

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ANDY D. ANDREWS,)
d/b/a A. D. ANDREWS NURSERY,)
)
Petitioner,)
)
vs.) Case No. 02-0215
)
P. S. L. LANDSCAPE SERVICES,)
INC. AND CUMBERLAND CASUALTY)
AND SURETY COMPANY,)
)
Respondents.)
_____)

RECOMMENDED ORDER

A hearing was held pursuant to notice in the above-styled cause on March 21, 2002, before Stephen F. Dean, assigned Administrative Law Judge of the Division of Administrative Hearings, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Andy D. Andrews, pro se
A. D. Andrews Nursery
Post Office Box 1126
Chiefland, Florida 32644

For Respondent: No appearance.

STATEMENT OF THE ISSUE

Is Petitioner entitled to compensation for the sale of agricultural products, and, if so, how much?

PRELIMINARY STATEMENT

The Petitioner sold plant materials to the Respondent, who received them and paid for them with a check. Thereafter, the Respondent stopped payment on the check. The Petitioner filed a petition with the Department of Agriculture pursuant to Chapter 604, Florida Statutes. The Department determined that the case involved disputed issues of fact and referred the case to the Division of Administrative Hearings. The case was noticed for hearing for March 21, 2002, by notice dated February 28, 2002. The case was heard as noticed.

At hearing, the Petitioner testified, and presented the testimony of Dennis Deming and Mathew Teal Pomeroy. The Petitioner introduced into the record Petitioner's Exhibits 1-5. The Respondent did not appear although notice was provided to both P.S.L. Landscape Services, Inc., and Cumberland Casualty and Surety Company. The Petitioner advised at hearing that he was not ordering a transcript or filing post hearing pleadings.

FINDINGS OF FACT

1. On or about August 28, 2001, Petitioner sold F.O.B. (Free on Board) at Petitioner's farm to P.S.L. Landscape Services Inc. (hereafter, PSL), 16 Crepe Myrtle trees 14 feet tall and 5 Live Oak trees 2.5 -3.0 inches in Diameter Breast High for a total costs, including tax, of \$4,208.20.

2. These trees were dug and wrapped in accordance with the standards of the American Association of Nurseryman in the afternoon of August 30, 2001. The tree roots balls were 40 inches in diameter, and the root balls were placed in wire baskets lined with burlap. The trees were placed upon a flatbed truck with the tops of the trees resting on a rack, and the entirety of the trees, except the roots, covered with a plastic screening material used for this purpose to keep the leaves from becoming wind burned in transit.

3. The trees were transported overnight to PSL where they were received Broward County the following morning at 8:00 a.m.

4. The trees were received and signed for by a representative of PSL, Randy Smith. The documents accompanying the shipment were introduced as part of Petitioner's Composite Exhibit 1. The first of these documents signed by Smith states:

Attention: We do not replace trees. If trees are not in satisfactory condition when received, do not accept them. So please take care of your trees. Refer to watering guide in our catalog.

5. The second document signed by Smith provides in bold type at the bottom of the page:

6. DO NOT REFUSE TO UNLOAD THE TRUCK. If there is a serious problem and you question

the merchandise, call our office immediately. Our number is 352 493 2496.

6. PSL provided the freight company two checks, one to the freight handler for the freight and the other for 4,208.20 to Petitioner. This check was delivered to the Petitioner by the freight company and deposited by the Petitioner in due course.

7. The Petitioner was notified several days later that a stop payment order had been received on the check for \$4,208.20 by PSL. This was the first time the Petitioner was aware of a problem with the merchandise. PSL had not contacted the Petitioner about any problem with the shipment.

8. When Mr. George Kijewski of PSL was contacted regarding the stop payment order, he responded that the trees had wilted. He wrote a letter dated December 21, 2001, to the Department of Agriculture in which he stated:

Our firm ordered material from A.D. Andrews Nursery for one of our projects. Two Live Oaks were not number one as ordered. The Crepe Myrtle came in bone dry, not wet as the nursery states. The nursery dug up the plant material ordered and left items in the field until they were loaded onto truck for delivery. They never went to holding area prior to loading to get watered or hardened off. When we got them they were wilting . . . [.]

9. Mr. Deming was present when the trees were prepared. Mr. Kijewski was not present when the trees were prepared.

Mr. Deming described the manner in which the trees were dug, prepared for shipment, and shipped. The Crepe Myrtles were dug using a tree spade; the root balls were placed in burlap-lined wire baskets; and the trees placed on the trailer bed where they were secured and covered with a plastic screen to protect them from wind in transit. The Oaks were handled in a similar manner.

10. The trees were not watered; however, the area had received approximately 1.5 inches of water in the seven days prior to shipment. The roots were wet enough to cause the burlap to be damp. The shipping documents do not reflect any wilting or problems although the documents, as quoted above, advised that product should not be received if not in good shape. No notes were made upon receipt reflecting the alleged poor condition of the trees.

11. The trees were sold F.O.B. at Chiefland, and were the property of PSL when loaded.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case.

13. The provisions of Chapter 604, Florida Statutes, establish a procedure for recovery from a surety in the sale of agricultural products and goods. Chapter 672, Florida Statutes, is that portion of the Uniform Commercial Code (UCC)

applicable to the sales of goods. Section 672.105(1), Florida Statutes, defines goods as all things which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities and things in action. "Goods" also includes the unborn young of animals and growing crops . . .[.] The trees in question in this case are goods. Section 672.103(1), Florida Statutes, defines buyer and seller. The seller in this case was the Petitioner, and the buyer was PSL.

14. Section 672.201, Florida Statutes, addresses the formal requirements for a written contract. Generally, contracts for the sale of more than \$500 of goods must be in writing to be enforceable unless the contract to be enforced is with respect to goods for which payment has been made and accepted or which have been received and accepted in accordance with Section 672.606, Florida Statutes. PSL tendered payment which was received by the freight handler, who was not affiliated with PSL. The exception for the requirement of a written contract is established.

15. The contract called for sale Free on Board in Chiefland. Title transferred when the goods were loaded on the truck at the Petitioner's farm. See Section 672.401(2), Florida Statutes.

16. Section 672.606, Florida Statutes, provides regarding buyer's rights upon improper delivery that if the goods fail to conform to the contract, the buyer may reject the whole; or accept the whole, or accept any commercial unit or units and reject the rest. The goods were inspected and received in Broward County by PSL. No question regarding the quality or condition of the goods was raised upon their receipt.

17. Section 672.602, Florida Statutes, provides that buyer's rejection must be within a reasonable time after tender of the goods or their delivery, and it is ineffective unless the buyer seasonably notifies the seller. PSL did not reject any of the trees upon receipt, and did not notify seller.

18. PSL stopped payment on the check which it had tendered in payment for the goods. It did so without good cause and contrary to its obligations under its contract with the Petitioner.

19. As indicated above, the facts of this case establish the contract and it is enforceable without being in writing against the PSL.

21. PSL stopped payment on the goods, and asserts that it "rejected" the goods. Section 672.602(2)(b), Florida Statutes, provides that if the buyer has taken physical

possession of the goods . . . the buyer has a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them.

22. PSL did not give notice seasonably of its rejection, and it did not handle the goods it had received in a manner consistent with its asserted rejection.

23. When the buyer wrongfully rejects goods, the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender, and the unpaid contract price together with any incidental damages provided in Section 672.710, Florida Statutes, less any expenses saved by the seller in consequence of the buyer's breach.

24. There were no expenses saved in the consequence of PSL's breach. The market price was the contract price. There was no money paid on the contract. The Petitioner did not present any evidence of incidental expenses. PSL owes the Petitioner the contract amount of \$4,208.20. In the absence of payment, the surety must make good that amount.

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED:

That the Department enter a final order adopting these findings and conclusions of law, directing PSL to pay to Petitioner \$4,208.20 within 14 days of receipt of its final order; and, if PSL fails to abide by the Department's order, directing the surety to make good on its bond in the amount of \$4,208.20.

DONE AND ENTERED this 30th day of April, 2002, in Tallahassee, Leon County, Florida.

STEPHEN F. DEAN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of April, 2002.

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.