

Stone Commercial Brokerage, Inc. v Organic Inc.

2005 NY Slip Op 30094(U)

December 6, 2005

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: HON. RICHARD B. LOWE, III
Justice

PART 54

Stone Commercial Brokerage

INDEX NO. 601 799/03
MOTION DATE 7/28/05
MOTION SEQ. NO. 006
MOTION CAL. NO. _____

- v -

Organic Inc.

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

FILED

DEC 12 2005

COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 12/6/05

HON. RICHARD B. LOWE, III

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

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,

Plaintiff

-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.

FILED
DEC 12 2005
COUNTY CLERK'S OFFICE
NEW YORK

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

In the most recent phase of this lengthy litigation, this court considered the sufficiency of plaintiff's complaint, which complaint is based on plaintiff's claim of entitlement to commissions arising out of his employment as a real estate salesperson. The complaint alleges that Eric Kades (Kades) was employed by co-plaintiff Stone Company (Stone), in California, and defendant Julien J. Studley (Studley) in New York. Briefly, Kades complains that he was not paid earned commissions on four different commercial leases, entered into for the benefit of the same client, Organic, Inc. (Organic). These four leases were allegedly entered into in four different cities: Chicago, San Francisco, New York, and Detroit, from the spring of 1998, through sometime in 1999.

In a decision and order dated April 19, 2004, this court dismissed all claims against

the individual defendants Jonathan Nelson, Marita Scarfi, Colleen Brennan, and Michael Hudes. The court also dismissed claims for fraudulent misrepresentation, tortious interference with contractual relations, tortious interference with business relations, negligent misrepresentation, breach of contract, conspiracy and conversion contained in the first through seventh, eleventh, twelfth and thirteenth causes of action; and dismissed the ninth cause of action, for unjust enrichment, against the individual defendants Lee Feld and Howard Wendy.

In motion sequences #006 and #008, now pending before the court, Studley and defendant W.F. Realty, Inc. (W.F. Realty) move for summary judgment dismissing the eighth, ninth and tenth causes of action, the only claims remaining in the complaint.

In motion sequence #007, plaintiff moves to vacate a "so ordered" confidentiality stipulation entered into between the parties, and W.F. Realty cross-moves to nullify the admission of plaintiff's counsel pro hac vice.

Motion sequences #006, #007, and #008 are consolidated for disposition.

The plaintiff's motion, and defendant's cross motion, in sequence #007, raise threshold issues.

Plaintiff seeks to vacate a negotiated confidentiality stipulation, entered into by the parties. W.F. Realty opposes vacature of the confidentiality stipulation, and seeks to vacate plaintiff's counsel's admission to the court pro hac vice, based on counsel's alleged violation of Disciplinary Rule DR 7-105, by his having threatened to present

criminal charges against defendant in order to obtain an advantage in this civil matter.

In support of its motion, plaintiff claims that Omnicom, Inc. (Omnicom), a non-party to this action, is a part owner of W.F. Realty. Plaintiff argues that W.F. Realty “used Omnicom’s ownership stake in various proposed tenants” to direct brokerage commissions to W.F. Realty, even though W.F. Realty had not earned those commissions, and that Omnicom illegally restrained trade, all of which conduct allegedly constitutes violations of the Donnelly Act, N.Y. General Business Law § 340 and § 341. Plaintiffs also allege that they have become aware of additional, unspecified facts which support their claims of Donnelly Act violations.

Plaintiff claims that the confidentiality stipulation, now sought to be vacated, was entered into in advance of obtaining the deposition of Lee Feld (Feld), a principal in the corporate defendant W.F. Realty, which deposition defendant allegedly refused to consent to without a confidentiality agreement. Plaintiff claims that Feld’s deposition has revealed information indicative of a conspiracy to obtain commissions which W.F. Realty was not entitled to, which information plaintiff seeks to turn over to the United States and New York Attorney Generals (collectively, the AG).

W.F. Realty claims that the confidentiality stipulation, so ordered on February 28, 2005, was entered into to permit discovery of defendant’s confidential shareholder agreements, without waiving that confidentiality.

The plaintiff's motion, and defendant's cross motion, in sequence #007, are denied. Without determining whether the AG's office is bound by the parties' stipulation or not, the proper remedy for plaintiff is to contact the New York Attorney General and communicate its concerns directly to the AG. The court, in its discretion, sees no reason to vacate a bargained-for confidentiality stipulation at this point in the proceedings, on the offer of proof made by plaintiff. The cross motion to vacate plaintiff's counsel's admission pro hac vice based on alleged misconduct of counsel has also been presented to the wrong forum. This court does not have jurisdiction over the enforcement of violations of the Code of Professional Responsibility. Defendant's concerns about plaintiff's counsel's alleged ethical violations should be reported to the Grievance Committee for the 1st Judicial District, so that appropriate action may be taken by the Departmental Disciplinary Committee, if warranted.

The outcome of motion sequence #006 turns on evidence, or lack of evidence, of plaintiff Kades' status as a licensed real estate broker in California and New York.

In motion sequence #006, W.F. Realty seeks summary judgment on the ninth cause of action, for unjust enrichment. The complaint alleges, in the ninth cause of action, that defendants "have been unjustly enriched, given the substantial efforts performed by Plaintiffs, including but not limited to, the receipt of commissions (arising out of Organic, Inc. real estate transactions) which should have been received by Plaintiffs as compensation for the services which the Plaintiff rendered to effectuate said transactions

[* 6]
and close the deals.” Complaint, ¶ 147.

W.F. Realty argues that plaintiffs’ unjust enrichment claims are nothing more than claims for real estate sales commissions, which are barred in both New York and California: California Bus. & Prof. Code § 10137 prohibits the payment of real estate sales commissions to someone who is neither licensed, nor in the employ of a licensed broker, or licensed in another state; and New York’s Real Property Law § 442-a prohibits a real estate salesperson from collecting commissions from anyone other than a licensed real estate broker with whom he or she is employed.

A movant’s burden on a motion for summary judgment is to establish that there are no material issues of fact. *Zuckerman v City of New York*, 49 NY2d 557 (1980). Once a movant has met this burden, the party opposing the motion must come forward with proof of the existence of a triable issue. *Indig v Finkelstein*, 23 NY2d 728 (1968).

W.F. Realty has adequately stated a prima facie case for summary judgment on the ninth cause of action, as far as Kades is concerned, by alleging that Kades is barred by statute from collecting fees for the sale of real estate after he left Stone’s employment in California, and while he was unlicensed in New York. (It is undisputed that these are the only transactions on which Kades bases his claims against W.F. Realty). Kades has failed to come forward with evidence which would tend to create a question of fact regarding his entitlement to be compensated for these real estate transactions. Kades does not dispute that the relevant transactions in San Francisco would have closed after he was no

longer in Stone's employ, and that he never obtained a license in New York, while working for Studley. Based on this failure of proof, W.F. Realty's motion for summary judgment on the ninth cause of action is granted, and Kades's claim for compensation based on unjust enrichment in the ninth cause of action against W.F. Realty is dismissed.

With respect to Stone's claim based on unjust enrichment, W.F. Realty, has not alleged that Stone was not a licensed broker in California. Thus, W.F. Realty has failed to establish a prima facie case of entitlement to summary judgment on Stone's claims based on unjust enrichment. That branch of W.F. Realty's motion is denied.

In motion sequence #008, Studley moves for summary judgment on the three remaining claims, for breach of contract, unjust enrichment and wages pursuant to Labor Law § 191.

An action for breach of contract requires proof of the contract, performance of the contract by one party, a breach by the other party, and damages. *WorldCom, Inc. v Sandoval*, 182 Misc 2d 1021 (Sup Ct, NY County 1999). In order to establish a prima facie case of entitlement to judgment on the eighth cause of action, for breach of contract, Studley needs to establish that Kades is not entitled to judgment, as a matter of law. However, Kades has adequately alleged the existence of a real estate salesperson's contract, performance under the terms of the contract and Studley's refusal to pay earned commissions. Studley argues that none of the transactions under which Kades lays claim to commissions gave rise to a contractual obligation to pay Kades: the Michigan and New

York real estate leases never closed, and Studley never received any commission on these transactions; Kades was still employed by Stone when the Chicago transaction closed, and thus was not entitled to recover a commission from Studley in the spring of 1998; and Kades had already left Studley's employ when the San Francisco lease closed, in May of 1999, precluding Kades from any claimed right to commissions on that transaction.

Questions of fact exist, however, as to when Kades left Studley's employ, and whether he had a continuing right to commissions for some of the transactions at issue. Studley's motion, with respect to the eighth cause of action, is denied.

Likewise, these same, and other, questions of fact permeate consideration of Kades' claims against Studley for unjust enrichment, and wages pursuant to the Labor Law, which preclude summary judgment for Studley, and indicate the need for a trial to determine Studley's liability on these claims.

Accordingly, it is

ORDERED that motion sequence #006, for summary judgment, is granted with respect to defendant Kades's claims, and denied in all other respects; and it is further

ORDERED that motion sequence #007, and the defendant's cross-motion, are denied; and it is further

ORDERED that motion sequence #008, for summary judgment, is denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: December 6, 2005

ENTER:

A handwritten signature in black ink, appearing to be 'J.S.C.', written over a horizontal line.

J.S.C.

FILED
DEC 12 2005
COUNTY CLERK'S OFFICE