

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SKINNER NURSERIES, INC.,)
)
 Petitioner,)
)
 vs.) Case No. 05-3372
)
 AKERS HOLDINGS, LLC AND)
 FIDELITY AND DEPOSIT COMPANY OF)
 MARYLAND, AS SURETY,)
)
 Respondents.)
 _____)

RECOMMENDED ORDER

This cause came on for formal hearing before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings, on November 14, 2005, in Jacksonville, Florida.

APPEARANCES

For Petitioner Skinner Nurseries, Inc.:

Donald M. DuMond, pro se
Skinner Nurseries, Inc.
2970 Hartley Road, Suite 302
Jacksonville, Florida 32257

For Respondent Akers Holdings, LLC:

R. Dean Akers, pro se
(No Appearance)

For Respondent Fidelity and Deposit Company of Maryland, as Surety:

Kathy Alves, pro se
(No Appearance)

STATEMENT OF THE ISSUE

The issue is whether Respondent, Akers Holdings, LLC, and its surety, Fidelity and Deposit Company of Maryland, are liable for funds due to Petitioner from the sale of agricultural products.

PRELIMINARY STATEMENT

On or about March 23, 2005, Petitioner filed an Agent Complaint with the Florida Department of Agriculture and Consumer Services (the "Department"). The Complaint alleged that Respondent or its surety owed funds to Petitioner for nursery products in the amount of \$136,942.49 purchased by Respondent under the provisions of the Agricultural Bond and License Law, Sections 604.15 through 604.34, Florida Statutes. Thereafter, on or about May 18, 2005, Respondent, Akers Holdings, LLC, filed a response to the Complaint in which it alleged that all accounts with Petitioner are paid as agreed and that none of the alleged open accounts were, in fact, open. Respondent, therefore, claimed that it owed Petitioner nothing.

The matter was referred to the Division of Administrative Hearings on October 18, 2005. A Notice of Hearing issued scheduling the matter for November 14, 2005. The hearing

commenced and was completed that morning in Jacksonville, Florida, with the testimony of Petitioner's witnesses only since neither Respondent, Akers Holdings, LLC, or Respondent, Fidelity and Deposit Company of Maryland, appeared by counsel or pro se.

At the hearing, Petitioner presented the testimony of Chris Diaz, Petitioner's Controller, and Alice Hunt, Petitioner's Credit Manager, and offered Exhibit Nos. 1 through 3, all of which were admitted, into evidence. Respondents presented no evidence or witnesses and did not contact the division to attempt to excuse their appearance at the hearing. No transcript was filed. Neither Petitioner nor Respondents submitted proposed findings of fact and conclusions of law.

References to statutes are to Florida Statutes (2004) unless otherwise noted.

FINDINGS OF FACT

1. Petitioner is a producer of agricultural products as defined by Section 604.15(5), Florida Statutes. Petitioner operates a nursery supply company that produces trees, plants, and other landscaping supplies at a location in Bunnell, Florida.

2. Respondent is a dealer in agricultural products as defined by Section 604.15(1), Florida Statutes. At the time of the transactions in question, Respondent was a landscape distribution company and a licensed dealer in agricultural

products supported by a surety bond provided by Fidelity and Deposit Company of Maryland.

3. This matter arose over an Agent Complaint filed by Petitioner on March 23, 2005, in which it alleged that Respondent owed \$136,942.49, based upon numerous invoices for nursery goods delivered to various job sites where Respondent was providing landscaping services.

4. Respondent Akers Holdings, LLC, by its agent or employee, R. Dean Akers, signed a Promissory Note on March 23, 2005, in the amount of \$137,445.47 plus ten percent simple interest per annum. Under the note, Respondent agreed to repay its outstanding debt to Petitioner at the rate of \$12,083.64 per month, commencing March 15, 2005, until paid in full.

5. Respondent made payments under the note as follows:

<u>Date of Payment</u>	<u>Amount Paid</u>	<u>Check No.</u>
3/15/2005	\$12,083.64	13536
4/15/2005	12,097.81	1360
5/13/2005	12,090.51	13657
6/14/2005	12,129.37	1372
7/29/2005	12,103.41	13782

6. The payment dated 7/29/2005 was received by Petitioner on August 8, 2005. No subsequent payments were made by Respondent, Akers Holdings, LLC, after that date.

7. At the time of hearing, based upon the evidence presented by Petitioner, the amount due to Petitioner under the

Promissory Note was \$81,655.81, and the amount due to Petitioner on open account was \$30,734.58.

8. Respondent, Akers Holdings, LLC, offered no excuse for its nonpayment of either the Promissory Note or the open account with Petitioner.

9. Accordingly, Respondent Akers Holdings, LLC, or its surety, Fidelity and Deposit Company of Maryland, owe Petitioner \$81,655.81 on the Promissory Note and \$30,734.58 on open account, for a total amount owed of \$112,390.39.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569, 120.57(1), and 604.21(6), Fla. Stat.

11. Section 604.15, Florida Statutes, contains the following definitions, in pertinent part:

(1) 'Agricultural products' means the natural products of the farm, nursery, grove, orchard, vineyard, garden, and apiary (raw or manufactured);

(2) 'Dealer in agricultural products' means any person, partnership, corporation, or other business entity, whether itinerant or domiciled within this state, engaged within this state in the business of purchasing, receiving, or soliciting agricultural products from the producer or the producer's agent or representative for resale or processing for sale; acting as an agent for such producer in the sale of agricultural products for the account of the producer on a net return basis; or acting as a

negotiating broker between the producer or the producer's agent or representative and the buyer.

* * *

(5) 'Producer' means any producer of agricultural products produced in the state.

12. Section 604.17, Florida Statutes, requires dealers in agricultural products to have a license to engage in such business.

13. Before dealers receive their licenses, they must deliver to the Department a surety bond or a certificate of deposit. The surety bond or certificate of deposit secures payment to producers for agricultural products sold to dealers. § 604.20(1), Fla. Stat.

14. Petitioner has met its burden of proving, by a preponderance of the evidence, that Respondents are indebted to Petitioner for unpaid invoices in the amount of \$112,390.39, as evidenced by the amount outstanding on the Promissory Note executed by Respondent, Akers Holdings, LLC, and the open account with Petitioner.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Department of Agriculture and Consumer Services enter a Final Order requiring Respondent, or its surety, to pay Petitioner \$112,390.39 for unpaid invoices.

DONE AND ENTERED this 26th day of January, 2006, in Tallahassee, Leon County, Florida.



ROBERT S. COHEN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of January, 2006.

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.