹

For Respondent Capitol Indemnity Corporation:

(No appearance)

STATEMENT OF THE ISSUE

Whether Petitioner is entitled to reimbursement of \$8,900 for the travel package she purchased from HAT Tours, LLC, a “seller of travel,” pursuant to an agreement between the parties.

PRELIMINARY STATEMENT

On June 25, 2021, Petitioner, Maria Dichov, 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 American Contractors Indemnity Company, as surety, and Capital Indemnity Corporation, as surety on behalf of Respondent, HAT Tours, LLC (“HAT Tours” or “Respondent”), naming the Department as the obligee. HAT Tours requested a formal hearing and this matter was referred to DOAH for assignment of an ALJ.

This matter was scheduled for hearing on February 24, 2022, and it commenced as scheduled. Petitioner testified on her own behalf and offered the testimony of two witnesses: J. Scott Bayes and Elizabeth Yohan. Petitioner’s Exhibits 1 through 11 were admitted into evidence. HAT Tours’ owner, Grethe Arani, testified. There were no other witnesses offered. HAT Tours’ Exhibits 1 through 4 were admitted into evidence.

¹ On the date of the hearing, Garen H. Kasparian, Esquire, Associate Bond Claims Attorney for American Contractors Indemnity Company, attended the hearing. However, he did not seek to represent the Company as counsel. He was also not accepted as a qualified representative in this matter.

The proceeding was recorded by a court reporter, but the parties did not order a copy of the transcript. Both parties timely filed Proposed Recommended Orders,² which have been considered in preparation of this Recommended Order.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2019 edition, which was in effect when the agreement was entered.

FINDINGS OF FACT

Based upon the exhibits and testimony offered at hearing, the following Findings of Fact are made:

1. At all times material to the matter, Petitioner was a retired consumer living in San Francisco, California. She purchased a travel tour with HAT Tours that was scheduled to take place in Northern Europe.

2. Respondent, HAT Tours, is a “seller of travel” that organizes and operates tour services for opera tours in Europe. HAT Tours is located in St. Petersburg, Florida.

3. On August 24, 2019, Ms. Dichov entered into an agreement with HAT Tours for a tour to visit opera houses in Germany with a departure date of May 4, 2020, and return date of May 16, 2020.

4. The total amount for the tour was \$8,900. Ms. Dichov paid a required deposit of \$2,000 to HAT Tours on August 24, 2019, and she paid the remaining required balance of \$6,900 on or about February 3, 2020. Thus, Petitioner paid the full amount of \$8,900 for the tour.

5. Ms. Arani, one of HAT Tours’ owners, testified that in March 2020, she learned that HAT Tours would be unable to conduct the tour due to a shut down in Europe related to the COVID-19 pandemic. However, she was aware of what was happening with the COVID-19 outbreak in other areas of Europe

² Petitioner attached an email that was not produced during the final hearing. Thus, it is not a part of the record.

before the shut-down. The tour did not depart for travel to Europe as scheduled. However, HAT Tours assured the travelers that the tour was not cancelled, but rather, postponed at that time.

6. Ms. Dichov was lulled by the promise that the tour was postponed and would be rescheduled at a later date.

7. On March 5, 2021, Ms. Dichov received an email from HAT Tours notifying her that the tour was postponed “until further notice.” The competent substantial evidence establishes that Ms. Dichov learned that the travel services she contracted for would not be provided to her on March 5, 2021.

8. On April 12, 2021, after not receiving any definite information from HAT Tours regarding new tour dates, Ms. Dichov demanded a full refund of the tour cost of \$8,900.

9. On April 16, 2021, HAT Tours offered a refund for the opera tickets, and on April 27, 2021, Ms. Dichov rejected the offer as she was not certain of what she would be willing to accept as a refund.

10. On June 25, 2021, Petitioner filed a claim affidavit against HAT Tours’ performance bond with the Department seeking reimbursement for the full cost that she paid for the European tour travel package that was not furnished to her. Ms. Dichov filed her claim within 120 days of her learning that the tour would be postponed indefinitely and her discovery that she would not be reimbursed for the full costs of the tour. Thus, the undersigned finds Ms. Dichov timely filed her claim.

11. Since the agreement for performance of the agreement was entered into on August 24, 2019, the bond in effect at that time would be applicable in this matter.

12. On July 28, 2021, without any further discussion, Ms. Dichov received a check from HAT Tours for \$2,665. On August 9, 2021, she advised HAT Tours that she was not accepting the amount as settlement and again demanded full reimbursement for the tour cost. The undersigned finds that

Ms. Dichov did not accept the partial refund as settlement of the dispute regarding performance of the tour, but rather, the \$2,665 payment Ms. Dichov received was a partial reimbursement of the total amount owed.

13. At the final hearing, Ms. Arani testified that it was excused from complying with the terms of the contract due to a loss caused by “quarantine or other similar causes,” namely the COVID-19 pandemic. HAT Tours pointed to the terms and conditions of the agreement that was purportedly in effect at the time Ms. Dichov purchased her tour package. HAT Tours initially filed terms and conditions effective December 31, 2020. During the hearing, HAT Tours discovered that the 2020 version of the agreement was not in effect at the time Petitioner entered the agreement for the tour. The undersigned then instructed HAT Tours to submit the terms and conditions of the agreement in effect when Petitioner entered the agreement. On March 2, 2022, HAT Tours resubmitted Exhibit 1. Upon review, the undersigned finds that the terms and conditions in Exhibit 1 reflect that they were “valid December 31, 2019.” Thus, they were not in effect on the date Petitioner entered the agreement on August 24, 2019.

14. After being given an opportunity to produce the correct copy of the terms and conditions, HAT Tours has failed to do so. Thus, the record does not contain a version of the terms and conditions in effect at the time Petitioner and HAT Tours entered the agreement.

15. Based on the foregoing, the undersigned finds that Ms. Dichov is entitled to reimbursement of the amount paid to HAT Tours for the European tour in the amount of \$8,900. The undersigned further finds that there is no competent substantial evidence to demonstrate that HAT Tours would not be liable for a full refund to Petitioner under the theory of impossibility based on terms of the agreement, i.e., if loss is caused by “quarantine or other similar causes.”

CONCLUSIONS OF LAW

16. DOAH has jurisdiction over the parties and subject matter in this proceeding. §§ 120.569, 120.57, and 559.929, Fla. Stat.

17. Chapter 559, Florida Statutes, is the “Florida Sellers of Travel Act.” § 559.926, Fla. Stat. 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.

18. It is undisputed that HAT Tours meets the definition of a "seller of travel."

19. 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.

20. 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.

21. Here, Petitioner timely filed her claim against the bond seeking reimbursement for failure to provide services. On March 5, 2021, Ms. Dichov became aware that the services she contracted for would not be furnished. In addition, HAT Tours indicated that it would not reimburse Ms. Dichov for the full costs of the travel package.

22. As the claimant, Ms. Dichov has the burden to prove she is entitled to reimbursement by a preponderance of the evidence. *Dep't of Banking & Fin., Div. of Sec. & Inv. Prot. v. Osborne Stern & Co.*, 670 So. 2d 932, 934 (Fla. 1996)(stating that “[t]he 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).

23. HAT Tours’ argument that it was unable to perform the obligations under the contract terms due to the COVID-19 pandemic gives rise to the defense of “impossibility of performance.” If proved, HAT Tours provides a legally sufficient defense for not complying with the terms and conditions of the agreement entered into with Petitioner. “Impossibility of performance” refers to those situations where one side of a contract becomes impossible to perform. *Crown Ice Mach. Leasing Co. v. Sam Senter Farms, Inc.*, 174 So. 2d

614, 617 (Fla. 2d DCA 1965). “Impossibility of performance” is an affirmative defense. *Michel v. Beau Rivage Beach Resort, Inc.*, 774 So. 2d 900 (Fla. 4th DCA 2001); *American Aviation, Inc. v. Aero-Flight Serv., Inc.*, 712 So. 2d 809 (Fla. 4th DCA 1998). The burden of proof as to an affirmative defense is on the party asserting the defense. *Captain's Table, Inc. v. Khouri*, 208 So. 2d 677 (Fla. 4th DCA 1968).

24. Ms. Dichov met her burden and established that she is entitled to full reimbursement for the cost of the tour as she did not receive the services for which she paid. The burden of proof of the affirmative defense of impossibility is on HAT Tours and HAT Tours has failed to demonstrate that it was impossible to perform under the terms of the agreement.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Agriculture and Consumer Services issue a final order as follows:

A. Finding Maria Dichov’s claim of \$8,900 against the performance bond of HAT Tours is granted; and

B. Finding that Maria Dichov is entitled to reimbursement of \$6,235, the remaining amount owed for the cost of the tour.

DONE AND ENTERED this 25th day of March, 2022, in Tallahassee, Leon County, Florida.



YOLONDA Y. GREEN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of March, 2022.

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.