

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

OTHER SIDE SOD, LLC,

Petitioner,

vs.

Case No. 17-3275

C. FULLERTON AND LANDSCAPING
CO., INC., AND GREAT AMERICAN
INSURANCE GROUP, AS SURETY,

Respondents.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a telephonic final hearing in this cause was held on October 10, 2017, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Joel C. Deriso, pro se
Other Side Sod, LLC
3356 Southwest County Road 769
Arcadia, Florida 34269-7112

For Respondents: Jean Fullerton, pro se
C. Fullerton Sod & Landscaping Co., Inc.
Post Office Box 1936
Arcadia, Florida 34265

Douglas J. Aumann, pro se
Senior Claim Representative
Great American Insurance Company
Bond Division
301 East Fourth Street
Cincinnati, Ohio 45202

STATEMENT OF THE ISSUES

Whether C. Fullerton and Landscaping Co., Inc., is indebted to Other Side Sod, LLC, for the purchase of sod and pallets; and, if so, in what amount.

PRELIMINARY STATEMENT

Other Side Sod, LCC (Petitioner/Other Side Sod), has sold sod to C. Fullerton and Landscaping Co., Inc. (Respondent/Fullerton), for many years. By "Agricultural Products Dealer Claim Form," dated March 20, 2017, and received by the Florida Department of Agriculture and Consumer Services (Department) on March 27, 2017, Petitioner claims that Fullerton has not paid for sod and pallets valued at \$16,317.74. Co-Respondent, Great American Insurance Group (Great American), is Respondent's surety. Respondent timely denied the claim and the matter was referred to the Division of Administrative Hearings (DOAH) for final hearing.

At the final hearing, Petitioner presented the testimony of Joel Deriso, who serves as manager for Other Side Sod. Respondent offered the testimony of Jean D. Fullerton, who serves as president of the company.

Petitioner's Exhibits 1 and 2 were admitted into evidence. Respondent's Exhibits 1 through 6 were also admitted into evidence.

A transcript of the final hearing was not filed. Respondent and Great American filed a Joint Proposed Recommended Order, which was considered by the undersigned in the preparation of this Recommended Order. Petitioner did not file a proposed recommended order. All references to Florida Statutes will be to 2016, unless otherwise indicated.

FINDINGS OF FACT

1. Petitioner is a Florida Limited Liability Corporation located in Arcadia, Florida, and at all times relevant hereto was a producer of agricultural products, as defined by section 604.15(9), Florida Statutes. Petitioner is also a "dealer in agricultural products" within the meaning of section 604.15(2).

2. Respondent, during all times relevant hereto, was a "dealer in agricultural products," within the meaning of section 604.15(2).

3. At all times relevant to this proceeding, Great American served as surety for Respondent.

4. At all times relevant to this proceeding, Respondent was a customer of Other Side Sod. Respondent purchased sod from Petitioner and thereafter resold and installed the sod to Respondent's customers.

5. Petitioner sold sod to its customers on wooden pallets. An integral part of each transaction involved the pallets.

6. There are 10 invoices in dispute which cover the period October 14, 2016, through February 10, 2017. For the underlying transactions that relate to the invoices in question, the following language is contained on each field/delivery ticket:

Terms of Sale: Payment due upon receipt. All payment[s] applied to pallet balance first. Interest at the rate of 1 1/2% per month will be charged on unpaid invoice amounts after 14 days. Invoices will be charged \$0.02 per square foot additional after 30 days. Purchaser agrees to pay all costs of collection, including attorney fees, in [the] event it is necessary to institute suit for collection. Venue will be in DeSoto County, Florida. All Sales F.O.B. Shipping Point.

7. On or about October 14, 2016, Petitioner sent Respondent invoice 47293, which showed a balance due of \$462 for pallets related to the sale of Bahia sod. The invoice remained unpaid for more than 30 days and Petitioner, in accordance with the terms of sale, amended the original invoice and added a charge of two cents for each of the 83,200 units of Bahia sod related to the transaction (\$1,664). Petitioner also added to the invoice a charge of \$124.80 for sales tax related to the late payment penalty (\$1,664 x 7.50 percent).

8. On or about October 23, 2016, Petitioner sent Respondent invoice 47378, which showed a balance due of \$224 for pallets related to the sale of Bahia sod. The invoice remained unpaid for more than 30 days and Petitioner, in accordance with

the terms of sale, amended the original invoice and added a charge of two cents for each of the 70,400 units of Bahia sod related to the transaction (\$1,408). Petitioner also added to the invoice a charge of \$105.60 for sales tax related to the late payment penalty ($\$1,408 \times 7.50$ percent).

9. On or about October 24, 2016, Petitioner sent Respondent invoice 47420, which showed a balance due of \$280 for pallets related to the sale of Bahia sod. The invoice remained unpaid for more than 30 days and Petitioner, in accordance with the terms of sale, amended the original invoice and added a charge of two cents for each of the 16,000 units of Bahia sod related to the transaction (\$320). Petitioner also added to the invoice a charge of \$24 for sales tax related to the late payment penalty ($\$320 \times 7.50$ percent).

10. On or about November 13, 2016, Petitioner sent Respondent invoice 47549, which showed a balance due of \$1,526 for pallets related to the sale of Bahia sod. The invoice remained unpaid for more than 30 days and Petitioner, in accordance with the terms of sale, amended the original invoice and added a charge of two cents for each of the 103,200 units of Bahia sod related to the transaction (\$2,064). Petitioner also added to the invoice a charge of \$154.80 for sales tax related to the late payment penalty ($\$2,064 \times 7.50$ percent).

11. On or about December 6, 2016, Petitioner sent Respondent invoice 47755, which showed a balance due of \$434 for pallets related to the sale of Bahia sod. The invoice remained unpaid for more than 30 days and Petitioner, in accordance with the terms of sale, amended the original invoice and added a charge of two cents for each of the 30,400 units of Bahia sod related to the transaction (\$608). Petitioner also added to the invoice a charge of \$45.60 for sales tax related to the late payment penalty ($\$608 \times 7.50$ percent).

12. On or about January 8, 2017, Petitioner sent Respondent invoice 48093, which showed a balance due of \$1,256 for 12,800 units of Bahia sod, \$224 for a pallet deposit, and \$72 for sales tax. The invoice remained unpaid for more than 30 days and Petitioner, in accordance with the terms of sale, amended the original invoice and added a charge of two cents for each of the 12,800 units of Bahia sod related to the transaction (\$256). Petitioner also added to the invoice a charge of \$19.20 for sales tax related to the late payment penalty ($\$256 \times 7.50$ percent).

13. On or about December 13, 2016, Petitioner sent Respondent invoice 48166, which showed a balance due of \$343 for pallets related to the sale of Bahia sod. The invoice remained unpaid for more than 30 days and Petitioner, in accordance with the terms of sale, amended the original invoice and added a

charge of two cents for each of the 163,200 units of Bahia sod related to the transaction (\$3,264). Petitioner also added to the invoice a charge of \$244.80 for sales tax related to the late payment penalty ($\$3,264 \times 7.50$ percent).

14. On or about January 29, 2017, Petitioner sent Respondent invoice 48285, which showed a balance due of \$3,000 for 40,000 units of Bahia sod, \$308 for a pallet deposit, and \$225 for sales tax (total = \$3,533). On February 3, 2017, Respondent submitted to Petitioner partial payment in the amount of \$3,210.50, which left an unpaid balance of \$322.50. The balance remained unpaid for more than 30 days and Petitioner, in accordance with the terms of sale, amended the original invoice and added a charge of two cents for each of the 40,000 units of Bahia sod related to the transaction (\$800). Petitioner also added to the invoice a charge of \$60 for sales tax related to the late payment penalty ($\$800 \times 7.50$ percent).

15. On or about January 31, 2017, Petitioner sent Respondent invoice 48301, which showed a balance due of \$390 for 5,200 units of Bahia sod, \$91 for a pallet deposit, and \$29.25 for sales tax (total = \$510.25). On February 15, 2017, Respondent submitted to Petitioner partial payment in the amount of \$468.33, which left an unpaid balance of \$41.92.^{1/} The balance remained unpaid for more than 30 days and Petitioner, in accordance with the terms of sale, amended the original invoice

and added a charge of two cents for each of the 5,200 units of Bahia sod related to the transaction (\$104). Petitioner also added to the invoice a charge of \$7.80 for sales tax related to the late payment penalty (\$104 x 7.50 percent).

16. On or about February 10, 2017, Petitioner sent Respondent invoice 48409, which showed a balance due of \$390 for 5,200 units of Bahia sod, \$21 for a pallet deposit, and \$29.25 for sales tax (total = \$440.25). On February 15, 2017, Respondent submitted to Petitioner partial payment in the amount of \$398.33, which left an unpaid balance of \$41.92. The balance remained unpaid for more than 30 days and Petitioner, in accordance with the terms of sale, amended the original invoice and added a charge of two cents for each of the 5,200 units of Bahia sod related to the transaction (\$104). Petitioner also added to the invoice a charge of \$7.80 for sales tax related to the late payment penalty (\$104 x 7.50 percent).

CONCLUSIONS OF LAW

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

18. 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.

19. The definition of "agricultural products" includes sod that is produced in Florida. § 604.15(1), Fla. Stat. The sod grown by Petitioner is an agricultural product within the meaning of section 604.15(1).

20. 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(2), Fla. Stat. Respondent is a dealer in agricultural products within the meaning of section 604.15(2).

21. 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.

22. As the Petitioner, Other Side Sod 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., 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"); 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).

23. Section 604.21(1)(a) provides as follows:

Any person, partnership, corporation, or other business entity claiming to be damaged by any breach of the conditions of a bond or certificate of deposit assignment or agreement given by a dealer in agricultural products as hereinbefore provided may enter complaint thereof against the dealer and against the surety company, if any, to the department, which complaint shall be a written statement of the facts constituting the complaint. Such complaint shall include all agricultural products defined in s. 604.15(1), as well as any additional charges necessary to effectuate the sale unless these additional charges are already included in the total delivered price. Such complaint shall be filed within 6 months from the date of sale in instances involving direct sales or from the date on which the agricultural product was received by the dealer in agricultural products, as agent, to be sold for the producer. No complaint shall be filed pursuant to this section unless the transactions involved total at least \$500 and occurred in a single license year. Before a complaint can be processed, the complainant must provide the department with a \$50 filing fee. 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.

24. As part of the claim, Petitioner seeks recovery of the two-cent late payment penalty, and related taxes, charged as a result of Respondent's failure to comply with the 30-day payment provision contained in the terms of sale. On its face, the 30-day late penalty provision kicks in only if Respondent is delinquent in remitting payment. Petitioner suggests that the language in section 604.21(1)(a), which allows for recovery of "any additional charges necessary to effectuate the sale," authorizes the recovery of the late payment penalty.

25. Chapter 604 does not define the term "necessary." According to Merriam-Webster, the word "necessary" means "absolutely needed." Merriam-Webster (2017), <https://www.merriam-webster.com/dictionary/necessary>. There is no credible evidence that a two-cent per square foot late payment penalty is a charge that is absolutely needed in order to effectuate the sale of sod, and accordingly this penalty is not recoverable as an item of damages authorized by section 604.21.^{2/} Because section 604.21 does not allow, in this instance, for the recovery of the late payment penalty, then it is also the case that Petitioner's claim for the recovery of additional sales tax is not authorized.

26. Petitioner proved that it is entitled to recover the amounts set forth in the original invoices, less the partial

payments received from Respondent. Accordingly, Respondent owes Petitioner \$4,931.34.

27. Petitioner also seeks recovery of the filing fee paid to the Department for the complaint filed against Respondents on March 27, 2017. Petitioner paid a \$50 filing fee, which is specifically recoverable against Respondent.

See § 604.21(1)(a), Fla. Stat.

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 approving the claim of Other Side Sod, LLC, against C. Fullerton and Landscaping Co., Inc., in the amount of \$4,981.34.

DONE AND ENTERED this 7th day of November, 2017, in Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of November, 2017.

ENDNOTES

^{1/} Ms. Fullerton, on behalf of Respondent, made partial payments on invoices 48301 and 48409 because she mistakenly believed that the parties agreed on a lower per unit rate as the purchase price for the sod.

^{2/} Mr. Deriso testified that he added the penalty provision to the sales agreement because he had experienced difficulty with Respondent timely remitting payment. It was his hope that the penalty provision would encourage Respondent to timely remit payment. This testimony clearly establishes that the penalty provision was optional and not necessary to effectuate the sale of the sod.

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.