

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ACTION SOD AND LANDSCAPE, LLC,)
)
 Petitioner,)
)
 vs.) Case No. 12-1967
)
 TERRA BELLA AND ASSOCIATES,)
 INC., AND GREAT AMERICAN)
 INSURANCE COMPANY, AS SURETY,)
)
 Respondents.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on August 17, 2012, by video teleconference at sites in Miami and Tallahassee, Florida, before Administrative Law Judge June C. McKinney of the Division of Administrative Hearings, pursuant to the authority set forth in sections 120.569 and 120.57(1), Florida Statutes.

APPEARANCES

For Petitioner: Barbara Callado, President
Action Sod and Landscape, LLC.
Post Office Box 833143
Miami, Florida 33283-3143

For Respondent: Dennis Hall, President
Terra Bella and Associates, Inc.
Post Office Box 22397
Hialeah, Florida 33002

For Respondent: Great American Insurance Company
No Appearance

STATEMENT OF THE ISSUE

Whether the Respondent Terra Bella and Associates, Inc., owes the Petitioner \$17,806.20 for sod purchased from Petitioner, Action Sod and Landscape, LLC.

PRELIMINARY STATEMENT

This is an action under the Agricultural Bond and Licensure Law, sections 604.15-604.34, Florida Statutes. On or about February 22, 2012, Action Sod and Landscape, LLC, ("Petitioner" or "Action Sod") filed a complaint with the Florida Department of Agriculture and Consumer Services ("Department") alleging that Terra Bella and Associates, Inc., ("Respondent" or "Terra Bella") and Great American Insurance Company, as Surety (hereinafter "Co-Respondent" or "Great American") are indebted to Petitioner in the sum of \$16,756.20 for sod sold to Respondent during the period from November 2011 to December 2011. Respondent filed an answer denying the claim and disputing the allegations.

On May 31, 2012, this matter was forwarded to the Division of Administrative Hearings to conduct a formal hearing. On June 13, 2012, the undersigned issued an Order scheduling the hearing. This matter was set for hearing on August 17, 2012, and the final hearing was held by video teleconference at the scheduled time and date. Both parties appeared at hearing.

At the final hearing, Petitioner testified on her own behalf. Respondent also testified on his own behalf and presented the testimony of Ricky McIntosh. Respondent's Composite Exhibit 1 was offered and received into evidence.

The proceeding was recorded but not transcribed. Petitioner timely filed a Proposed Recommended Order, which has been duly considered in preparation of this Recommended Order. Terra Bella did not file a post-hearing submittal.

FINDINGS OF FACT

1. Action Sod is a 25-year-old business that sells plants and sod for lawn and landscaping.

2. Terra Bella is a construction landscape maintenance company that has been in existence since 2004.

3. Great American was the surety for Terra Bella during 2011.

4. In the latter part of 2011, Action Sod sold and invoiced Terra Bella the following sod orders: Invoice 114825 on November 16, 2011, for Vero Beach in the amount of \$1,979.50; Invoice 114828 for Parkland Heron Bay on November 16, 2011, in the amount of \$1,979.50; Invoice 114875 for Parkland on November 16, 2011, in the amount of \$2,268.40; Invoice 115360 for Pickup at Okechobbe Farm on November 21, 2011, in the amount of 1,455.20; Invoice 116151 for Harron Beach on November 29, 2011, in the amount of 3,852.00; Invoice 116350 for Enin 5613480172 on

December 1, 2011, in the amount of \$3,852.00; and Invoice 116880 for Pickup at Okechobbe Farm on December 6, 2011, in the amount of \$1,369.60.

5. Action Sod expected payment of each invoice within 30 days from date of pick up or delivery.

6. After Barbara Callado Lopez ("Lopez"), Action Sod's President and Director, did not receive payment for the outstanding November and December invoices totaling \$26,396.90, she called Terra Bella repeatedly to request payment.

7. On January 24, 2012, Terra Bella paid Action Sod \$9,640.00 for Invoices 113134, 113750, 114132, and 114626, leaving an outstanding balance of \$16,756.20.

8. On February 22, 2012, Action Sod filed a claim against Terra Bella with the Department because \$16,756.20 had not been paid. Action Sod ultimately amended the claim to \$16,806.20 to include the remaining monies owed for sod purchased plus the \$50.00 filing fee for a claim.

9. On February 29, 2012, Lopez went to Terra Bella's office requesting payment. The parties had a heated argument about the sod and monies owed. Lopez requested payment in the amount of \$16,756.20. Terra Bella provided a counter offer to Action Sod of \$13,006.20, which was calculated by subtracting \$750.00 for pallets returned and \$3,000.00 for the sod that didn't pass inspection and had to be replaced.

10. Even though Lopez was dissatisfied with the offered amount of \$13,006.20, she accepted it. Terra Bella paid Action Sod \$13,006.20 with check #5098, which stated in the memo section, "Final Payment of Agreed Upon Open Bal."

11. During the meeting, Lopez also signed six Final Waiver and Release of Lien forms for the following properties: Vero Lago, LLC; The Ranches at Cooper City, LLC; Parkland Reserve, LLC; Miami Dade Aviation Department; Heron Bay; and Monterra Clubhouse. The waivers neither provided invoice numbers nor identified and described the property locations as listed on the invoices. Each waiver provided in relevant part the following:

The undersigned lienor, received FINAL payment and hereby waives and releases its lien and right to claim a lien for labor, services, equipment, or materials furnished to Terra Bella & Associated, Inc., though February 29, 2012, on the . . . project. . . to the following property. . .

12. Action Sod cashed check #5098 and therefore Terra Bella is not indebted to Petitioner for any sod sold in November and December of 2011.

CONCLUSIONS OF LAW

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

14. Section 604.15 provides in pertinent 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; 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, tropical foliage, 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) "Producer" means any grower of agricultural products produced in the state.

15. Based on the findings of fact herein, Terra Bella is a dealer in agricultural products and Action Sod is a producer pursuant to section 604.15(2) and (9).

16. Dealers in agricultural products are required to be licensed by the Department. § 604.16, Fla. Stat. In order to be licensed, dealers must deliver a surety bond or certificate of deposit to the Department, which "shall be conditioned to secure the faithful accounting for and payment to producers or their agents or representatives of the proceeds of all agricultural products handled or purchased by such dealer." § 604.20(1), Fla. Stat. Terra Bella has a surety bond issued by Great American Insurance Company.

17. Producers are permitted to file a complaint against dealers and their sureties for damage claimed as a result of the breach of this condition. § 604.21(1), Fla. Stat.

18. The complainant in a proceeding initiated pursuant to section 604.21(1) has the burden of proving by a preponderance of the evidence the entitlement to the amounts sought to be recovered. See Florida Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981). However, even though the complainant bears the ultimate burden of proving the truth of the claim, once the complainant has made a prima facie case of entitlement to recover, the dealer has the obligation to come forward with evidence to refute that entitlement. See id.

19. Action Sod carried its burden of proving a prima facie case that Terra Bella purchased \$16,756.20 of sod and owed the monies to Action Sod when the claim was filed.

20. Terra Bella, nonetheless, produced sufficient evidence to refute monies still being owed. Accord and satisfaction results when: (1) the parties mutually intend to effect a settlement of an existing dispute by entering into a superseding agreement; and (2) there is actual performance in accordance with the new agreement. Compliance with the new agreement discharges the prior obligations. Wolowitz v. Thoroughbred Motors, Inc., 765 So. 2d 920 (Fla. 1st DCA 2000).

21. In this matter, the record is clear that each prong for the test of accord and satisfaction was met. On February 29, 2012, a dispute existed between Action Sod and Terra Bella as to the amount of monies owed. At hearing, Petitioner contended that Terra Bella still owes Action Sod \$2,824.80. However, the contention is rejected. The record shows that the parties reached an accord and resolved the dispute with an agreed amount of \$13,006.20, which was paid with check #5098. The fact that the check #5098 stated "Final Payment of Agreed Upon Open Bal" further demonstrates the agreement between the parties. Additionally, Action Sod signed waiver and releases of final payments as superseding agreements. Together the waivers and the accompanying payment of \$13,006.20

discharge Terra Bella's prior obligation. Therefore, Terra Bella is insulated from liability because Action Sod accepted the renegotiated amount, signed the waivers, and cashed check #5098, which constitutes accord and satisfaction.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Agriculture and Consumer Services enter a final order dismissing the complaint of Action Sod and Landscape against Terra Bella and Associates.

DONE AND ENTERED this 5th day of September, 2012, in Tallahassee, Leon County, Florida.



JUNE C. MCKINNEY
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 September, 2012.

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.