STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NAPLES FERTILIZER AND GARDEN CENTER PARTNERSHIP,	)	
Petitioner,	)	
vs.	)	Case No. 07-0374
SMALLWOOD DESIGN GROUP/SMALLWOOD LANDSCAPE, INC., AND HARTFORD FIRE INSURANCE COMPANY, AS SURETY,	)	
Respondents.	)	

RECOMMENDED ORDER

The Administrative Law Judge (ALJ) assigned to this case by the Division of Administrative Hearings (DOAH) conducted the final hearing on June 14, 2007, in Naples, Florida.

APPEARANCES

For Petitioner: Darrin M. Phillips, Esquire
Darrin M. Phillips, P.A.
350 Fifth Avenue South, Suite 200
Naples, Florida 34102

For Respondents: (No Appearance)

STATEMENT OF THE ISSUES

The issues presented are whether Respondent, Smallwood Design Group/Smallwood Landscape, Inc. (Smallwood or the company), owes Petitioner $12,817.17 for agricultural products and, if so, whether the surety is liable for any deficiency.

PRELIMINARY STATEMENT

On November 6, 2006, Petitioner filed an Amended Agricultural Products Dealer Complaint (Complaint) with the Department of Agriculture and Consumer Services (Department). The Department referred the matter to DOAH to conduct an administrative hearing.

Neither of the respondents appeared at the hearing. Petitioner presented the testimony of one witness and submitted six exhibits for admission into evidence. The identity of the witness and exhibits and any attendant rulings are set forth in the Transcript of the hearing filed on June 29, 2007.

Petitioner timely filed its Proposed Recommended Order (PRO) on July 3, 2007. Smallwood did not file a PRO. Respondent, Hartford Fire Insurance Company, filed a letter on July 11, 2007, which the ALJ deems to be a PRO filed more than ten days after the date the Transcript was filed with DOAH.

FINDINGS OF FACT

1. Petitioner is a Florida corporation licensed by the Department as a "dealer in agricultural products," within the meaning of Subsection 604.15(2), Florida Statutes (2006) (agricultural dealer).[1] The license number and business address of Petitioner are 68954 and 3930 14th Street North, Naples, Florida 34103.

2. Smallwood is a Florida corporation licensed by the Department as an agricultural dealer pursuant to license number 68513. The sole shareholder and registered agent for Smallwood is Ms. JoAnn Smallwood. The business address for Smallwood is 2010 Orange Blossom Drive, Naples, Florida 34109.

3. Hartford Fire Insurance Company (Hartford) is the surety for Smallwood pursuant to bond number 21BSBCI1473 issued in the amount of $100,000 (the bond). The term of the bond is December 9, 2005, through December 9, 2006.

4. Petitioner conducts a garden center business that, in relevant part, sells agricultural products, defined in Subsection 604.15(1). Petitioner sells products at wholesale and retail to businesses and consumers in the Naples area.

5. Smallwood purchased agricultural products from Petitioner from 1983 until sometime in 2006. The purchases were made in the ordinary course of Smallwood's architectural landscape construction and horticultural management business (landscape business).

6. The terms of purchase required payment from Smallwood within 30 days. Any monthly balance that remained unpaid after 45 days was subject to interest at a monthly rate of 1.5 percent and an annual rate of 18 percent.[2] With one exception, Smallwood paid Petitioner within 60 days of delivery.

7. The exception to Smallwood's payment history with Petitioner is the subject of this proceeding. From May 11 through September 26, 2006, Smallwood did not pay Petitioner $12,817.17 for 66 invoices involving 440 items (pallets or pieces) of sod that Petitioner delivered to Smallwood.[3] The sod consisted of varieties identified in the record as: Floratam, Seville, Zoysia, Croton, and Fountain Grass.[4]

8. Smallwood does not deny that Petitioner should be paid $12,817.17. However, Smallwood alleges that Petitioner has filed its claim against the wrong party.

9. Smallwood alleges that, on June 13, 2006, another corporation purchased the assets of Smallwood, including the right to conduct the landscape business in the name of Smallwood, and assumed Smallwood's liability to Petitioner for any prior purchases. Subsequent purchases are allegedly the obligation of the successor corporation.

10. Ms. Smallwood filed a Response to Amended Claim with the Department on January 7, 2007 (the Response). The Response identifies the successor corporation as Spartan Partners, Inc., an Illinois corporation, located at 350 Pfingsten Road, Suite 109, Northbrook, Illinois 60062 (Spartan), and alleges that Petitioner's claim is not valid because:

> [Smallwood] sold its assets and <u>has not been engaged in business</u> since June 13, 2006. Specifically, pursuant to an Asset Purchase

> Agreement, [Smallwood] sold its assets (including its name) to Spartan . . . , and thereafter, Spartan continued operating the business for a period of time and then sold some of the assets and ceased operations. (emphasis supplied)
>
> Smallwood . . . does not have knowledge of the accounts of Spartan, which continued doing business under the Smallwood name after the sale of assets on June 13, 2006. If items purchased from [Petitioner] have not been paid for, Spartan is the responsible and liable party. (emphasis supplied)

11. The Response filed in January of 2007 was not the first time Petitioner had seen the Smallwood defense. Smallwood sent Petitioner a form letter, dated September 14, 2006, that: contained a salutation addressing "All Vendors of [Smallwood]," referenced the "Termination of Credit Arrangements and Guaranties," and was signed by Ms. Smallwood on behalf of Smallwood (notice letter). The notice letter provided in relevant part:

> The purpose of this letter is to advise you that the assets of [Smallwood], including the company name, were sold to Spartan . . . as of June 13, 2006. Since [Smallwood] sold all of its assets, that corporate entity is no longer actively engaged in any business. The business known as [Smallwood] is now conducted by [Spartan]. . . . (emphasis supplied)
>
> As a result of the sale of assets and the fact that [Smallwood] is no longer actively engaged in business, the relationship or agreement you had with that particular corporate entity is hereby terminated and of

> no further force and effect. If you are continuing to do business with [Spartan], you should, if you have not done so already, make or confirm your business arrangements with that entity. Furthermore, if I signed any document that could be construed as a personal guaranty of payment for any obligations of [Smallwood], please consider this letter to be a formal revocation, cancellation and termination of any such document. (emphasis supplied)

Petitioner's Exhibit 3 (P-3).

12. Part of the Smallwood defense is supported by the evidence. Smallwood did sell its assets to Spartan.

13. The Asset Purchase Agreement between Smallwood and Spartan was admitted into evidence as Petitioner’s Exhibit 2 (P-2). The Agreement shows that Spartan purchased the assets of Smallwood on June 13, 2006, for $1.030 million, of which $883,602.11 was allocated to accounts receivable due the seller.

14. The seller is identified in the Asset Purchase Agreement as Ms. Smallwood and the company. The seller received $895,500.00 in cash at the closing.

15. The remaining part of the Smallwood defense involves two allegations. First, Smallwood alleges that Spartan assumed a liability of $3,834.43 for 23 purchases of sod by Smallwood from May 11 through June 13, 2006. Second, Smallwood alleges that Spartan owes Petitioner $8,982.74 for 43 purchases of sod from June 14 through September 26, 2006.

16. If the evidence were to support both allegations, the result may effectively deprive Petitioner of an administrative remedy. The corporate documents attached to the Asset Purchase Agreement do not show that Spartan complied with the bond and license requirements in Subsection 604.19 prior to conducting the landscape business in the name of Smallwood. Spartan sold the assets needed to satisfy a judgment against Spartan, Spartan is a foreign corporation, and Spartan no longer conducts the landscape business in Florida.

17. It would be unnecessary to determine whether Smallwood or Spartan is liable for the $12,817.17 if: the terms of the bond were to allow an assignment of the bond to Spartan, and the Asset Purchase Agreement were to show that the bond was one of the contracts assigned to Spartan or one of the assets purchased by Spartan. The bond would cover both Smallwood and Spartan in such a case, and a determination of which shell hid the proverbial pea would be moot.

18. A copy of the bond did not find its way into the record. Petitioner did not submit a copy of the bond for admission into evidence, and the Department did not transmit a copy of the bond when the agency referred the matter to DOAH. The copy of the Asset Purchase Agreement admitted into evidence does not include a schedule of the contracts assigned to Spartan or a schedule of the assets sold to Spartan.

19. A finding that Spartan expressly assumed Smallwood's liability to pay Petitioner $3,834.43 for sod delivered from May 11 through June 13, 2006, is not supported by the evidence. In relevant part, the Asset Purchase Agreement provides:

> At Closing, Purchaser shall assume those liabilities of Company specifically defined and listed on the **Schedule 1.6(b)** attached hereto ("Assumed Liabilities"), and Purchaser shall not assume, incur, guarantee, or be otherwise obligated with respect to any liability whatsoever of Company other than as so stated. . . . (emphasis not supplied)
>
> Purchaser shall cause Stockholder [Ms. Smallwood] to be released as guarantor or obligor under the . . . Assumed Liabilities. . . .

P-2 at 2.

20. Schedule 1.6(b) is missing from the copy of the Asset Purchase Agreement that was admitted into evidence. Even if a complete exhibit were to show that Spartan assumed Smallwood's liability to Petitioner, neither of the respondents submitted evidence or cited legal authority to support a finding that such an assumption released Smallwood from its obligation to Petitioner or otherwise extinguished that obligation. Nor is there any evidence that Petitioner acquiesced in an assumption by Spartan or otherwise released Smallwood from the obligation to pay Petitioner for sod delivered prior to June 13, 2006.

21. The remaining allegation in the Smallwood defense is that Spartan, rather than Smallwood, purchased the sod Petitioner delivered between June 13 and September 26, 2006. It allegedly is Spartan that owes Petitioner $8,982.74.

22. The remaining allegation implicitly argues that, after June 13, 2006, Smallwood was no longer a viable corporation with the legal capacity to purchase sod from Petitioner because the asset sale resulted in what courts describe as a “de facto merger” of Smallwood into Spartan or a “mere continuation of business” by Spartan. The law pertaining to these two doctrines is discussed in the Conclusions of Law, but certain factual findings are relevant to both doctrines.

23. The Smallwood defense is a mutation of the doctrines of "de facto merger" and "mere continuation of business," either of which have been utilized by courts to hold a successor corporation liable for the obligations of the corporate predecessor. The Smallwood defense takes the relevant judicial doctrines a step further. The defense implicitly assumes that if a "de facto merger" or "mere continuation of business" occurred as a result of the asset sale, Smallwood "merged" into Spartan, and Smallwood was no longer a viable corporate entity with the legal capacity to purchase sod from Petitioner.

24. Two facts preclude the application of either judicial doctrine to the sale of Smallwood's assets. First, there is no

commonality or continuity of ownership interests between Smallwood and Spartan. Spartan did not acquire some or all of the stock of Smallwood, and Ms. Smallwood did not become a shareholder in Spartan. The two corporations do not share common directors or officers.

25. The second fact involves the purchase price paid for the Smallwood assets. The purchase price does not suggest a cozy relationship between Smallwood and Spartan that otherwise may have persuaded a court to disregard the separate corporate existence of Smallwood after the asset-sale. No evidence suggests that the price paid was not the fair market value of the Smallwood assets negotiated at arms length between a willing buyer and a willing seller.

26. Smallwood remained in existence as a viable Florida corporation after the asset-sale on June 13, 2006. No legal impediment prevented Smallwood from purchasing sod from Petitioner, and Smallwood had the legal capacity to do so. The purchases may have breached the terms of the Asset Purchase Agreement, but the legal capacity of Smallwood to purchase sod from Petitioner is not driven by contractual arrangements between Smallwood and private third parties.

27. Smallwood remained in existence as a Florida corporation at least through January 7, 2007, when Ms. Smallwood filed the Response with the Department. The Response does not

allege as a factual matter that Smallwood had been liquidated and was no longer in existence as a Florida corporation; or that the $895,500 the seller received for the sale of assets was not in corporate solution and available to pay invoices submitted by Petitioner. The Response merely states that Smallwood was not actively engaged in the conduct of business.

28. Smallwood was actively engaged in the landscape business after June 13, 2006. Smallwood maintained its customary banking account; continued to issue checks imprinted with the company name; paid Petitioner for goods that Petitioner delivered to Smallwood before May 11, 2006; accepted without objection or disclaimer 43 invoices totaling $8,982.74 that were billed to the company for sod delivered to the company at the company's business address; issued the notice letter to its creditors; and purported to terminate credit agreements and guarantees.

29. Prior to receiving the notice letter, Petitioner had no reason to believe that Smallwood was not conducting the landscape business. The face of Smallwood remained unchanged.

30. Ms. Smallwood continued to operate the landscape business pursuant to a long-term employment contract with Spartan. Spartan signed Mr. Keith Whipple, another key employee of Smallwood, to a similar contract. Copies of the employment contracts are attached to the Asset Purchase Agreement.[5]

31. Between June 13 and September 14, 2006, Ms. Smallwood continued to sign Smallwood checks imprinted with the company name and issued on the Smallwood business account. Ms. Smallwood signed the checks as the authorized representative of Smallwood. Smallwood accepted 35 invoices issued to the company for $7,007.13 and deliveries of the sod at the company's customary business address.

32. The notice letter was dated September 14, 2006, but Petitioner received the letter on or about September 26, 2006. Between September 14 and 26, 2006, Smallwood accepted eight invoices for sod purchased for $1,975.61.

33. The evidence does not show when Smallwood actually mailed the notice letter, and Petitioner did not stamp the notice letter with the date it was received. The chief operating officer for Petitioner testified at the hearing but does not recall the date Petitioner actually received the notice letter. However, the witness testified that Petitioner stopped all sales to Smallwood immediately upon receipt of the notice letter to allow time for Petitioner to complete a credit check of Spartan. The trier of fact finds the relevant testimony to be credible and persuasive.

34. The failure to timely disclose the identity of Spartan as a successor entity operating in the name of Smallwood misled Petitioner, if not other creditors.[6] Between June 13 and

September 26, 2006, Petitioner extended credit for purchases of $8,982.74 before Petitioner had the opportunity to ensure the credit worthiness of Spartan and, if desired, to obtain a written guarantee from the individual officers and shareholders.[7]

35. Smallwood, rather than Spartan, purchased sod from Petitioner from May 11 through September 26, 2006. Smallwood owes Petitioner $12,817.17.

36. Hartford does not claim that the terms of the bond do not ensure payment of the purchases made by Smallwood. Hartford's sole objection in its PRO is that the bond proceeds must be paid directly to the Department rather than to Petitioner. Hartford correctly cites Subsection 604.21(8) in support of its objection.

CONCLUSIONS OF LAW

37. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57(1). DOAH provided the parties with adequate notice of the hearing. Neither of the respondents appeared at the hearing.

38. The burden of proof is on Petitioner. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 2d DCA 1981). Petitioner must show by a preponderance of the evidence that Petitioner is entitled to the remedy claimed in the Complaint.

39. Petitioner satisfied its burden of proof. Prior to receiving the notice letter from Smallwood, Petitioner sold sod to Smallwood in 66 transactions for an aggregate sales price of $12,817.25. Smallwood has not paid any of the amount due. It is undisputed that the terms of the bond ensure payment of purchases by Smallwood.

40. The Smallwood defense is a twist of the judicial doctrines of "de facto merger" and "mere continuation of business," which courts have utilized to hold successor corporations liable for the obligations of the corporate predecessor. The defense implicitly assumes that if a "de facto merger" or "mere continuation of business" occurred on June 13, 2006, Smallwood did not have the legal capacity to purchase sod from Petitioner after the "merger."

41. Two methods are generally used to acquire corporate assets. In one method, the acquiring corporation purchases the stock of the predecessor and, as the new shareholder, succeeds to the ownership of the assets of the acquired corporation (stock acquisition). In the other method, the predecessor sells its assets to the acquiring corporation, but the shareholders of the predecessor retain their stock, and the predecessor remains a viable corporate entity until liquidation (asset acquisition).

42. A successor corporation in a stock acquisition is subject to the liabilities of the acquired corporation. A

successor corporation in an asset acquisition generally is not subject to the liabilities of the selling corporation. Compare Corporate Express Office Products, Inv. V. Phillips, 847 So. 2d 406, 412 (Fla. 2003) (successor in a stock acquisition entitled to enforce non-compete agreements of employees of predecessor), and The Celotex Corporation v. Pickett, 490 So. 2d 35, 38 (Fla. 1986) (imposing liability for punitive damages on successor corporation after corporate merger), with Bernard v. Kee Manufacturing Company, Inc., 409 So. 2d 1047, 1049-1050 (Fla. 1982) (refusing to impose products liability on successor after asset acquisition).

43. Spartan acquired the assets of Smallwood through an asset acquisition. In such cases, Florida courts generally do not impose the liabilities of the selling predecessor upon the buying successor unless: the successor corporation assumes the obligations of the predecessor; the transaction is a "de facto merger," the successor is a "mere continuation of business" of the predecessor, or the transaction is a fraudulent effort to avoid liabilities. Bernard, 409 So. 2d at 1049; Orlando Light Bulb Services, Inc. v. Laser Lighting and Electrical Supply, Inc., 523 So. 2d 740, 742 (Fla. 5th DCA 1988).

44. The evidence is insufficient to show that Spartan expressly or impliedly assumed the liabilities of Smallwood.

No allegation is made that the asset acquisition was a fraudulent effort to avoid the liabilities of Smallwood.

45. The judicial doctrines of "de facto merger" and "mere continuation" are distinct concepts. Munim v. Azar, 648 So. 2d 145, 153 (Fla. 4th DCA 1994). However, a prerequisite for the application of either doctrine is a common identity of officers, directors, and shareholders. Serchay v. NTS Fort Lauderdale Office Joint Venture, 707 So. 2d 958, 960 (Fla. 4th DCA 1998); 300 Pine Island Associates, LTD. v. Cohen & Associates, P.A., 547 So. 2d 255, 256 (Fla. 4th DCA 1989). Smallwood fails the "commonality of interests" test based on previous findings.

46. Other factors may indicate a commonality of interests between a predecessor and successor corporation. Orlando Light Bulb, 523 So. 2d at 743 n.1; 300 Pine Island, 547 So. 2d at 256. One issue courts have examined is whether the successor corporation paid fair market value for the assets of the predecessor. Krogen Express Yachts, LLC v. Nobili, 947 So. 2d 581, 584 (Fla. 4th DCA 2007); Jacksonville Bulls Football, LTD. v. Blatt, 535 So. 2d 626, 629 (Fla. 3d DCA 1988). Smallwood fails the "fair market value" test based on previous findings.

47. An owner of property generally has the right to dispose of property as the owner sees fit. However, no transfer may be made which prejudices the rights of existing creditors. Jacksonville Bulls Football, 535 So. 2d at 629.

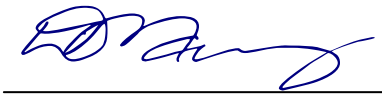
48. Smallwood sold its property to Spartan without disclosing the sale for approximately 105 days. Between the dates of sale and disclosure, Petitioner extended $12,817.17 in credit to Smallwood, and Smallwood owes Petitioner that amount.

RECOMMENDATION

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

RECOMMENDED that the Department enter a final order directing Smallwood to pay $12,817.17 to Petitioner, and, in accordance with Subsection 604.21(8), requiring Hartford to pay over to the Department any amount not paid by Smallwood.

DONE AND ENTERED this 15th day of August, 2007, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of August, 2007.

ENDNOTES

1/ All subsection, section, and chapter references are to Florida Statutes (2006) unless otherwise stated.

2/ The 45-day period is calculated from the terms of the invoices in evidence. The invoices provide that a monthly finance charge of 1.5 percent is charged after 30 days if the invoice is not paid by the 15th of the month following the 30-day due date.

3/ The total of $12,817.17 is the sum of the amounts alleged in paragraphs 2 through 4 of Petitioner's PRO. The sum of the amounts alleged in paragraphs 2 through 4 is less than the total of $12,817.25 alleged in paragraph 5 of Petitioner's PRO and less than the total of $12,867.25 alleged in the Complaint.

4/ The invoices in evidence show that the unpaid claim is for sod. The invoices do not include a charge for pallets or crates used to deliver the sod.

5/ The initial terms of employment are subject to automatic renewal.

6/ The evidence is not sufficient to support a finding that Smallwood intentionally misled Petitioner or other creditors. Nor is such a finding required to resolve the matters at issue in this proceeding.

7/ The evidence does not include a written guarantee signed by Ms. Smallwood.

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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.