

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 13-0195

In re: Agri-Sales, Inc.

Respondent

Decision and Order

Appearances: Christopher Young, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, DC for the Complainant
Mary E. Gardner, Esquire, Mary E. Gardner, PC, West Dundee, Illinois for the Respondent

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (the Act or PACA), instituted by a Complaint filed on March 21, 2013, by Bruce W. Summers, then the Associate Deputy Administrator, Fruit and Vegetable Program, Agricultural Marketing Service (AMS), United States Department of Agriculture (USDA).

The Complaint filed by Complainant alleges that Respondent, during the period April of 2010 through February of 2012, failed to make full payment promptly to seven (7) sellers of the agreed purchase prices in the total amount of \$403,741.90 for 62 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate and foreign commerce in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

A copy of the Complaint and the Rules of Practice were served upon Respondent by certified mail on or about March 29, 2013. Counsel for the Respondent entered her appearance on April 17, 2013¹ and filed a Motion to Enlarge Time to Answer.² There being no objection to the Motion, it was granted and Respondent was given until March 29, 2013 in which to file its Answer.

The Answer filed on May 29, 2013 denied that it purchased Produce from Eddy Produce for which that vendor had not been paid, admitted that it owed some funds to the other six vendors, and denied any willful violation of the PACA.

The case was assigned to my docket on June 6, 2013.³ On June 11, 2013 I directed the parties to file their witness and exhibit lists with the Hearing Clerk and to exchange copies of the exhibits intended to be introduced at any hearing.⁴ On June 28, 2013, a joint request for extension of time was filed and the filing and exchange dates were extended by Order dated July 1, 2013.⁵ On September 5, 2013, Complainant filed its witness and exhibit lists.⁶ Although there is some indication that Respondent's counsel provided Complainant's counsel with the Respondent's exhibits, no witness or exhibit list was filed with the Hearing Clerk until January 6, 2014.⁷ On review of the status of the case, I directed the parties to file cross motions for summary judgment and this matter is before the Administrative Law Judge upon the Motion of the Complainant for Summary Judgment. Respondent failed to avail itself of the opportunity to file a cross motion for summary judgment on behalf of the Respondent, or otherwise rebut the allegations of the Complainant with factual evidence of any type.

¹ Docket Entry #3.

² Docket Entry #4.

³ Docket Entry # 8.

⁴ Docket Entry # 9.

⁵ Docket Entries #10 and 11.

⁶ Docket Entry # 12.

⁷ Docket Entry # 13.

The Summary Judgment Standard

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes (the Rules or the Rules of Practice) set forth at 7 C.F.R., Subpart H, apply to the adjudication of this matter. While the Rules do not specifically provide for the use or exclusion of summary judgment, the Department's Judicial Officer has consistently ruled that hearings are futile and summary judgment is appropriate where there is no factual dispute of substance. *In re Animals of Montana, Inc.*, 68 Agric. Dec. 92, 104 (U.S.D.A. 2009); *In re Kathy Jo Bauck d/b/a Puppy's on Wheels a/k/a Puppies on Wheels & Pick of the Litter*,⁸ 68 Agric. Dec. 853, 858-59 (U.S.D.A. 2009); *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987).

While not an exact match, “no factual dispute of substance” may be equated with the “no genuine issue as to any material fact” language found in the Supreme Court's decision construing FED. R. CIV. P. 56 in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). *See also In re Thomas Massey*, 56 Agric. Dec. 1640 (U.S.D.A. 1997). An issue is “genuine” if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way, and an issue of fact is “material” if under the substantive law it is essential to the proper disposition of the claim. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual dispute must be material. *Schwartz v. Bhd. of Maint. Way Employees*, 264 F.3d 1181, 1183 (10th Cir. 2001). The usual and primary purpose of summary judgment is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

⁸ *See supra* notes 6 and 7, at 858-59 where the use of summary judgment is discussed in a variety of cases.

If a moving party supports its motion,⁹ the burden shifts to the non-moving party, who may not rest on mere allegation or denial in pleadings, but must set forth specific facts showing there is a genuine issue for trial. *T. W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987); *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993). In setting forth such facts, the non-moving party must identify the facts by reference to depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials. FED. R. CIV. P. 56(c)(1); *Anderson*, 477 U.S. at 247; *see also Adler*, 144 F.3d at 671. A non-moving party cannot rely upon ignorance of facts, on speculation or suspicions, and may not avoid summary judgment on a hope that something may show up at trial. *Conaway v. Smith*, 853 F.2d 789, 793 (10th Cir. 1988). In ruling on a motion for summary judgment all evidence must be considered in the light most favorable to the non-moving party with all justifiable inferences to be drawn in the non-movant's favor. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970); *Anderson*, 477 U.S. at 254. In absence of a response to Complainant's Motion for Summary Judgment or cross motion for summary judgment, the record is completely and totally devoid of the type of supporting documentation discussed above.

As discussed in *Anderson*, the judge's function is not himself to weigh and determine the truth of the matter but to determine whether there is a genuine issue for trial. *Anderson, id.* at 250. The standard to be used mirrors that for a directed verdict under FED. R. CIV. P. 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479-80 (1943); *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 624 (1944). If reasonable minds could

⁹ *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

differ as to the import of the evidence, however, a verdict should not be directed. *Anderson*, 477 U.S. at 250; *Wilkerson v. McCarthy*, 336 U.S. 53, 62 (1949).

Formerly it was held that if there was what was called a scintilla of evidence, a judge was obligated to leave that determination to a jury, but recent decisions have established a more reasonable rule that in every case the question for the judge is not whether there is literally no evidence, but whether there is any upon which the jury could properly proceed to find a verdict for the party producing it upon whom the onus of proof is imposed. *Improvement Co. v. Munson*, 81 U.S. (14 Wall.) 442, 448 (1872). While administrative proceedings typically do not have juries, the rule's application remains applicable for a judge sitting as a fact finder performing the same function.

Discussion

Applying the foregoing standard to the evidence before me, it is necessary to determine whether Respondent established the existence of genuine issues of material fact as to each of the allegations addressed in Complainant's Motion. An evaluation of the evidence supporting the allegations contained in the Complaint follows.

The first two paragraphs of the Complaint contain a reference to the PACA and deal with the Respondent's identity and contain no substantive allegations of violations. The third paragraph is a summary paragraph of the alleged violations and references and incorporated an Appendix setting forth the specifics of those transactions. The fourth paragraph alleges that the violations alleged in the third paragraph constitute willful, flagrant and repeated violations of the PACA.

As Respondent failed to submit any cross motion, any response to Complainant's Motion for Summary Judgment, or any rebutting factual evidence concerning the violations, only

Respondent's Answer exists to address the allegations before me. Accordingly, consistent with *T. W. Electric* and *Much*, Complainant's Motion must be granted. Consistent with the burden shifting requirements set forth in *T. W. Electric*, *Muck*, *Anderson* and *Adler*, the admissions in the Answer and the evidence of record compel the only possible conclusion that as a result of a combination of the Respondent's 100% shareholder's health problems and the failure of its own produced buyers to pay for produce, produce purchases were not paid for in a time manner and the violations alleged in the Complaint will be deemed established.

Although Complainant suggests that the amount owed to Eddy Produce set forth on Appendix A should be increased by some \$19,565.00, any additional amount was not alleged in the Complaint and accordingly is not before me.¹⁰ As to the other six sellers, Natures Finest Produce was also out of business, and although the other five reported lesser amounts owed as of January 24, 2014, the amount owed was still more than *de minimus*. See *In re Moore Mktg., Int'l, Inc.*, 47 Agric. Dec. 1472, 1482 (U.S.D.A. 1988).

On the basis of the entire record, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. Respondent Agri-Sales, Inc. is a corporation organized and existing under the laws of the state of Illinois. Respondent's business address is the home address of its 100% shareholder.
2. At all times material herein, Respondent was licensed under the provisions of the PACA. License No. 20000783 was issued to Respondent on March 7, 2000. That license was succeeded on April 22, 2011 by License No. 21000806 which was next subject to renewal on April 22, 2013.

¹⁰ Complainant's Motion for Summary Judgment, p.5 (Docket Entry # 15). Eddy Produce is no longer in business and could not be contacted to determine any amount currently owed, Attachment 3 (Declaration of Mark Hudson) to Motion for Summary Judgment. *Id.*

3. Respondent, during the period April of 2010 through February of 2012, failed to make full payment promptly to seven (7) sellers of the agreed purchase prices in the total amount of \$403,741.90¹¹ for 62 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate and foreign commerce.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. Respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Order

1. The facts and circumstances of Respondent's violations shall be published.
2. If not already terminated by reason of failing to pay the renewal fee, PACA License No. 20110806 issued to Respondent is revoked.
3. This Decision and Order shall become final and effective without further proceedings thirty-five days after service on the Respondents, unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days, pursuant to section 1.145 of the Rules of Practice, 7 C.F.R. §1.145.

¹¹ It is recognized that as of January 24, 2014, a lesser amount was owed; however, given the absence of evidence on behalf of the Respondent, the record establishes that for the period in question, the amounts alleged are deemed correct.

Copies of this Decision and Order will be served upon the parties by the Hearing Clerk.

March 12, 2014

Peter M. Davenport

Peter M. Davenport
Chief Administrative Law Judge

Copies to: Christopher Young, Esquire
Mary E. Gardner, Esquire

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