

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GATEWAY FARMS, LLC,

Petitioner,

vs.

Case No. 15-3728

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

Respondents.

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held via video teleconference with locations in Fort Lauderdale and Gainesville, Florida, on December 9, 2015, before W. David Watkins, a designated Administrative Law Judge of the Division of Administrative Hearings (Division).

APPEARANCES

For Petitioner: David Hajos, pro se
Gateway Farms, LLC
22413 Northwest 227th Drive
High Springs, Florida 32643

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, Gateway Farms, LLC, 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 (2015), for the purchase of trees; and, if so, in what amount.

PRELIMINARY STATEMENT

On May 1, 2015, Gateway Farms, LLC (Gateway), 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 Gateway payment for slash pine, bald cypress, and sable palm trees supplied by Gateway. The claim was for a total of \$13,462.30,^{1/} which included shipping costs for the trees and applicable taxes. Gateway 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 5, 2015. By letter dated June 26, 2015, the Department referred the matter to the Division to schedule an evidentiary hearing.

The matter was initially scheduled for hearing on September 11, 2015, in Gainesville, Florida. The final hearing was continued once, and at the request of Landscape, was rescheduled for a video teleconference hearing on December 9, 2015.

At the final hearing, Gateway presented the testimony of its owner, David Hajos, and offered two exhibits in evidence. Respondents presented the testimony of Sandra Benton, Guy Michaud, and John Harris, who was accepted as an expert. Respondents offered 14 exhibits in evidence.

At the conclusion of the hearing, the parties agreed that proposed recommended orders would be due 10 days following the filing of the official hearing transcript at the Division. The one-volume final hearing Transcript was filed on January 20, 2016. Respondents timely filed their Proposed Recommended Order (PRO) by the established deadline, February 1, 2016. Twenty-two days later, on February 23, 2016, Petitioner filed its PRO. Petitioner's PRO was not timely filed, and accordingly, has not been considered in the preparation of this Recommended Order.

Unless otherwise indicated, citations are to the 2015 version of the Florida Statutes.

FINDINGS OF FACT

The Parties

1. Gateway is a producer and seller of agricultural products, including slash pine trees. Gateway operates tree farms on 200 acres in five different locations in Columbia, Alachua, and Suwannee Counties. David Hajos is the owner and principal operator of Gateway.

2. Mr. Hajos has 17 years of experience in growing, harvesting, and selling pine and other species of trees in Florida.

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 has been the president of Landscape for 18 years.

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

5. Gateway has been doing business with Landscape for many years, with no indication of prior problems relating to the quality of trees provided. Lynn Griffith, Landscape's plant and soil expert, considers Gateway to be a competent and professional grower.

The Setting

6. 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.

7. Pursuant to orders placed by Landscape, Gateway sold a total of 148 slash pines for use at the SWA site. The invoices for those pines are dated January 22 and 23, and February 9 and 16, 2015. Upon their arrival at the site, authorized personnel of Landscape received, inspected, and accepted the

148 slash pine trees. No problems or concerns were expressed regarding the delivery or condition of the slash pines.

The Dispute Giving Rise to this Proceeding

8. Between 20 and 30 of the trees ordered from Gateway were intended as replacement trees for the approximately 150 slash pines provided by six other vendors that had been planted by Landscape, and then died. When the dead trees were removed by Landscape, pine beetles were observed infesting the trees.

9. Within several weeks of planting, 58 of the slash pines purchased from Gateway began to show signs of decline, resulting in their eventual death. Landscape consulted with the Palm Beach County Extension Service and industry professionals as to the cause of the death and decline of the slash pine trees, who undertook an investigation into the same.

10. 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.

11. In March 2015, Lynn Griffith, an agricultural consultant, conducted an SWA site visit. Mr. Griffith noted that a majority of the planted pines were healthy, but there were some that were not doing well; some had holes in them indicative of a pine beetle infestation.

12. In his report dated March 12, 2015, Mr. Griffith opined on the impact of the ambrosia (pine) beetle infestation on the slash pines:

The quantities of boreholes in some of the dead or declining pines would lead me to conclude that borers could be a primary cause of death, but in other cases the number of holes was low, indicating the pine decline was initiated by other factors.

13. In an e-mail dated April 24, 2015, Ms. Benton advised Gateway (and JWD Trees, another supplier of slash pines to the SWA site) that the cause of the death and decline of the slash pine trees were because the two suppliers failed to properly prepare them in the nursery, and had sold them to Landscape with root systems inadequate to support the normal performance of the plant.

14. At hearing, Ms. Benton's opinion regarding the cause of death of the pines was echoed by John Harris, accepted as an expert in landscape economics and arborism. Mr. Harris's 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. Typically, this is caused by improper "hardening off" of the root system by the grower. However, on cross-examination, Mr. Harris acknowledged that while pine beetles typically infest stressed trees, if the beetle population builds up enough in an area they will attack otherwise healthy trees.

15. At hearing, Mr. Hajos testified that the pine trees he supplied to Landscape had been properly hardened off for a period of six weeks:

Hardened off is a process when you dig a tree and you hold it until it starts to regenerate new roots, so instead of just digging it up and selling it we dig it up and hold it under optimal irrigation and nursery conditions before we ship the tree.

16. Mr. Hajos further testified that any trees that are going to die due to the stress of being dug out of the ground will die during the hardening off process.

17. Mr. Hajos attributed the death of the Gateway trees to several factors, including stress caused by improper lifting of the trees during loading and unloading, stress caused by a delay in planting the trees after they arrived at the SWA site, and the pre-existing pine beetle infestation.

18. Mr. Hajos examined a photograph received in evidence and explained that it showed a tree being improperly lifted by Landscape personnel during unloading. The photograph showed the

strap around the tree trunk doing the primary lifting. The result is that rather than distributing the pressure between the trunk and the strap on the root ball, the root ball will be loosened, which will stress the tree.

19. Mr. Hajos testified that he was aware that the Gateway trees that had been delivered to the SWA site were left on the ground for days before being planted. This testimony was corroborated by Landscape's Daily Job Report log which reflected the delivery of the first load of Gateway pines to the SWA site on January 23 and 24, 2015, but that planting of those trees did not begin until January 29, 2015.

20. On one occasion, a Landscape truck that had picked up trees from Gateway, broke down in Ocala on its return trip to Palm Beach County and had to return to the Gateway site in High Springs. There, the trees were unloaded, and then reloaded onto a different truck where they were delivered two days later to the SWA job site. This inordinate delay and additional loading and unloading further stressed the trees.

21. Once Landscape became aware that it had a beetle infestation at the SWA site, it began a preventative spray program. However, once a pine beetle has entered the bark of a pine tree preventative spraying will be ineffective at eradicating the pest. Newly planted pine trees at the SWA site

were not sprayed on the day of planting, thereby providing the pine beetles an opportunity to infest the new trees.

22. Guy Michaud was Landscape's job foreman at the SWA site. Mr. Michaud has been in the business of planting trees since 1983, and has worked for Landscape for 14 years. Mr. Michaud could not testify with certainty that the Gateway trees died of inadequate roots, as opposed to a beetle infestation.

23. None of the other species of trees sold by Gateway for use at the SWA site experienced problems.

24. Based on the totality of the evidence, it is more likely than not that a combination of factors contributed to the SWA slash pine deterioration, including delays in planting the trees after delivery, rough handling, and the beetles. None of these causes are attributable to the actions of Gateway. Likewise, the greater weight of the evidence does not support a conclusion that the trees sold by Gateway to Landscape were non-viable nursery stock.

25. Subsequent to filing its claim in the amount of \$13,462.30 with the Department, Gateway received a payment of \$5,528.84 from Landscape. Thus, the unpaid balance due Gateway for the 58 slash pines is \$7,933.46.

26. Gateway is entitled to payment in the amount of \$7,933.46 for the slash pine trees it provided to Landscape.

Besides the amount set forth above, Gateway claims the sum of \$50.00 paid for the filing of the claim against Landscape and its bond. The total sum owed to Gateway by Landscape is \$7,983.46.

CONCLUSIONS OF LAW

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

28. 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.

29. 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 produced and sold by Gateway are "agricultural products" within the meaning of section 604.15(1).

30. 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).

31. 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.

32. The burden of proof in an administrative proceeding is on the party asserting the affirmative of an issue. Dep't of Banking & Fin. 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.

33. Gateway bears the burden of proving the allegations of its complaint by a preponderance of the evidence. See Dep't of Banking & Fin. 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."); 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).

34. Gateway has satisfied its burden. As set forth in the Findings of Fact, Respondent, Landscape, owes Gateway \$7,933.46 for 58 slash pine trees.

35. Gateway additionally seeks recovery of the filing fee paid to the Department for the claim filed against Respondents on May 1, 2015. Gateway 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.").

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Department of Agriculture and Consumer Services approving the claim of Gateway Farms, LLC, against Landscape Professional Services, Inc., in the total amount of \$7,983.46 (\$7,933.46 plus \$50 filing fee); and if Landscape Professionals Services, Inc., fails to timely pay Gateway Farms, LLC, 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.

DONE AND ENTERED this 18th day of March, 2016, in
Tallahassee, Leon County, Florida.



W. DAVID WATKINS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of March, 2016.

ENDNOTE

^{1/} The evidence established that payment had been made for the
sabal palms and cypress purchased from Gateway. At issue is
payment for 58 slash pines, totaling \$7,933.46.

COPIES FURNISHED:

Tina Robinson
Department of Agriculture and Consumer Services
Division of Consumer Services
Bureau of Mediation and Enforcement
2005 Apalachee Parkway
Tallahassee, Florida 32399-0800

Sandra R. Wilson-Benton
Landscape Service Professionals, Inc.
6115 Northwest 77th Way
Tamarac, Florida 33321

Cristopher Stephen Rapp, Esquire
Tobin & Reyes, P.A.
Mizner Park Office Tower, Suite 510
225 Northeast Mizner Boulevard
Boca Raton, Florida 33432
(eServed)

Mark John Labate, Esquire
Mark J. Labate, P.A.
2748 East Commercial Boulevard
Fort Lauderdale, Florida 33308
(eServed)

David Hajos
Gateway Farms, LLC
22413 Northwest 227th Drive
High Springs, Florida 32643

Lorena Holley, General Counsel
Department of Agriculture and Consumer Services
407 South Calhoun Street, Suite 520
Tallahassee, Florida 32399-0800
(eServed)

Honorable Adam Putnam
Commissioner of Agriculture
Department of Agriculture and Consumer Services
The Capitol, Plaza Level 10
Tallahassee, Florida 32399-0810

Paul J. Pagano, Bureau Chief
Bureau of Mediation and Enforcement
Department of Agriculture and Consumer Services
Rhodes Building, R-3
2005 Apalachee Parkway
Tallahassee, Florida 32399-6500
(eServed)

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.