

**Rubin v George**

2013 NY Slip Op 32132(U)

September 9, 2013

Supreme Court, New York County

Docket Number: 101786/2011

Judge: Alice Schlesinger

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

**IA** PART 16

PRESENT: ALICE SCHLESINGER  
Justice

PART \_\_\_\_\_

Index Number : 101786/2011  
RUBIN, ROBERT

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

vs  
GEORGE, ADRIAN

MOTION DATE \_\_\_\_\_

Sequence Number : 003  
CONFIRM/REJECT REFEREE REPORT

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

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is *denied and the cross-motion is granted in accordance with the accompanying memorandums decision.*

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

**FILED**  
SEP 11 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

SEP 09 2013

Dated: September 9, 2013

*Alice Schlesinger*  
ALICE SCHLESINGER, J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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

-----X  
ROBERT RUBIN,

Plaintiff,

Index No. 101786/11  
Motion Seq. No. 003

-against-

ADRIAN GEORGE and RASHID NIANG also known  
as JACOB NIANG,

Defendants.

**FILED**

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SCHLESINGER, J.: SEP 11 2013

**NEW YORK  
COUNTY CLERK'S OFFICE**

As revealed in this Court's December 19, 2012 decision on plaintiff's motion for summary judgment, this foreclosure proceeding is anything but routine. It involves what at first glance appears to be a typical mortgage, in this case a loan of \$300,000 made by plaintiff Robert Rubin to defendant Adrian George on March 21, 2007, secured by a three-family dwelling located at 34 West 128<sup>th</sup> Street in Manhattan.<sup>1</sup> The Mortgage provided for an interest rate of 16%, with the entire principal plus \$48,000 in accrued interest due within a year. It is undisputed that, to date, Mr. George has not repaid the loan; for that reason, Mr. Rubin commenced this foreclosure proceeding.

What makes this foreclosure proceeding unusual is the terms of ¶19 of the Mortgage. While the Mortgage document appears to be a standard pre-printed form mortgage, ¶19 is anything but. It provides that:

It shall be an additional event of default in the event mortgagor fails to make payment of the agreed loan brokerage due and payable to GENE BOSHES, the real estate broker who brought about this loan, pursuant to the separate commission agreement between mortgagor and the said real estate broker, and mortgagee shall have each and all of the same rights to declare the loan due and payable in full in the event of such failure of payment.

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<sup>1</sup> According to the Mortgage (¶18), the loan is subordinate to a mortgage held by Credit Suisse, in the original principal sum of one million dollars, now reduced.

Interestingly, accompanying the Mortgage form is a typewritten Rider, which also contains some unusual provisions that need not be addressed here. However, neither the Mortgage form, nor the Rider, states the amount of the broker's commission. Nor did plaintiff include a copy of the referenced "separate commission agreement" with the mortgage documents attached to its pleadings or with his summary judgment motion.

Paragraph 19 of the Mortgage is all the more unusual in light of the fact that — as both sides agree — Gene Boshes was NOT the real estate broker who brought about the loan. The person who brought about the loan was Kenneth Stiles. According to plaintiff, because Stiles was unlicensed and could not enforce a commission agreement, the name of Boshes was inserted so that he, as a licensed broker, could enforce the agreement if necessary and then turn the money over to Stiles.

As discussed at length in this Court's prior decision, the heart of the controversy here relates to the purported commission agreement. Defendant asserts that he was compelled at the closing to sign a commission agreement for \$250,000 — nearly the entire sum of the loan — and that the inclusion in the Mortgage of a requirement that he pay that sum as part of the loan renders the loan usurious and unenforceable. As part of his opposition to plaintiff's summary judgment motion, defendant included a signed copy of a purported commission agreement for \$250,000. Because plaintiff insisted that the document was fabricated and that the true commission agreement called for a payment of only about \$27,500, this Court referred the matter to Judicial Hearing Officer Ira Gammerman to hear and report on the true terms of the actual commission agreement.

JHO Gammerman held a hearing over the course of three days at which both parties offered documentary evidence and the testimony of witnesses. The JHO then

rendered a decision on the record on May 30, 2013, finding that the agreement for \$250,000 had not been executed in connection with the loan and that instead an agreement for a "normal" commission of about \$27,000 reflected the parties actual agreement (Exh E to moving papers). On that basis, JHO Gammerman recommended that this Court reject defendant's claim of usury and grant plaintiff's motion for summary judgment. Plaintiff then moved to confirm the report and recommendation of JHO Gammerman, and defendant cross-moved to reject it. Those competing motions are now before the Court for determination.

#### Discussion

The controlling statute, CPLR §4403, gives this Court broad discretion when reviewing the report of a referee, such as the Report of JHO Gammerman at issue here:

Upon the motion of any party or on his own initiative, the judge required to decide the issue may confirm or reject, in whole or in part, the verdict of an advisory jury or the report of a referee to report; may make new findings with or without taking additional testimony; and may order a new trial or hearing.

After reviewing the exhibits admitted into evidence at the hearing, the transcript of the testimony taken, and the arguments presented by both sides, this Court is compelled to reject the Report of JHO Gammerman for the following reasons.

In his somewhat brief Report, the JHO acknowledged that he had accepted into evidence a copy of a fully executed document proffered by defendant calling for the payment of the \$250,000 commission. However, the JHO did not discuss in his Report the related testimony; that is, the defendant Mr. George and the broker Mr. Boshes had both testified that they recognized their signatures on the document, although Boshes did not recall signing a document that contained the \$250,000 figure. Nor did the JHO report that

the copy of the document offered by defendant, at the top, had an indication from a fax machine suggesting that the broker Boshes, who had signed it, had sent it by fax to George some time after the closing.

While not discussing the testimony of the defendant in any detail, and without directly finding the defendant credible or not, the JHO did state that, in the first instance, he was "struck by what [he, the JHO] thought was the unlikelihood of the scenario advanced by the defendant based on what [he] considered to be the level of sophistication of Mr. George ..." (TR 237)<sup>2</sup>. He further noted that Mr. George had offered an explanation for his signing the commission agreement for \$250,000, testifying that the money was actually part of another deal that he was trying to set up regarding the conversion of another property to condominiums.

The JHO did not include any further discussion of Mr. George's testimony. The testimony of defendant Rubin was not addressed at all. Nor was his credibility assessed.

Rather, the JHO gave great weight to the testimony of the supporting witnesses, acknowledging the need to assess their credibility. He stated that he had "serious questions" with respect to the credibility of defendant's witness Mr. Orsini. But it was the testimony of a paralegal from the law firm that represented the plaintiff at the closing that "really doomed the defense." (TR 238)<sup>3</sup>.

The paralegal had produced at the hearing an unsigned commission agreement. It was identical in all respects to the one offered by George at the hearing, except that it contained the amount of \$27,000, instead of \$250,000, and it had no signatures. The

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<sup>2</sup> "TR" referee to the transcript of the decision by JHO Gammerman.

<sup>3</sup> Apparently, Mr. George was not represented by counsel at the closing.

paralegal had testified that he had conducted a search of the law firm's computer system at the direction of his boss (the attorney who had appeared at the closing but who did not testify at the hearing). Based on his understanding of computers, which was confirmed at least in part by computer experts who testified at the hearing, it appeared that the document had been created the day before the closing. However, no printing date could be confirmed.

JHO Gammerman then made a specific finding based on the paralegal's testimony and the unsigned document he printed out from the firm's computer (TR 238):

The document that he [the paralegal] extracted from the computer and which I believe he did extract and was on the computer was, in fact, the document that was executed at the time of the closing and was not a document which supported the defense of usury. So I would recommend to Judge Schlesinger that she grant the motion.

That was it, and in the opinion of this Court, it is not enough. Defendant at the hearing had produced a copy of a signed document, and both signatories recognized their own signature. Defendant also offered an explanation as to the circumstances surrounding the document's creation and execution, and an explanation why he did not have the original (he never had it; the original he signed at the closing was then taken so that someone could secure the signature of Boshes, who was not present), and how he had come into possession of the copy (Boshes had sent it to him by fax at his request after the closing). Without directly finding that George was not a credible witness, and without hearing any testimony directly contradicting George's testimony as to how he had come into possession of the executed copy, the JHO determined to allow an unsigned document extracted from a computer to defeat George's signed document in its entirety,

notwithstanding the negative inference that could properly be drawn against Rubin based on the plaintiff's failure to produce a signed copy of an agreement supporting his position.

Additionally, plaintiff did not call as a witness the attorney who had represented him at the closing or any other person who could confirm that the paralegal's document had actually been brought to the closing and signed by defendant George. The JHO simply made inferences and assumptions based on the existence of a document on a computer at the attorney's office, without more. In the opinion of this Court, no factual or legal basis existed to support those inferences and assumptions. Although gaps existed in the evidence introduced by both parties, the JHO did not discuss those gaps or his evaluation of each individual's testimony; the decision rested solely on the his acceptance of the paralegal's testimony that a blank commission agreement containing a figure of \$27,000 existed on the law firm's computer. Under these circumstances, this Court declines to accept the JHO's conclusion, as he did not set forth specific findings to justify what this Court would characterize as a leap to that conclusion.

The net result is that plaintiff's motion for summary judgment must be denied. Unfortunately, it appears that this matter can only be resolved with a full trial on all the issues, ranging from plaintiff's prima facie case in foreclosure to the defendant's affirmative defense of usury. Counsel are directed to appear in Room 222 for a conference on Wednesday, October 23, 2013 at noon to discuss the selection of a trial date. The Court declines at this time to grant plaintiff's motion to direct the tenants to attorn and to allow the plaintiff to act as mortgagee in possession. However, that issue may be discussed further at the conference.

Accordingly, it is hereby



ORDERED that plaintiff's motion to confirm the Report of JHO Gammerman and for summary judgment and related relief is denied to the extent provided herein; and it is further

ORDERED that defendant's cross-motion to reject the Report of JHO Gammerman is granted.

Dated: September 9, 2013

SEP 09 2013

  
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J.S.C.  
ALICE SCHLESINGER

**FILED**  
SEP 11 2013  
NEW YORK  
COUNTY CLERKS OFFICE