

agriculture products, plus \$50.00 filing fee, totaling \$2,345.00.

PRELIMINARY STATEMENT

Horizon Nursery of Florida, LC, hereinafter Horizon Nursery, filed an Amended Claim before the Florida Department of Agriculture and Consumer Services, hereinafter Department, against Designing Women Landscaping, Inc., d/b/a Designing Women Landscaping and Nursery, hereinafter Designing Women Landscaping, for indebtedness due to the failure of Designing Women Landscaping to pay Horizon Nursery for agriculture products sold to Designing Women Landscaping. Designing Women Landscaping filed a response denying and challenging the Amended Claim and requesting a hearing. On November 6, 2008, the Department referred this matter to the Division of Administrative Hearings.

At hearing, Horizon Nursery presented the testimony of one witness and entered six exhibits (Petitioner's Exhibits numbered 1 through 6) into evidence. Designing Women Landscaping presented the testimony of one witness and entered four exhibits (Respondent's Exhibits numbered 1 through 4) into evidence.

No transcript of the final hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was set for ten days following the conclusion of the hearing. The parties timely filed their post-hearing

submissions, which were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. No dispute exists that, at all times material hereto, Horizon Nursery was a producer of agriculture products.

2. No dispute exists that, at all times material hereto, Designing Women Landscaping was a dealer in agriculture products.

3. No dispute exists that, at all times material hereto, Designing Women Landscaping purchased agriculture products from Horizon Nursery.

4. Linda Esposito testified on behalf of Horizon Nursery. She is the Office Manager of Horizon Nursery.

5. Beth Best testified on behalf of Designing Women Landscaping. She is the Vice President of Operations for Designing Women Landscaping.

6. No dispute exists that Horizon Nursery and Designing Women Landscaping began their business relationship in February 2005.

7. Horizon Nursery has a form titled "Terms and Conditions of Credit" for dealers in agricultural products who desire to do business with it on credit. Horizon Nursery also refers to the form as a credit application. The Terms and Conditions of Credit contains a section at the end of the form for the date,

the name of the firm, the signature and title of the person executing the form on behalf of the firm, the printing of that person's name, and the social security number of that person.

The Terms and Conditions of Credit provisions provide in pertinent part:

Charges are due 30 days from invoice date.
All past due accounts are subject to a
service charge of 1.5% per month.

* * *

The undersigned applicant does hereby certify that the information given is correct . . . it is agreed and understood by HORIZON NURSERY . . . and the undersigned that all purchases made on an open account will be paid in full according to the terms of sale on each invoice and this application.

8. Horizon Nursery possessed a Terms and Conditions of Credit form dated February 8, 2005, with the firm name of Designing Women Landscape. Further, the Terms and Conditions of Credit form contained the signature of the owner of the firm, however, the name of the owner was not printed. The social security number was redacted. Designing Women Landscaping admitted that the signature appears to be that of its President, Susan Hallett.¹ An inference is drawn and a finding of fact is made that the signature is that of the President of Designing Women Landscaping.

9. Designing Women Landscaping did not possess a copy of the Terms and Conditions of Credit.

10. A finding of fact is made that Designing Women Landscaping executed, agreed to, and was subject to the Terms and Conditions of Credit.

11. Regarding payments on an account, Horizon Nursery's standard operating procedure is to apply a payment first to service charges on the account and then to the oldest outstanding invoice of the account.

12. Designing Women Landscaping received specific invoices from Horizon Nursery, regarding agricultural products ordered by and shipped to it, and paid the specific invoices for agricultural products from Horizon Nursery. However, several payments by Designing Women Landscaping were made beyond 30 days of the date of the invoices. When a payment was not made within 30 days of an invoice date, Horizon Nursery added a service charge to the balance owed in accordance with the Terms and Conditions of Credit; and, in accordance with its standard operating procedure, applied the payment first to the service fee owed and then to the oldest outstanding invoice.

13. However, when Horizon Nursery sent a subsequent invoice to Designing Women Landscaping for agricultural products that were ordered by and shipped to Designing Women Landscaping, the invoice reflected, among other things, the cost for

agricultural products ordered by and shipped to Designing Women Landscaping, but did not reflect the service charge that had been added to the Designing Women Landscaping's account for the late payment. Moreover, none of the invoices for agricultural products ordered by and shipped to Designing Women Landscaping reflected service charges that had been added to the Designing Women Landscaping's account for late payments.

14. Horizon Nursery's AR Dated Invoice/Payment Report reflects a beginning balance of \$-0- for Designing Women Landscaping as of April 3, 2006. Subsequent to April 3, 2006, according to the AR Dated Invoice/Payment Report, Designing Women Landscaping began to accrue service charges.

15. Throughout the business relationship between Horizon Nursery and Designing Women Landscaping, no dispute exists that Designing Women Landscaping received specific invoices totaling \$168,622.96 for agricultural products ordered by and shipped to it by Horizon Nursery; and that Designing Women Landscaping paid \$168,622.96 to Horizon Nursery.

16. The last specific invoice submitted to Designing Women Landscaping was invoice no. 115783 dated April 8, 2008, in the amount of \$2,295.00. Horizon Nursery's AR Dated Invoice/Payment Report reflects that a payment of \$2,295.00 was received by Horizon Nursery on May 15, 2008. The payment was received beyond 30 days of the date of the invoice. In accordance with

its Terms and Conditions of Credit, Horizon Nursery added a service charge to Designing Women Landscaping's account. Additionally, in accordance with its standard operating procedure, Horizon Nursery applied the payment first to service charges and then to the oldest outstanding invoice. Applying the two aforementioned procedures, Designing Women Landscaping's account resulted in a balance owed.

17. By a statement dated December 15, 2008, Horizon Nursery notified Designing Women Landscaping that it had an outstanding balance of \$2,460.99, representing two outstanding invoices: invoice no. 115542 dated December 17, 2007, in the amount of \$450.00, with a balance of \$165.99, and invoice no. 115783 dated April 8, 2008 in the amount of \$2,295.00, with a balance of \$2,295.00, which was the last specific invoice to Designing Women Landscaping. Because Horizon Nursery had applied payments from Designing Women Landscaping first to service charges and then to the oldest outstanding invoice, the two invoices remained outstanding even though Designing Women Landscaping had paid the amounts indicated in the invoices.

18. Horizon Nursery's employee responsible for accounts receivable had several telephone conversations, regarding the late payments, service charges, and how Horizon Nursery applied the payments received, with Designing Women Landscaping's bookkeeper, who was the employee responsible, among other

things, for paying the invoices approved by Ms. Best. Designing Women Landscaping's bookkeeper was employed with it for nine to 12 months. At no time did Horizon Nursery discuss with or communicate to an officer of Designing Women Landscaping regarding the service charges, late payments, and how Horizon Nursery applied the payments received.

19. Even though Horizon Nursery's statement dated December 15, 2008, and ledger reflects a balance of \$2,460.99, Horizon Nursery is claiming \$2,295.00, the amount of the invoice dated April 8, 2008.

20. Additionally, Horizon Nursery is claiming \$50.00 for filing the Amended Claim with the Department.

21. No appearance was made by the casualty company, Nova Casualty Company.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto, pursuant to Sections 120.569 and 604.21, Florida Statutes (2008), and Subsection 120.57(1), Florida Statutes (2008).

23. Dealers of agricultural products are licensed by the Department. § 604.17, Fla. Stat. (2008). Dealers must post a bond or other security as a precondition to licensure, ensuring

payment to producers for all agricultural products purchased.
§§ 604.19 and 604.20, Fla. Stat. (2008).

24. These proceedings are de novo. § 120.57(1)(k), Fla. Stat. (2008).

25. The general rule is that "the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal." Florida Department of Transportation v. J. W. C. Company, Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981). The burden of proof is upon Horizon Nursery to show by a preponderance of the evidence that it is entitled to the relief sought.

26. Horizon Nursery has met its burden. Generally, only the parties to a contract are obligated or bound by it. 17A Am. Jur. 2d, Contracts § 412. Designing Women Landscaping entered into a contract with Horizon Nursery, through the Terms and Conditions of Credit, with the terms and conditions, among others, that Designing Women Landscaping would be able to purchase agricultural products from Horizon Nursery on credit, and that the purchases would be paid in-full according to the terms on each invoice and the Terms and Conditions of Credit. Horizon Nursery and Designing Women Landscaping agreed to be bound by the Terms and Conditions of Credit. The payment term on each invoice, pertinent hereto, was payable within 30 days of the date of the invoice. The terms of the Terms and Conditions

of Credit, pertinent hereto, were that the payment was due within 30 days from the date of the invoice, that an account was past due if not paid within the 30-day period, and that a past due account was subject to a service charge of 1.5 percent per month.

27. The undersigned is persuaded that Horizon Nursery was obligated to provide notice to Designing Women Landscaping of its service charge for extending credit and how the service charge would be applied. Horizon Nursery provided such notice to Designing Women Landscaping in the Terms and Conditions of Credit.

28. Designing Women Landscaping failed to make several payments within the 30-day period of the date of the invoice. Horizon Nursery applied the 1.5 percent service charge.

29. Horizon Nursery did not provide statements to Designing Women Landscaping reflecting the service charges which had been incurred.

30. Horizon Nursery's standard operating procedure, regarding late payments and how it applied late payments to accounts that had incurred service charges, was to apply the payments that it received first to outstanding service charges and the balance of the payment to the oldest outstanding invoice. Horizon Nursery did not provide notice to Designing Women Landscaping of its standard operating procedure. The

undersigned is not persuaded that Horizon Nursery was obligated to provide notice to Designing Women Landscaping of its standard operating procedure.

31. Horizon Nursery did not provide statements to Designing Women Landscaping reflecting how Horizon Nursery applied the payments made by Designing Women Landscaping.

32. Due to Designing Women Landscaping knowing that its payment for an invoice was due within 30 days of the date of the invoice to avoid a 1.5 percent service charge per month and that several of its payments were late, Designing Women Landscaping knew that it was incurring service charges. What was unknown to Designing Women Landscaping was the amount of the service charges incurred and how Horizon Nursery was applying the payments being made. The undersigned is not persuaded that Designing Women Landscaping can now protest having incurred service charges.

33. Consequently, no hidden charges were incurred by Designing Women Landscaping.

34. Hence, Designing Women Landscaping is obligated to pay all charges incurred.

RECOMMENDATION

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

RECOMMENDED that the Florida Department of Agriculture and Consumer Services enter a final order finding that Designing Women Landscaping, Inc., d/b/a Designing Women Landscaping and Nursery is indebted to Horizon Nursery of Florida, LC in the amount of \$2,295.00 and ordering the payment of same, plus a filing fee of \$50.00 for filing the Amended Claim.

DONE AND ENTERED this 5th day of February, 2009, in Tallahassee, Leon County, Florida.

Errol H. Powell

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of February, 2009.

ENDNOTE

1/ The president, Susan Hallett, did not testify at hearing.

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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.