

**Stone Commercial Brokerage, Inc. v Organic Inc.**

2004 NY Slip Op 30124(U)

October 29, 2004

Supreme Court, New York County

Docket Number: 0060179/2003

Judge: Richard B. Lowe

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: RICHARD B. LOWE III

PART 58

0601799/2003

STONE COMMERCIAL BROKERAGE  
vs  
ORGANIC INC.

INDEX NO. \_\_\_\_\_

MOTION DATE 10/11/04

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

SEQ 4

REARGUMENT/RECONSIDERATION

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED  
MEMORANDUM DECISION.

**FILED**

NOV 10 2004

CLERK OF THE SUPREME COURT  
STATE OF NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 10/29/04

RICHARD B. LOWE III

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
STONE COMMERCIAL BROKERAGE, INC.  
D/B/A STONE COMPANY and ERIC KADES,

Plaintiffs,

-against-

Index No. 601799/03

ORGANIC INC., SUCCESSOR IN INTEREST TO  
ORGANIC ONLINE, INC., JONATHAN  
NELSON, INDIVIDUALLY, MARITA SCARFI,  
INDIVIDUALLY, COLLEEN BRENNAN,  
INDIVIDUALLY, MICHAEL HUDES,  
INDIVIDUALLY, JULIEN J. STUDLEY, INC.,  
W.F. REALTY, INC., LEE FELD,  
INDIVIDUALLY, HOWARD WENDY,  
INDIVIDUALLY,

Defendants.

-----X  
**Hon. Richard B. Lowe, III:**

Plaintiff moves to reargue a decision and order of this court dated April 19, 2004.

Defendant W.F. Realty (WF) has cross-moved to reargue.

Familiarity with the prior order is presumed.

The complaint identified 12 causes of action, labeled by plaintiff according to the theory of each claim asserted. Applying a liberal standard on the original motion to dismiss, the court reviewed the complaint in order to determine whether a particular cause of action stated any claim for relief, regardless of the theory of recovery identified by the plaintiff. Dismissal of each cause of action was granted only after it was decided that plaintiff could not recover under a particular cause of action, under any theory of recovery.

CPLR 2221 (d) (2) provides that "[a] motion for leave to reargue: ...(2) shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion."

A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided.

*Foley v Roche*, 68 AD2d 558 (1st Dept 1979).

Plaintiff now moves to reargue, claiming that the court mischaracterized the theories under which plaintiff sought relief for the second, fourth, fifth, sixth and eighth causes of action. In particular, plaintiff argues that the fifth and sixth causes of action were claims for breach of contract, controverting the plain language of the labels affixed by plaintiff in the complaint: "Tortious Interference With Existing and/or Prospective Business Relations—All Deals," and "Negligent Misrepresentation—All Deals." Complaint, ¶ 31.

This branch of plaintiff's motion is nothing more than an attempt to argue once again the very question previously decided.

Plaintiff also claims that the court erred in broadly applying RPL § 442-d, and the holding in *NFS Services, Inc. v West 73<sup>rd</sup> Street Assocs.* (102 AD2d 388 [1<sup>st</sup> Dept 1984],

*affd* 64 NY2d 919 [1985]), to bar actions for real estate commissions by an out-of-state co-broker. The statute should be narrowly construed, and the case law should be limited to its facts, claims plaintiff, to actions by an out-of-state broker against a resident owner of real estate. However, plaintiff has failed to cite any authority, by way of legislative history or authoritative case law, to support the narrow construction it is urging, once again, on reargument.

With respect to the real estate transactions alleged to have occurred in Michigan and Illinois, plaintiff concedes that the laws of Michigan and Illinois are similar to New York's RPL § 442-d, and prohibit an action for commissions by an out-of-state broker. On reargument, plaintiff makes a conclusory reference to other provisions of the Michigan and Illinois laws which, it claims, permit a resident broker to split earned commissions with an out-of-state licensed real estate broker. Plaintiff has not affixed copies of the statutes to its moving papers, or provided any discussion of how these statutes have been interpreted in their home states. The mere reference to these statutes, without more, is insufficient to support plaintiff's motion for reargument.

Defendant WF cross-moves to reargue this court's failure to dismiss the ninth cause of action against it, for unjust enrichment. WF resubmitted copies of its original memoranda of law in support of its cross motion. On reargument, WF claims that the court refused to dismiss plaintiff's ninth cause of action for unjust enrichment "without addressing whether plaintiff had indeed alleged facts sufficient to support such a claim at

all.” Affirmation of David S. Greenberg, dated May 18, 2004. Further, argues WF:

the Court misapprehended relevant case law regarding R.P.L. § 442-d, citing a controlling decision of the Appellate Division for a proposition inconsistent with, and in direct opposition to, the actual holding of that case.

*Id.*

WF has not identified the improperly cited case on which it bases this cross motion.


WF’s reargument is nothing more than an attempt to argue, once again, the questions which were previously decided.

The cross motion is, therefore, denied.

Accordingly, it is

ORDERED that the motion and cross motion for reargument are denied.

Dated: October 29, 2004

FILED  
NOV 10 2004  
NEW YORK COUNTY CLERK'S OFFICE  
ENTER:  
  
RICHARD B. LOWE III  
S.C.