

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JWD TREES, INC.,

Petitioner,

vs.

Case No. 15-3566

LANDSCAPE SERVICE PROFESSIONALS,
INC., AND THE GRAY INSURANCE, AS
SURETY,

Respondents.

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held in Fort Myers, Florida, on December 10, 11, and 21, 2015, before Lynne A. Quimby-Pennock, a designated Administrative Law Judge of the Division of Administrative Hearings (Division).

APPEARANCES

For Petitioner: Sonia M. Diaz, Esquire
Coleman, Hazzard & Taylor, P.A.
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2640 Golden Gate Parkway
Naples, Florida 34105

For Respondent: Mark John Labate, Esquire
Mark J. Labate, P.A.
2748 East Commercial Boulevard
Fort Lauderdale, Florida 33308

STATEMENT OF THE ISSUES

Whether Petitioner, JWD Trees, Inc., is entitled to payment from Landscape Service Professionals, Inc., and the Gray

Insurance Company, as Surety, pursuant to sections 604.15 through 604.34, Florida Statutes (2014), for the purchase of trees; and, if so, what amount.

PRELIMINARY STATEMENT

On May 4, 2015, JWD Trees, Inc. (JWD), filed an Agricultural Products Dealer Claim Form (claim) with the Florida Department of Agriculture and Consumer Services (Department), alleging that Landscape Service Professionals, Inc. (Landscape) and its surety, The Gray Insurance Company (Insurance Company), owed JWD payment for 210 slash pine trees. The claim was for a total of \$42,567.80 (210 slash pine trees, shipping costs and applicable taxes). JWD is also claiming a \$50.00 filing fee for filing the claim. The Department provided Notice of the claim to Landscape and the Insurance Company. Respondent Landscape answered the Complaint on June 12. By letter dated June 16, the Department referred the matter to the Division to schedule an evidentiary hearing.

The matter was initially scheduled for hearing on August 31, in Fort Myers, Florida. The final hearing was continued twice and rescheduled for December 10 and 11, and completed on December 21.

At the hearing, JWD presented the testimony of J.W. Drott, III (president, JWD); Dennis Boddison (vice-president, JWD); John Nemcovic; and C. Way Hoyt, who was accepted

as an expert certified arborist. JWD's Exhibits 1 through 5, 7 through 13, 15, 17 through 19, 21, 22, 25 through 32, 36, 37, 46, 48, 55, 57, and 58 were admitted in evidence. JWD presented Lynn Griffith's deposition testimony in lieu of in-person testimony at the hearing (Exhibit 55). Respondents presented the testimony of Sandra Benton, Steven Grant, Guy Michaud, Leo Urban, William "Bill" Schall, and John Harris, who was accepted as an expert. Respondents' Exhibits 7, 10, 16, 18, 21a, and 40 were admitted in evidence.

A Joint Pre-Hearing Stipulation provided undisputed facts. As appropriate, those facts may be found below.

The four-volume final hearing Transcript was filed on January 29, 2016. A Notice of Filing Transcript was issued on February 1, directing the parties to file any proposed recommended orders (PROs) on February 8. The parties timely filed proposed recommended orders (PROs) on the established due date. Each PRO has been carefully considered in the preparation of this Recommended Order.

Unless otherwise indicated, citations are to Florida Statutes 2015.

FINDINGS OF FACT

The Parties

1. JWD is a Florida licensed dealer in agricultural products pursuant to chapter 604, Florida Statutes. JWD's

primary business is buying and selling trees, but it also operates a tree farm in Lee County, Florida. JWD is principally located in North Fort Myers, Florida. J.W. Drott, III, is the president and Dennis Boddison is the vice-president of JWD Trees.

2. Mr. Drott has 20 years of experience in buying and selling trees. Mr. Boddison has 16 years of experience in the tree business.

3. Respondent Landscape is a Florida licensed dealer in agricultural products, pursuant to chapter 604. Landscape is a full-service landscape business located in Tamarac, Florida. Sandy Benton is the president and Tom Benton is vice-president of Landscape. Ms. Benton started Landscape in February 1998.

4. Respondent Insurance Company filed a denial of the claim and was represented at hearing by Landscape's counsel.

5. Southeastern Shade is a registered nursery and has been in the business of growing trees for approximately nine years. John Nemcovic and his wife, Shelley, own and operate Southeastern Shade. Southeastern Shade supplied the 278 slash pines that JWD brokered to Landscape.

6. JWD and Landscape had a prior business relationship. JWD was on Landscape's list of pre-approved vendors.

The Setting

7. At all relevant times, Landscape was a contractor responsible for installing landscaping at the Palm Beach County

Solid Waste Authority (SWA) site on Jog Road in Palm Beach County, Florida. Landscape was vetted for the SWA project, which was a big project for Landscape.

8. In September 2014, Ed Conk,^{1/} Landscape's plant buyer, sought bids on a list of plants for the SWA job. The list included slash pine trees. According to the bid sheet, the slash pines were to be 16 feet, 18 feet, and 20 feet in height, and in quantities of 176, 167, and 118 respectively. There was nothing in the request for bids, or JWD's actual bid that addressed how long the slash pine trees were hardened off, or whether or how they had been root pruned.

9. On or about October 1, 2014, Mr. Drott, on behalf of JWD, submitted a written bid to Mr. Conk to provide 461 slash pines.^{2/} Landscape accepted the JWD bid, but only ordered 210 slash pines. Other slash pines were bought through other vendors and delivered to the SWA site.

10. The 210 slash pines were delivered over the course of three days: November 11, 12, and 13, 2014. Authorized personnel of Landscape received, inspected, and accepted the 210 slash pine trees. No problems or concerns were expressed regarding the delivery or condition of the slash pines.

11. A week later, Mr. Conk ordered 68 additional slash pine trees from JWD. JWD delivered the additional slash pines on November 19, 2014.

The Dispute Giving Rise to this Proceeding

12. Landscape's personnel documented receipt of the initial slash pines over a three-day period: November 11, 12, and 13, 2014. Once the slash pines were unloaded, they were "laid it on the ground and my water truck watered them down." The personnel also documented the planting of the slash pines; however, the exact location of JWD's trees in the SWA site map was not clearly established. The slash pines were planted at the SWA site either on the day of delivery or the day after delivery.

13. There was an irrigation system in place for watering the newly planted trees; however, it was not fully functional when the initial slash pines were planted. A water truck was used to water the trees. The SWA site had significant rainfall at times, and the ground was underwater during part of the pertinent period. It is unclear when the additional slash pine trees were planted: either on the day of delivery (November 19) or the following day (November 20).

14. Several weeks after the slash pines were planted, some of the slash pines started to deteriorate. Mr. Drott was notified that there was a beetle issue with the slash pines in early December 2014. Mr. Drott contacted Mr. Conk. Mr. Drott advised Mr. Conk to get the affected trees out of the area and to put a spray program in effect immediately to address the beetle infestation.

15. On January 7, 2015, Mr. Boddison, Mr. Conk, Mr. Nemcovic, and Guy Michaud, Landscape's foreman for the SWA site, conducted an SWA site visit. Mr. Nemcovic thought the beetle problem was causing the slash pines to deteriorate. Mr. Boddison noted that the SWA site was cut out of a large native pine wood flat, with a large retention area. Mr. Boddison also questioned Mr. Conk and Mr. Michaud about how the trees were unloaded, how they were handled and planted, and since there was an evident beetle infestation, what was being done as preventative maintenance.

16. In March 2015, Lynn Griffith, an agricultural consultant, conducted an SWA site visit. Mr. Griffith noted that a majority of the pines were healthy, but there were some that were not doing well; that some had holes in them indicative of a pine beetle infestation. Upon receiving a written report from Mr. Griffith in mid-March 2015, Mr. Drott provided the report to Mr. Conk.

17. In early April 2015, Landscape invited a Palm Beach County extension agent William Schall, the SWA project landscape architect Leo Urban, representatives of the prime contractor, Mr. Griffith, and selected Landscape employees to conduct a site visit at the SWA site. Mr. Drott was not invited to the inspection. Three dead trees were pulled out during this inspection. Only one of the dead trees was attributed to JWD.

18. Mr. Schall admitted that he did not know of other stress factors on the SWA site, and had only been told (by Landscape personnel) about how the trees were handled. Mr. Schall acknowledged that the SWA site was a prior pine tree area, and that pine beetles could be in the area. Further, he observed that at least one of the trees was planted too deep, which could add stress to newly planted trees.

19. Mr. Urban confirmed that there was an engineering problem at the SWA site, and the retention basin held water for longer periods of time than it should have. Mr. Urban confirmed that the SWA site was a prior pine forest. Additionally, during the April 2015 SWA site visit, Mr. Urban pointed out to Landscape personnel that there were four pines planted close to standing water. Landscape moved those four pines.

20. When Mr. Griffith was invited to the April 2015 SWA site visit, he was under the impression that all the interested parties would be there. Neither JWD nor Mr. Nemcovic was present. Mr. Griffith theorized potential factors leading to the demise of the slash pine trees: once water stress is introduced to newly transplanted trees, especially field-grown trees as is this case, it is hard for the trees to recover; the over-watering of the newly transplanted trees may have inadvertently washed away a significant amount of the spray that was used to treat the beetle infestation; or poor roots. Mr. Griffith observed, from

two trees "yanked" out of the ground, "very little in the way of new root initiation." He went on to speculate that it was possible that any roots could have rotted off from over-irrigation, could have been knocked off during the unloading and planting of the trees, or could have been ripped off when the trees were pulled. However, no pathology diagnosis was conducted to determine what, if any, root disease was present or if the roots suffered from over watering.

21. In April 2015, Mr. Drott received communications from Landscape indicating that the cause of the slash pine trees demise was attributed to the lack of hardening off or root issues. This was Mr. Drott's first notice that "hardening off" of the roots, and not the beetle infestation, was the cause of the slash pines' demise.

22. Mr. Hoyt's review of the case materials was extensive. He reviewed Landscape's discovery responses, including the daily job reports, two reports by Mr. Griffith, Mr. Schall's report, and photographs that were provided by JWD and Landscape. He participated in an SWA site visit in September 2015, as well as a site visit and interview of the principals of Southeastern Shades in October 2015. He attended Landscape's expert deposition and read his report, and inspected root balls and photographs of root balls, which Landscape purported to be from JWD. Mr. Hoyt also

spoke with other JWD customers. He also attended the three-day hearing.

23. Slash pine trees are very sensitive and can be easily stressed. Stress can be caused by a variety of factors including: transplanting; harsh handling; bark exposure to sunlight, including superficial wounds to the bark; too much or too little water; or planting too deeply. The stress will cause a tree to emit chemicals that attract beetles, which inhabit the trees and may kill a stressed tree within a week or two of the infestation.

24. Based on the totality of his review, Mr. Hoyt opined that a combination of factors contributed to the SWA slash pines to deterioration: excess watering, planting too deep, rough handling, and the beetles. His testimony is found credible.

25. Mr. Harris' opinion centered on only one possible explanation for the trees' demise: a failure to have an adequate root system or an inability of the roots to generate new growth.

26. Landscape personnel were unable to definitively identify the dead trees as being trees supplied by JWD. There were photographs introduced at the hearing that were initially marked as being from one supplier, then changed to another. There is a lack of clarity in identifying which supplier actually supplied the now demised trees.

27. Landscape has not paid for, and refuses to pay for the 210 slash pine trees reflected in JWD's invoice no. 16707. The total amount of the invoice is \$42,567.80. The additional 68 slash pines were on invoice no. 16818, which has been paid, and these are not the subject of this case.

28. JWD is entitled to payment in the amount of \$42,567.80 for the slash pine trees it provided to Landscape. Besides the amount set forth above, JWD claims the sum of \$50.00 paid for the filing of the claim against Landscape and its bond. The total sum owed to JWD by Landscape is \$42,617.80.

CONCLUSIONS OF LAW

29. The Division has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569, 120.57(1), & 604.21(6), Fla. Stat.

30. The Department is the state agency responsible for licensing dealers in agricultural products and investigating and taking action on complaints against such dealers. §§ 604.15 through 604.34, Fla. Stat.

31. The definition of "agricultural products" includes the "natural products of the . . . farm [and] nursery . . . produced in the state[.]" § 604.15(1), Fla. Stat. The trees brokered by JWD are "agricultural products" within the meaning of section 604.15(1).

32. The definition of a "dealer in agricultural products" includes any, "corporation . . . engaged within this state in the business of purchasing, receiving, or soliciting agricultural products from the producer . . . for resale or processing for sale[.]" § 604.15(1), Fla. Stat. Landscape is a dealer in agricultural products within the meaning of section 604.15(1).

33. Any business claiming to be damaged by any breach of the conditions of an agreement made with a dealer in agricultural products may file a complaint with the Department against the dealer and against the surety company. See § 604.21(1)(a), Fla. Stat.

34. The burden of proof in an administrative proceeding is on the party asserting the affirmative of an issue. Dep't of Banking & Fin., Div. of Sec. & Inv. Prot. v. Osborne, Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Evans Packing Co. v. Dep't of Agric. & Consumer Servs., 550 So. 2d 112 (Fla. 1st DCA 1989). In this case, Petitioner must prove by a preponderance of the evidence that it provided goods or services to Respondent and that Respondent failed to pay for such goods or services.

35. JWD bears the burden of proving the allegations of its complaint by a preponderance of the evidence. See Dep't of Banking & Fin., Div. of Sec. & Inv. Prot. v. Osborne Stern & Co., supra, ("The general rule is that a party asserting the

affirmative of an issue has the burden of presenting evidence as to that issue.”); Fla. Dep’t of Transp. v. J.W.C. Co., 396 So. 2d 778, 788 (Fla. 1st DCA 1981); Vero Beach Land Co., LLC v. IMG Citrus, Inc., Case No. 08-5435 (Fla. DOAH Mar. 4, 2009; Fla. DACS July 20, 2009), aff’d, IMG Citrus, Inc. v. Westchester Fire Ins. Co., 46 So. 3d 1014 (Fla. 4th DCA 2010).

36. JWD Trees has satisfied its burden. As set forth in the Findings of Fact, Respondent Landscape owes JW Trees \$42,567.80 for 210 slash pine trees.

37. JWD additionally seeks recovery of the filing fee paid to the Department for the claim filed against Respondents on May 4, 2015. JWD paid a \$50 filing fee, which is specifically recoverable against Respondent. See § 604.21(1)(a), Fla. Stat. (“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.”).

38. During Petitioner’s opening statement, counsel indicated that, in addition to the payment for the trees, shipping, and filing fee, Petitioner was requesting interest on the debt owed by Respondent. Nothing in the governing statute mentions costs, generally, or interest, particularly. Petitioner has cited no other authority for the undersigned to recommend payment of interest accrued on the debt. Section 55.03(1),

Florida Statutes, "provides only that a 'judgment or decree' shall bear interest. Such does not include administrative orders." Bank of Cent. Fla. v. Dep't of Banking & Fin., 470 So. 2d 742, 746 (Fla. 1st DCA 1985). "Although administrative orders entered in adjudicatory proceedings are generally regarded as quasi-judicial in nature . . . administrative orders are generally regarded as not having the force or effect of a final judgment or decree of a court." Id. (citations omitted).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that that a final order be entered by the Department of Agriculture and Consumer Services:

A. Approving the claim of JWD Trees, Inc., against Landscape Professional Services, Inc., in the total amount of \$42,617.80 (\$42,567.80 plus \$50 filing fee); and if Landscape Professionals Services, Inc., fails to timely pay JWD Trees, Inc., as ordered, that Respondent, The Gray Insurance Company, as Surety, be ordered to pay the Department of Agriculture and Consumer Services as required by section 604.21, Florida Statutes, and the Department reimburse the Petitioner as set out in section 604.21, Florida Statutes; and

B. Ordering Landscape Professional Services, Inc., to pay JWD Trees, Inc., reasonable costs and attorney's fees.

Jurisdiction is retained to determine the amount of costs and

attorney's fees, if the parties are unable to agree to the amount.

DONE AND ENTERED this 4th day of March, 2016, in Tallahassee, Leon County, Florida.



LYNNE A. QUIMBY-PENNOCK
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of March, 2016.

ENDNOTES

^{1/} Mr. Conk was terminated by Landscape and did not testify in this proceeding.

^{2/} JWD's bid included other trees, but only the slash pines are at issue in this case.

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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.