

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

SOUTH FLORIDA SOD, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-0262
	)	
WEST FLORIDA IRRIGATION &	)	
LANDSCAPING, INC., AND OLD	)	
REPUBLIC SURETY COMPANY,	)	
	)	
Respondents.	)	
_____	)	
BAYSIDE SOD, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-0306
	)	
WEST FLORIDA IRRIGATION &	)	
LANDSCAPING, INC., AND OLD	)	
REPUBLIC SURETY COMPANY,	)	
	)	
Respondents.	)	
_____	)	

RECOMMENDED ORDER

A formal hearing was held pursuant to notice in the above-styled cases by Lawrence P. Stevenson, assigned Administrative Law Judge of the Division of Administrative Hearings, on December 17, 2004, in Bradenton, Florida.

APPEARANCES

For Petitioner South Florida Sod, Inc:

Jeffrey Sullivan, Esquire  
Stidham & Stidham, P.A.  
Post Office Box 510  
Bartow, Florida 33831

For Petitioner Bayside Sod, Inc:

Paul J. Bispham  
Bayside Sod, Inc.  
7850 Ibis Street  
Sarasota, Florida 34241

For Respondent West Florida Irrigation & Landscaping, Inc:

Robert H. Nutter, Esquire  
Ferlita, Nutter, Rosello  
& Newman, P.A.  
610 Azeele Street  
Tampa, Florida 33606-2273

For Respondent Old Republic Surety Company:

No appearance

STATEMENT OF THE ISSUES

DOAH Case No. 04-0262: Whether Respondent, West Florida Landscaping & Landscaping, Inc. ("West Florida Landscaping"), owes Petitioner, South Florida Sod, Inc. ("South Florida Sod"), \$29,360.80 for the sale of sod during the months of July and August 2003.

DOAH Case No. 04-0306: Whether Respondent, West Florida Landscaping, owes Petitioner, Bayside Sod, Inc. ("Bayside Sod"), \$18,750.68 for the sale of sod during the month of October 2003.

PRELIMINARY STATEMENT

On December 5, 2003, South Florida Sod filed an Amended Producer Complaint with the Department of Agriculture and Consumer Services (the "Department") alleging that West Florida Landscaping had failed to pay 43 invoices for various amounts of sod for a total of \$29,360.80. The Department notified West Florida Landscaping and its bond surety, Old Republic Surety Company, of the Amended Producer Complaint by separate letters dated December 9, 2003. On December 23, 2003, West Florida Landscaping filed a request for an extension of the time in which to answer the Amended Producer Complaint. By letter dated December 29, 2003, the Department granted West Florida Landscaping until January 16, 2004, to answer the Amended Producer Complaint. On January 9, 2004, West Florida Landscaping filed an Answer denying the validity of the Amended Producer Complaint. West Florida Landscaping asserted that it did not purchase the agricultural products listed in the invoices and did not authorize anyone to purchase those products on its behalf. West Florida Landscaping stated that the person who took delivery of the products was not an agent or employee of West Florida Landscaping and that West Florida Landscaping did not receive any of the products referred to in the Amended Producer Complaint. On January 20, 2004, the Department forwarded the Amended Producer Complaint and the Answer to the

Division of Administrative Hearings ("DOAH") for assignment of an Administrative Law Judge and conduct of a formal hearing.

The matter was assigned DOAH Case No. 04-0262.

On December 9, 2003, Bayside Sod filed a Producer Complaint with the Department alleging that West Florida Landscaping had failed to pay 23 invoices for various amounts of sod for a total of \$17,524.00. On December 23, 2003, Bayside Sod filed an Amended Producer Complaint to include a 7 percent Florida sales tax to the amount sought, bringing the total to \$18,750.68. The Department notified West Florida Landscaping and its bond surety, Old Republic Surety Company, of the Amended Producer Complaint by separate letters dated January 6, 2004. On January 16, 2004, West Florida Landscaping filed its Answer to Bayside Sod's Amended Producer Complaint. This Answer was identical to West Florida Landscaping's Answer to South Florida Sod's Amended Producer Complaint. On January 27, 2004, the Department forwarded the Amended Producer Complaint and the Answer to DOAH for assignment of an Administrative Law Judge and conduct of a formal hearing. The matter was assigned DOAH Case No. 04-0306.

On February 12, 2004, West Florida Landscaping filed a motion to consolidate DOAH Case Nos. 04-0262, 04-0306, and 04-0424.<sup>1/</sup> By Order dated February 19, 2004, the cases were consolidated and were set for hearing on March 30, 2004.

The final hearing was convened on March 30, 2004. Prior to the taking of evidence, the parties engaged in settlement negotiations. They reached a tentative agreement and requested a period of 60 days in which to finalize matters. By Order dated April 5, 2004, the cases were placed in abeyance and the parties directed to file a status report on June 1, 2004.

On June 4, 2004, Paul J. Bispham, a principal of Bayside Sod, filed a letter notifying the undersigned that the tentative settlement terms had not been fulfilled and requesting that the hearing be rescheduled. By Order dated June 21, 2004, the cases were set for hearing on July 14, 2004. On July 6, 2004, West Florida Landscaping filed a motion to continue, which was granted by Order dated July 8, 2004. The hearing was re-scheduled for September 10, 2004, continued pursuant to an emergency motion by West Florida Landscaping, re-scheduled for November 9, 2004, and then continued again. The hearing was finally held on December 17, 2004.

At the hearing, South Florida Sod presented the testimony of Bryant McCall, its vice president. South Florida Sod's Exhibits 1 and 2 were admitted into evidence. Bayside Sod presented the testimony of Paul J. Bispham, its president and part-owner, and Benjamin Strong, field superintendent for Trent Colony Landscaping. Bayside Sod's Exhibit 1 was admitted into evidence. West Florida Landscaping presented the testimony of

its owner, Robert W. Owens, and of an employee, Steven Hendley. West Florida Landscaping offered no exhibits.

No Transcript of the proceeding was ordered. South Florida Sod submitted a Proposed Order on December 23, 2004. Neither of the other parties made a post-hearing submission.

#### FINDINGS OF FACT

1. Petitioners, South Florida Sod and Bayside Sod, are producers of agricultural products as defined by Subsection 604.15(5), Florida Statutes (2003). Both Petitioners grow and sell sod. South Florida Sod is located in Arcadia, Florida. Bayside Sod is located in Sarasota, Florida.

2. Respondent, West Florida Landscaping, located in Plant City, Florida, is a dealer in agricultural products as defined by Subsection 604.15(1), Florida Statutes (2003). At the time of the transactions in question, West Florida Landscaping was licensed as a dealer in agricultural products supported by a surety bond provided by Old Republic Surety Company.

3. West Florida Landscaping began purchasing sod from South Florida Sod in early 2003. The sod was purchased by a man named Dallas Justice. Bryant McCall, vice president of South Florida Sod, testified that Robert Owens, the owner of West Florida Landscaping, told him that Mr. Justice worked for him and would do the ordering for West Florida Landscaping.

4. The initial purchases were cash transactions. At some point during the course of dealings, Mr. Owens contacted South Florida Sod to request a line of credit. Mr. Owens completed a credit application, and thereafter West Florida Landscaping purchased sod on credit.

5. Mr. McCall testified that West Florida Landscaping was never a model credit customer. He had to "hound" West Florida Landscaping to pay its bill. However, up until July and August 2003, West Florida Landscaping always paid the bill, though often well after payment was due.

6. From July 11 through August 27, 2003, Mr. Justice placed 43 orders for sod with South Florida Sod in the name of West Florida Landscaping. The sod was picked up at South Florida Sod's place of business by truckers sent by Mr. Justice. The total price for all these orders was \$29,360.80. Invoices for each of these orders were sent to West Florida Landscaping, which neither paid them nor disputed their validity.

7. Mr. McCall contacted Mr. Owens about payment of the invoices. Mr. McCall testified that Mr. Owens stated that he had been out of town during the period of the unpaid invoices. Mr. Owens told Mr. McCall that upon returning, he discovered that Mr. Justice was defrauding him. Mr. Justice was ordering the sod and completing the work for West Florida Landscaping projects, but was also collecting the customers' payments and

keeping the money for himself. Mr. Owens did not fire Mr. Justice or turn him over to law enforcement authorities because he wanted Mr. Justice to work off the debt.

8. Mr. Owens promised Mr. McCall that he would make good on the debts incurred by Mr. Justice with South Florida Sod. Mr. McCall testified that a payment schedule was established, but that Mr. Owens did not observe it, forcing South Florida Sod to file a Producer Complaint. As of December 5, 2003, the balance owed South Florida Sod by West Florida Landscaping was \$29,360.80.

9. West Florida Landscaping began purchasing sod from Bayside Sod on a cash basis sometime in the middle of 2003. A man named "Gene," later identified as Dallas Justice, ordered the sod on behalf of West Florida Landscaping. Bayside Sod sold 11 truckloads of sod to Mr. Justice and was paid cash.

10. On October 1, 2003, Bayside Sod first extended credit to Mr. Justice at his request. Between October 2 and October 22, 2003, Mr. Justice took delivery of 23 orders for various amounts of sod worth \$18,750, with Florida sales tax. None of these deliveries was paid for by Mr. Justice or West Florida Landscaping.

11. Paul Bispham, owner and president of Bayside Sod, testified that he spoke with Mr. Owens on December 13, 2003.



Mr. Owens assured Mr. Bispham that he and Mr. Justice would pay the debt.

12. Benjamin Strong is a field superintendent for Trent Colony Landscaping. He gave West Florida Landscaping's name to Mr. Bispham as a reference when the latter contacted him to solicit new business. Mr. Strong had done business with Mr. Justice and West Florida Landscaping. His practice was to make out checks to West Florida Landscaping and give the checks to Mr. Justice. Mr. Strong testified that Mr. Owens later told him emphatically not to give any West Florida Landscaping checks to Mr. Justice.

13. At the hearing, Mr. Owens denied that Mr. Justice was ever an employee of West Florida Landscaping. Rather, Mr. Justice was an independent contractor whom Mr. Owens would hire on a per-job basis to lay sod. However, Mr. Owens admitted that he gave Mr. Justice authority to order sod for West Florida Landscaping, thus mooting the significance of Mr. Justice's status as an employee or independent contractor. Mr. Owens further admitted that he signed the letter seeking a line of credit from South Florida Sod.

14. Mr. Owens testified that he was in New Orleans for an extended period. While Mr. Owens was gone, Mr. Justice began ordering sod for jobs of his own, but had the purchases billed to West Florida Landscaping. Mr. Owens testified that he has

paid for any sod that Mr. Justice ordered for West Florida Landscaping projects, but that he believed himself under no obligation to pay for sod that Mr. Justice ordered for his own jobs. He discovered, belatedly, that Mr. Justice was "a liar and a cheat."

15. Mr. McCall credibly testified that Mr. Owens said nothing to him about Mr. Justice having used West Florida Landscaping's name to fraudulently obtain sod. Rather, Mr. Owens told him that Mr. Justice was, in Mr. Owens' absence, completing West Florida Landscaping jobs, but then cashing the checks made out to West Florida Landscaping and pocketing the money. This testimony is consistent with that of Mr. Strong and is credited.

16. Mr. Owens admitted to making some efforts to deduct money from Mr. Justice's pay in order to settle the debts with South Florida Sod, but stated that he did not feel a legal obligation to do so.

17. Mr. Justice was subpoenaed to appear and testify at the hearing in this matter, but he did not appear.

18. By the weight of the evidence and by his own admission, Mr. Owens authorized Mr. Justice to order sod on behalf of West Florida Landscaping. The evidence established that a course of dealing was established between Mr. Justice, on behalf of West Florida Landscaping, and the Petitioners in these

cases, whereby Mr. Justice would order and take delivery of the sod from the Petitioners, and West Florida Landscaping would pay the invoices for the sod. The greater weight of the evidence is that Mr. Justice was acting on behalf of West Florida Landscaping in all his dealings with South Florida Sod and Bayside Sod.

19. In light of the established course of dealing, West Florida Landscaping failed to establish any reasonable basis for its contention that South Florida Sod and Bayside Sod should have inquired as to Mr. Justice's continuing authority on each occasion that he ordered their sod. Mr. Owens' testimony that the sod ordered by Mr. Justice from South Florida Sod and Bayside Sod was not for West Florida Landscaping jobs cannot be credited based on the testimony of other witnesses and Mr. Owens' own actions subsequent to learning these suppliers had not been paid. While there is no question that Mr. Justice was the actual wrongdoer in these cases, there is also no question that it was West Florida Landscaping that lent the name of its legitimate business to Mr. Justice and, thus, enabled him to defraud South Florida Sod and Bayside Sod.

#### CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the parties and subject matter pursuant to Sections 120.57 and 604.21, Florida Statutes (2004).

21. South Florida Sod and Bayside Sod have the burden of proving the allegations in their respective complaints against West Florida Landscaping by a preponderance of the evidence. See Florida Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981). Though South Florida Sod and Bayside Sod have the ultimate burden of proving their claims, once each of them has made a prima facie case of entitlement to recover from West Florida Landscaping, then West Florida Landscaping has the burden of coming forward with evidence to refute the entitlement.

22. South Florida Sod and Bayside Sod have satisfied their burdens of proof. West Florida Landscaping is licensed as a dealer in agricultural products. West Florida Landscaping failed to make proper payment and account for sod that South Florida Sod and Bayside Sod provided to Mr. Justice on behalf of West Florida Landscaping. West Florida Landscaping failed to come forward with evidence sufficient to refute the prima facie case of entitlement made by South Florida Sod and Bayside Sod.

23. Both South Florida Sod and Bayside Sod claim entitlement to interest (termed "service charges") at a rate of 1.5 percent monthly, or 18 percent annually, based upon statements set forth in their invoices regarding past due accounts. However, Section 687.01, Florida Statutes (2003), provides that, in the absence of a special contract, interest

rates are capped at the rate provided in Section 55.03, Florida Statutes (2003). Case law is clear that a pre-printed interest rate contained in an invoice, without more, is insufficient to establish entitlement to any more pre-judgment interest than the statute allows. Nelson v. Ameriquest Technologies, Inc., 739 So. 2d 161, 165 (Fla. 3d DCA 1999), and cases cited therein. See also Spyke's Grove, Inc. v. Kulick and Western Surety Co., Case No. 01-2649A (DOAH November 1, 2001).

#### RECOMMENDATION

Based on the foregoing Findings of Facts and Conclusions of Law, it is

RECOMMENDED that the Department of Agriculture and Consumer Services enter a final order ordering Respondent, West Florida Irrigation & Landscaping, Inc., to pay \$29,360.80 to South Florida Sod, Inc., and \$18,750.68 to Bayside Sod, Inc., together with pre-judgment interest calculated at the rate specified in Section 55.03, Florida Statutes (2003); and further requiring Old Republic Surety Company to make payment, up to the amount of its bond, in the event that West Florida Irrigation & Landscaping, Inc., fails to make payment in a timely manner.

DONE AND ENTERED this 1st day of March, 2005, in  
Tallahassee, Leon County, Florida.

*Lawrence P. Stevenson*

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Filed with the Clerk of the  
Division of Administrative Hearings  
this 1st day of March, 2005.

ENDNOTE

<sup>1/</sup> DOAH Case No. 04-0424 involved a third Producer Complaint against West Florida Landscaping, this one brought by DeSoto Sod, Inc. On March 22, 2004, DeSoto Sod, Inc., notified DOAH that it had received payment in full from West Florida Landscaping and requested that the case be closed. By Order dated March 26, 2004, DOAH Case No. 04-0424 was severed from the other two consolidated cases. By Order dated March 29, 2004, the file in DOAH Case No. 04-0424 was closed.

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.