

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BUD SOD, LLC,)
)
 Petitioner,)
)
 vs.) Case No. 09-1278
)
 FYV, INC., d/b/a MIAMI TROPICAL)
 NURSERY, INC., AND FIDELITY AND)
 DEPOSIT COMPANY OF MARYLAND, AS)
 SURETY,)
)
 Respondents.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was held in this case on July 7, 2010, by video teleconference with the parties to appear from Fort Myers, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings in Tallahassee, Florida.

APPEARANCES

For Petitioner: Steven L. Polhemus, Esquire
Post Office Box 2188
LaBelle, Florida 33975

For Respondent FYV, INC., d/b/a Miami Tropical Nursery, Inc.:

(No appearance)

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

(No appearance)

STATEMENT OF THE ISSUE

Whether Respondent, FYV, Inc., d/b/a Miami Tropical Nursery, Inc. (Respondent or Buyer), owes Petitioner, Bud Sod, LLC (Petitioner or Seller), the sum of \$7,168.09 for pallets of sod sold to the Buyer by the Seller.

PRELIMINARY STATEMENT

Petitioner filed a complaint with the Florida Department of Agriculture and Consumer Services (Department) that alleged Respondent had failed to comply with an agreement regarding the purchase of sod. Petitioner alleged that the Buyer owed the Seller in excess of \$15,000 for bahia sod sold in pallets to Respondent. Petitioner seeks compensation for the sod against the Buyer and its surety. Fidelity and Deposit Company of Maryland was identified as the surety for Respondent. The case was forwarded to the Division of Administrative Hearings for formal proceedings on March 13, 2009.

Thereafter, the case was continued on numerous occasions primarily because the parties continued to negotiate the amount claimed to be owed. At one point, a civil mediator was to work with the parties to establish the amount owed. The case involved many tickets and invoices along with copies of drafts showing payment for the type and volume of product delivered. Finally, the principals for the two companies involved, Yolanda More (for Respondent) and Tanya Carter (for Petitioner), met to

sort through the invoices and payments to reach an amount claimed to be due and owing. As a result of that meeting, the parties agreed that Respondent would remit a specified sum. In accordance with the agreement, Respondent transferred \$10,000 to Petitioner. The remainder of the amount claimed was not paid.

Prior to hearing, Respondent's counsel was permitted to withdraw. At the final hearing, Petitioner presented the testimony of Tanya Carter. No one appeared for Respondent, and no evidence was presented on Respondent's behalf on July 7, 2010.

A transcript of the proceeding has not been filed and one is not expected. The parties were granted ten days from the conclusion of the hearing within which to file a proposed recommended order. Neither party has filed a proposed order. Notice of the hearing was provided to all parties of record, including the surety.

FINDINGS OF FACT

1. At all times material to the instant case, Petitioner and Respondent were involved in the purchase and sale of an agricultural product grown and delivered in Florida.

2. Under the terms of their on-going business relationship, Petitioner supplied Respondent with sod. There is no disagreement that Petitioner produced and sold the sod to Respondent. In fact, the parties had numerous dealings that

covered many tickets noting deliveries and invoices noting the monies owed.

3. Prior to July 7, 2010, the parties met without their attorneys to try and agree upon an amount owed by Respondent. At that time, they went through the volumes of paperwork related to the claim and reached a mutually-acceptable decision.

4. Petitioner maintains that Respondent owes \$17,168.09 as a compromised sum for the sod sold by Petitioner to Respondent. Of that amount, Petitioner acknowledges that Respondent remitted \$10,000 to the Seller.

5. Accordingly, Petitioner asserts that the sum of \$7,168.09 is owed and unpaid for the sod purchased by Respondent. Respondent presented no evidence to refute this amount.

CONCLUSIONS OF LAW

6. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.57 and 120.60, Fla. Stat. (2009).

7. Agriculture is an important industry in the State of Florida. Accordingly, the Legislature has recognized:

. . . that the recovery of agricultural products is impractical because of the speed with which such products move through commerce and because of the difficulty of identification and that, because recovery is impractical, producers are subject to the possibility of serious economic harm in the

event an agricultural products dealer defaults. Therefore, it is necessary in the interest of the public welfare to regulate agricultural products dealers in this state.

See § 604.151, Fla. Stat. (2009).

8. Section 604.15, Florida Statutes (2009), provides, in part:

For the purpose of ss. 604.15-604.34, the following words and terms, when used, shall be construed to mean:

(1) "Agricultural products" means the natural products of the farm, nursery, grove, orchard, vineyard, garden, and apiary (raw or manufactured); sod; tropical foliage; horticulture; hay; livestock; milk and milk products; poultry and poultry products; the fruit of the saw palmetto (meaning the fruit of the *Serenoa repens*); limes (meaning the fruit *Citrus aurantifolia*, variety Persian, Tahiti, Bearss, or Florida Key limes); and any other nonexempt agricultural products produced in the state, except tobacco, sugarcane, timber and timber byproducts, forest products as defined in s. 591.17, and citrus other than limes.

(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.

9. Section 604.21, Florida Statutes (2009), provides a mechanism for anyone damaged by a breach of the terms of an agreement given by a dealer in agricultural products to file a complaint against the dealer (herein Respondent) and its surety to seek compensation for the alleged breach. The complaint is processed by the Department.

10. In this case, Petitioner made just such a complaint, and the matter was duly-forwarded to the Division of Administrative Hearings for an evidentiary proceeding to resolve the disputed issues of fact.

11. A hearing held in accordance with Subsection 120.57(1), Florida Statutes (2009), on the complaint must be conducted if there are disputed issues of material fact. Petitioner has the burden of proving the allegations of the complaint by a preponderance of the evidence. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 934 (Fla. 1996)("The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue"); Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981).

12. In this case, Petitioner has met that burden. Petitioner has established by a preponderance of the evidence

that Respondent owes the sum of \$7,168.09 for agricultural product sold to the Buyer by Petitioner. It is incumbent on Respondent to remit that amount to Petitioner to satisfy the indebtedness for the product purchased.

13. Further, in accordance with Subsection 604.21(1)(g), Florida Statutes (2009):

(g) The surety company or financial institution shall be responsible for payment of properly established complaints filed against a dealer, notwithstanding the dealer's filing of a bankruptcy proceeding.

14. Thus, should Respondent fail to remit the appropriate amount as directed by the Department, the surety should be held responsible for the amount owed.

RECOMMENDATION

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

RECOMMENDED that the Department of Agriculture and Consumer Services enter a final order approving Petitioner's complaint against Respondent in the amount of \$7,168.09.

DONE AND ENTERED this 9th day of August, 2010, in
Tallahassee, Leon County, Florida.



J. D. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of August, 2010.

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.