

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DRS. ROBERT H. BIGGS AND S.)
V. KOSSUTH, d/b/a BK CEDARS,)
)
Petitioners,)
)
vs.) Case No. 06-1215
)
CHASE LANDSCAPING AND)
NURSERY, INC., AND FIDELITY)
AND DEPOSIT COMPANY OF)
MARYLAND, AS SURETY,)
)
Respondents.)

RECOMMENDED ORDER

On July 12, 2006, a hearing was held in Gainesville, Florida. The authority for conducting the hearing is set forth in Sections 120.569 and 120.57(1), Florida Statutes. The case was considered by Lisa Shearer Nelson, Administrative Law Judge.

APPEARANCES

For Petitioners: Dr. Susan V. Kossuth, pro se
Co-owner, BK Cedars
20874 Northwest 94th Street
Alachua, Florida 32615

For Respondent: Jan Chase, pro se
President, Chase Landscaping &
Nursery, Inc.
10675 Southwest 100th Avenue
Ocala, Florida 34481-7321

No appearance for Fidelity & Deposit Company of Maryland.

STATEMENT OF THE ISSUE

Whether Respondent, Chase Landscaping and Nursery, Inc. (Chase Landscaping), and its surety, Fidelity & Deposit Company of Maryland (Fidelity), are liable for funds due to Petitioners from the sale of agricultural products.

PRELIMINARY STATEMENT

On or about November 10, 2005, Petitioners filed a Producer Complaint with the Florida Department of Agriculture and Consumer Services. The Complaint alleged that Respondent Chase Landscaping or its surety owed \$3,661 to Petitioners for nursery products purchased by Chase Landscaping under the provisions of the Agricultural Bond and License Law, Sections 604.15 through 604.34, Florida Statutes. An Amended Complaint was filed February 9, 2006, making changes required by the Department. Respondent Chase Landscaping thereafter filed a response denying that any funds were owed because the product did not meet stated specifications. Fidelity acknowledged the Complaint in a letter to the Department, but did not contest the matter or request a hearing.

The matter was referred to the Division of Administrative Hearings April 5, 2006. Formal hearing was held as noticed July 12, 2006.

At hearing, Petitioners Dr. Robert H. Biggs and Dr. Susan V. Kossuth testified and presented four exhibits that were received into evidence. Respondent Chase Landscaping's

president, Jan Chase, testified and that Respondent's four exhibits were received into evidence. Fidelity did not appear.

No transcript of the hearing was filed with the Division. None of the parties prepared proposed recommended orders.

FINDINGS OF FACT

1. Petitioners Dr. R.H. Biggs and Dr. Susan V. Kossuth own and do business as BK Cedars. BK Cedars is a producer of agricultural products as defined by Section 604.15(5), Florida Statutes.

2. Respondent Chase Landscaping is a licensed and bonded dealer in agricultural products as defined by Section 604.15(1), Florida Statutes. During the time period covered by the transaction in question Chase Landscaping was covered by bond number 7507757 issued by Fidelity.

3. On May 24, 2005, Petitioners received a phone message from Chase Nurseries, Inc. (Chase Nurseries) inquiring about the possible purchase of 157 five to six feet Leyland cypress trees.

4. Chase Nurseries is a separate entity from Chase Landscaping, although both are owned by the same person, Jan Chase. Chase Nurseries is also located at the same address as Chase Landscaping, but apparently is not licensed and has no bond.

5. Jan Chase's customer wanted Leyland cypress trees that were six feet tall. BK Cedars sold Leyland cypress five-to-six feet tall for \$23.00 each. Trees six-to-seven feet tall were offered for sale priced at \$27.00 each. Chase opted to purchase the trees five-to-six feet tall at the lower price.

6. On June 1, 2005, Mike Bruns and another employee from Chase Nurseries came out to pick up the trees. Bruns declined the offer to choose, measure and flag the trees himself, and instead watched Susan Kossuth do so. Mike Bruns loaded the trees into the truck, paid for the trees with a Chase Nurseries check that he asked Petitioners to hold for a day, and left.

7. The cypress trees were billed for \$3,611.00. Although a check was tendered for that amount, it was returned to Petitioners marked "insufficient funds." Shortly thereafter, Jan Chase stopped payment on the check. Mr. Chase claimed that he was refusing to pay for the trees because his customer indicated that they were far from six feet tall and refused them.

8. It is irrelevant how tall the trees actually were. Chase Nurseries had the opportunity to measure them and chose not to do so before accepting them. If they were significantly shorter than six feet, as claimed, Mike Bruns

should have been able to tell that they were not tall enough when he loaded them into the truck. Further, Petitioners did not represent the trees as being six feet or over. They represented them as being five- to-six feet tall, which would not have met the specifications of Chase Nurseries' client in any event.

9. Petitioners made several efforts to collect the funds due them for purchase of the trees. Dr. Biggs made numerous telephone calls to Mike Bruns in an effort to receive payment. After Chase Nurseries stopped payment on the check, Petitioners filed a complaint with the State Attorney's office in addition to filing a claim through the Department of Agriculture and Consumer Services. All responses by Jan Chase were through Chase Nurseries.

10. When Petitioners filed their original complaint with the Department of Agriculture, they listed the respondent as "Chase Landscaping and Nursery, Inc.," and listed "Chase Nurseries" as a trade or d/b/a name for Chase Landscaping. The Department directed Petitioners to remove this designation from the complaint filed by Petitioners, because Department staff advised that Chase Landscaping did not have a "d/b/a" name.

11. When Jan Chase filled out the Answer for Respondent, he listed the Respondent as "Jan Chase d/b/a Chase Nurseries,

Inc." He did not indicate that Petitioners had named the wrong party. He also indicated on the form Answer that the trees were purchased by Jan Chase. Chase testified that his current bond for Chase Landscaping is being held up by Fidelity because of this case, but that Chase Landscaping had nothing to do with this case. He claimed Chase Nurseries did not meet the threshold amount required to hold a bond. This transaction alone exceeds the threshold required by the Department of Agriculture for an agricultural dealer to be licensed and bonded.

12. Petitioners came to hearing believing that the entity with which they dealt was covered by the Fidelity bond. They did not realize that Chase Landscaping was a separate entity from Chase Nurseries.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.569 and 120.57(1), Florida Statutes.

14. Section 604.15, Florida Statutes (2005), includes the following definitions:

(1) "Agricultural products" means the natural products of the far, 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 in 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.

* * *

(9) "Producer" means any grower of agricultural products produced in the state.

15. Section 604.21, Florida Statutes, provides in pertinent part:

(1)(a) Any person, partnership, corporation, or other business entity claiming to be damaged by any breach of the conditions of a bond or certificate of deposit assignment or agreement given by a dealer in agricultural products as hereinbefore provided may enter complaint thereof against the dealer and against the surety company, if any, to the department, which complaint shall be a written statement of the facts constituting the complaint. Such complaint shall include all agricultural products defined in s.604.15(1), as well as any additional charges necessary to effectuate the sale unless these additional charges are already included in the total delivered price. Such complaint shall be filed within 6 months from the date of sale. . . . No complaint shall be filed pursuant to this section unless the transactions involved total at least \$500 and occurred in a single license year. Before a complaint

can be processed, the complainant must provide the department with a \$50 filing fee. In the event the complainant is successful in proving the claim, the dealer in agricultural products shall reimburse the complainant for the \$50 filing fee as part of the settlement of the claim.

16. Petitioners have the burden of proving, by a preponderance of the evidence, that they are entitled to the remedy claimed in the Amended Complaint. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 2d DCA 1981).

17. Chase Nurseries is a dealer as defined by Section 604.15(2), Florida Statutes. It is however, by its own admission, not licensed and bonded as required by Section 604.18, Florida Statutes. More importantly, it is also not the respondent named in the complaint in this case.

18. While Petitioners have proven that Chase Nurseries breached its agreement to pay for the Leyland cypress trees purchased from BK Cedars, they have not proven any wrongdoing by the named respondent, Chase Landscaping.

19. It could be argued that inasmuch as Chase Nurseries and Chase Landscaping are at the same address and are owned by the same person who appeared at the hearing, the corporate structure could be disregarded where, as here, Chase Nurseries has failed to meet the licensure requirements imposed by Chapter 604, Florida Statutes. However, neither the

Commission nor the undersigned has the authority to disregard the corporate structure and pierce the corporate veil. As stated by the Supreme Court in Roberts' Fish Farm v. Spencer, 153 So. 2d 718 (Fla. 1963), only duly-established courts of law or equity may pierce the corporate existence and look beyond it to the stockholders or to other entities. The Court stated:

Those who utilize the laws of this state in order to do business in the corporate form have every right to rely on the rules of law which protect them against personal liability, unless it be shown that the corporation is formed or used for some illegal, fraudulent or other unjust purpose which justifies piercing of the corporate veil. This the reason for the rule, stated in all Florida cases, that the courts are reluctant to pierce the corporate veil and will do so only in a court of competent jurisdiction, after notice to and full opportunity to be heard by all parties, and upon a showing of cause which necessitates the corporate entity being disregarded in order to prevent some injustice.

153 So. 2d at 721. Because the Department of Agriculture does not have the authority to require payment from Chase Landscaping for the wrongs committed by Chase Nurseries, Petitioners' complaint cannot succeed.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That Petitioners' Amended Complaint against Respondents Chase Landscaping and Fidelity be dismissed.

DONE AND ENTERED this 28th day of July, 2006, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of July, 2005.

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.