

**Gabay v Bender**

2006 NY Slip Op 30535(U)

May 30, 2006

Supreme Court, New York County

Docket Number: 604159/02

Judge: Carol R. Edmead

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

HON. CAROL EDMEAD

PRESENT: \_\_\_\_\_

PART 35

Justice

Gabay, V

INDEX NO. 604159/02

MOTION DATE 5/30/06

MOTION SEQ. NO. 004

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

- v -

Bender, M

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

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

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

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

PAPERS NUMBERED  
**FILED**  
JUN 02 2006

Cross-Motion:  Yes  No

COUNTY CLERK'S OFFICE  
NEW YORK

Upon the foregoing papers, it is ordered that this motion

In this partition action, defendant moves by order to show cause for an order (a) recusing this Court from presiding over this action based on alleged impermissible and unethical *ex parte* communications concerning the merits of this action between Justice Carol Edmead and Referee Helene Blank, Esq., in violation of Canons 1, 2(A), and 3(B)(6) of the Code of Judicial Conduct and Sections 100.1, 100.2(A) and 100.3(B)(6) of the Rules governing Judicial Conduct, and (b) vacating the Interim Order herein, dated March 29, 2006.

Procedural Background

Plaintiff commenced this action for a partition and accounting regarding a residential apartment building located at 79 Horatio Street, New York, New York, which is co-owned by the parties (the "Property"). Pursuant to an Interlocutory Judgment issued by the Court (J. Lebedeff), dated April 13, 2005, the Property was to be sold as one parcel at a public auction under the direction of J.H.O Beverly Cohen, who was appointed the Referee. Thereafter, this action was reassigned to this Court.

After conducting an initial conference with the parties, Ms. Cohen retired, and resigned her appointment. This Court thereafter issued an amended order, substituting Helene Blank, Esq as the Referee appointed for the sale.

Pursuant to the Interlocutory Judgment, the Referee was permitted to "conduct and accounting and to supervise any discovery necessary to the accounting issues raised between the parties." The parties were directed to "present their appraisals of the Property to the Referee, who is empowered to determine whether any further appraisal need be ordered, and if so, to order such appraisal;" . . . .

Dated: \_\_\_\_\_

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

Subsequently, Referee Blank and the parties exchanged a series of emails concerning access to the Property.

On March 2, 2006, plaintiff's attorney emailed Referee Blank, with a copy to defendant's counsel, requesting a telephone conference to address certain issues, including defendant's "refus[al] to provide [plaintiff] with keys to units in the building." On March 6, 2006, Referee Blank responded to all recipients, stating "I will contact all parties to arrange a telephone conference . . . I would like to hear why [defendant] is refusing access. It had better be a good reason or I will seek Court intervention."

On March 7, 2006, defendant's counsel replied to all, stating that defendant "is not and has not refused access, and there is no outstanding request for either access or keys which has been denied by [defendant]. . . . Ms. Gabay [plaintiff] has a key to the front door of the building. The last time Ms. Gabay requested building keys was in December 2003 . . . . At that time, I advised her attorneys [that] . . . . [defendant] does not perceive a reason to depart from the understandings and practice established over many years, pursuant to which Vicky Gabay has been a passive investor who has not been involved in the operations of the property. . . . it does not appear that any legitimate purpose would be served by delivering a set of keys to Mr. Gabay at this juncture."

Almost two hours later, Referee Blank responded: "Whether there is any outstanding request to access to this property or whether or not in past the plaintiff has been an active manager of the property is irrelevant. I see no reason to deny the plaintiff access to property that they have a 50% interest in. I want the keys delivered to [plaintiff's counsel] before the end of business tomorrow. They have every right to actually survey and eyeball the state of the property from the inside as well as the outside."

On March 8, 2006, plaintiff's counsel responded to all, indicating that Referee lacked the power to order the plaintiff "to deliver the keys to the property to plaintiff's counsel, and that this issue is beyond the scope of the reference . . ." Plaintiff's counsel expressed concerns for security, safety and potential liability, and that it was "ready to provide access to the plaintiff to all areas of the premises for purposes of inspection, on reasonable notice."

On March 8, 2006, Referee Blank emailed the parties, stating that plaintiff's counsel's belief was erroneous, that plaintiff's desire to inspect the premises for the purpose of the upcoming sale is valid and falls under the umbrella of discovery she was ordered to oversee. "Nonetheless," Referee Blank advised that she would "consult with the Court . . . [and] ask her Honor what the parameters of my powers are and whether or not I have the power to not only order that the keys be turned over but whether I have the power to ask the Court to sanction either side if I think they are deliberately trying to undermine the orderly process that MUST take place in order to sell this property." In her email dated March 9, 2006, Referee Blank reiterated her position that plaintiff was entitled to unfettered access to the property to obtain a better "appreciation of what the value of the property is in the condition that it is in."<sup>1</sup>

---

<sup>1</sup>Defendant took the position that (1) the Referee was not empowered to supervise discovery on "all" issues, but rather only on the narrowly circumscribed issue of supervising "any discovery necessary to the accounting issues raised between the parties, and (2) the Referee was not entitled to usurp judicial authority to determine issues pertaining to the parties' common law rights of ownership of the Property, including rights of access to the Property; whether or not defendant had rights of access to the apartment units has no relationship to the Referee's mandate to

On the following day, defendant's counsel emailed his objection to Referee Blank's "communicating with Justice Edmead on an ex parte basis regarding substantive matters in this action." Referee Blank responded that evening by email, stating that defendant's objection was "duly noted." She also expressed that she "is neutral here and stand in the judge's shoes. . . . [defendant's] objection is unfounded and invalid. It is you and [defendants] who raised the issue that you are of the opinion that I am powerless to order you to turn over the keys to the property." Blank further stated that "to be absolutely sure I will ask her" the Court's interpretation of her Order as it related to my powers . . . ."

Finally, Referee Blank emailed all counsel on March 17, 2006 after her consultation with the Court. Referee Blank stated "I have spoken with her Honor regarding the issues of my authority, the keys and the delays that are taking place. Her Honor would like all sides to know the following: Her Order empowers me to make all necessary decisions to bring this litigation to an end - She agrees with me that the defendants must turn over a set of keys to the plaintiff. She has been apprised of all of the defendants' objections to doing so, but feels that since the plaintiff is a 50% owner the objections have no merit. She has told me that after the sale - I may if necessary, take into account any party's conduct that in anyway caused excessive delays in the sale, a diminution in the realized profit or caused undue expenses in bringing about the end of this litigation . . . if either side still insists on bringing this matter directly to her, she will have all sides in for a conference. . . ."

At the request of defendant's counsel, an in-court conference was held on March 21, 2006, which set forth a motion schedule on the issue of the referee's authority under the Interlocutory Judgment. On March 29, 2006, the Court held oral argument on plaintiff's order to show cause for an order directing the defendant to provide plaintiff with a set of keys to the commons areas, vacant units, and occupied units, and issued a Memorandum Decision. The Memorandum Decision directed Referee Blank to have the locks of the Property changed and to provide each co-owner with a set of keys to said Property.

Instant Motion

In support of recusal and vacatur of the Court's order, defendant argues that the *ex parte* communications were violative of the following: (1) Canon 3(B)(6), which prohibits a judge from engaging in such communications concerning a pending proceeding, (2) Canon 1, which provides that a judge should uphold the integrity and independence of the judiciary, (3) Canon 2(A), which states that a judge should avoid the appearance of impropriety and act in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Defendant's counsel also relies on Advisory Opinion (No. 01-83), which advises a judge against discussing "the merits of a child custody dispute with a law guardian appointed to represent the child, because such a discussion would constitute an impermissible ex parte communication in the

---

footnote 1, contd.

effectuate a judicial sale of the Property. At most, argues defendant, the Referee should have advised the parties to seek a ruling from the Court on the issue. Defendant's counsel wanted to (1) present his arguments the Court rather than through the Referee and (2) be present at any discussion concerning the substantive merits of this action.

absence of the consent of all parties.”<sup>2</sup>

Defendant also argues that recusal is warranted because as the Court had a preconceived view of the facts, and “adjudged the facts and the law in advance of formally hearing it,” and such judgment was publicly disclosed to the parties. Once the Court’s prejudgment was made in advance of hearing full argument, the Court was placed in the difficult position of having to defend the pronouncement, and the Court’s ability to impartially adjudicate the issue was compromised. In support, defendant contends that prior to the oral argument on March 29, 2006, the Court already prepared a Memorandum Decision granting plaintiff’s motion to the extent of directing the Referee to change the keys to all locks on apartment units and to deliver a copy of the keys to all such locks to both sides. The Court’s predisposition against the defendant is not only manifest by the preparation of the Memorandum Decision in advance of the oral argument, but from the content of such decision, which failed to address the substantive merits of several of defendant’s arguments in her answering papers. The Decision also placed great emphasis on the alleged sarcastic and caustic statement attributed to defendant’s counsel, by erroneously stating that defendant’s counsel’s “‘magnanimous’ offer to allow plaintiff- a co-owner- access, on notice, is anything but.” Defendant counsel’s never suggested that defendant would be “magnanimous” in arranging access to the Property. Thus, not only did the Court misquote defendant’s counsel, the Court’s ignored the substantive arguments made in defendant’s opposing papers and in the oral argument. The Court refused to consider the agreement between the parties which permitted defendant to solely handle the day-to-day operations of the Property, including the repair and maintenance of apartment units.

In opposition, plaintiff argues that defendant’s motion lacks merit and that defendant should be precluded from making further attempts to interfere with or delay the judicial sale. Plaintiff points out that Referee Blank disclosed the substance of her communication with the Court, and that defendant had ample opportunity to be heard on the record to address both the issue concerning the keys and the Referee’s authority. After addressing the merit of defendant’s argument at the March 21, 2006 conference, the court directed the parties to fully brief the issues because the Court wanted ensure that there was an appealable order.

Plaintiff also argues that the allegedly improper *ex parte* communication between the Court and Referee Blank is not grounds for recusal. Under the Code of Judicial Conduct (22 NYCRR § 100.3(B)(6)(c)), the Court may engage in *ex parte* communications with court personnel whose function is to “aid the judge in carrying out the judge’s adjudicative responsibilities.” Referee Blank was appointed by the court to preside over the judicial sale of the Property, supervise discovery, and conduct an accounting, all of which aid the Court in carrying out its adjudicative responsibilities. Plaintiff notes that CPLR 4301 provides that a referee “shall have all the powers of a court in performing a like function,” and therefore, a referee falls under the definition of “court personnel.” Furthermore, defendant points out that research discloses no case law to support defendant’s argument that the Court must recuse herself from a case based on an *ex parte* communication with a court-appointed referee.

---

<sup>2</sup> Defendant also indicates that she intends to make a motion to remove Ms. Blank as Referee after determination of this motion.

Analysis

“Absent a legal disqualification under Judiciary Law § 14 (Disqualification of judge by reason of interest or consanguinity), a Trial Judge is the sole arbiter of recusal. This discretionary decision is within the personal conscience of the court when the alleged appearance of impropriety arises from inappropriate awareness of 'nonjudicial data'" [citations omitted] and is applicable even where the purpose of the application is to maintain the appearance of impartiality [citations omitted] (*Corsini v Corsini*, 199 AD2d 103 [1<sup>st</sup> Dept 1993] [finding no abuse of discretion in the trial court's determination to decline motion to recuse, where the content of the ex parte communication with plaintiff was fully disclosed and placed upon the record by the trial court and did not involve either the merits of the case or the content of the settlement negotiations]).

Canon 3(B)(6) [22 NYCRR § 100.3], entitled “A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently, ”upon which defendant relies, provides that a judge shall not engage in *ex parte* communications. But the Rule itself then lists five separate and broadly-stated exceptions, including one that permits a Judge to initiate and consider an *ex parte* communication “when authorized by law to do so.” (22 NYCRR § 100.3[B][6][e]). Canon 3(B)(6), provides in relevant part:

(B) Adjudicative responsibilities.

(6) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending proceeding, except:

\* \* \* \* \*

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

\* \* \* \* \*

(e) A judge may initiate or consider any *ex parte* communications when authorized by law to do so.”

This Court is of the opinion that a court-appointed referee falls within the scope of “court personnel” as that term is expressed in 22 NYCRR § 100.3[B][6]. CPLR § 4301 provides that: “A referee to determine an issue or to perform an act shall have all the powers of a court in performing a like function . . . .” It has been stated that a “referee” is an officer exercising judicial powers, and is an arm of the court for a specific purpose (*Segal v Jackson*, 183 Misc 460, 48 NYS2d 877 [Supreme Court New York County 1944]). A referee functions primarily as an aid to the court and the responsibility of decision remains with the court (*Matter of Dissolution of 3260 Perry Ave. Realty Corp.*, 285 AD 71, 135 NYS2d 551 [1st Dept 1954], resettlement denied 285 AD 882, 140 NYS2d 506). This Court’s *ex parte* communications with Referee Blank were done to “aid the judge in carrying out” the Court’s adjudicative responsibilities. Referee Blank

was appointed by the court to preside over the judicial sale of the Property, supervise discovery, and conduct an accounting, for the benefit and on behalf of, and in lieu of the Court. Such actions clearly aided the Court in carrying out the Court's adjudicative responsibilities.

Defendant also failed to demonstrate that Canon 1 [22 NYCRR § 100.1], entitled "Judge Should Uphold the Integrity and Independence of the Judiciary," or Canon 2(A) [22 NYCRR § 100.2], entitled "A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities" were violated.

Canon 1 [22 NYCRR § 100.1] provides:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. . . .

Similarly, Canon 2(A) provides that

"A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Defendant failed to demonstrate how the Court's consultation with the court-appointed Referee Blank, who was appointed to stand in the shoes of the Court to facilitate the judicial sale, jeopardized the integrity and independence of the Court. Referee Blank was placed in a neutral position to oversee discovery and bring this partition case to closure. Referee Blank operated as an extension of this Court's review power, and her independence and integrity was never compromised. Therefore, defendant failed to demonstrate that the Court's integrity and independence was compromised by its communications with Referee Blank.

The Advisory Opinion (No. 01-83) quoted by defendant is factually inapposite to the circumstances herein.

According to the Advisory Opinion, the judge at issue asked whether it was ethically permissible to participate in an ex parte conference requested by the receiver in which it was intended that the merits of the action would be discussed. Based on the Committee's previous opinion, that "a judge cannot discuss the merits of a child custody dispute with a law guardian appointed to represent the child", the judge was advised to refrain from participating in "an ex parte conference requested by the receiver to discuss the merits of the action." Here, the ex parte communication was not between the Court and a person appointed to represent an interested party, but between two impartial officers of the Court, *i.e.*, the Court and a person appointed to "represent" the Court in a neutral capacity.

Furthermore, contrary to defendant's contention, a review of the Court's Memorandum Decision demonstrates that the decision was based largely on the email exchanges between the parties and Referee Blank and the parties' written submissions, which contained the parties' principal arguments. The Court specifically noted defendant's arguments concerning the Referee's purported lack of authority to decide issues concerning the use, occupancy and possession of the Property, the defendant's concerns for safety and security posed by permitting

third-parties access to the Property, as well as defendant's position that the Court lacked authority to grant the referee broad and general decision-making powers (Memorandum Decision page 5). The Court also considered defendant's argument that there was no basis in fact or law to grant plaintiff a set of keys as requested, and the argument giving the plaintiff a set of keys would violate the practice and agreement between the parties which gave defendant sole managerial, day-to-day responsibilities over the Property (Memorandum Decision pages 6-7). The Court expressly indicated that it wanted the issues formally briefed.

Defendant's counsel's complaint that he was denied a fair opportunity to (1) present his arguments the Court rather than through the Referee and (2) be present at any discussion concerning the substantive merits of this action is undermined by the fact that the parties were given an opportunity to flesh out their positions upon plaintiff's order to show cause. Moreover, the *ex parte* communications were disclosed to the parties, and the parties had an opportunity to address the substance of the communications in writing and at oral argument before the Court.

*Corsini v Corsini* (199 AD2d 103 [1<sup>st</sup> Dept 1993]), cited by defendant, does not warrant a different result. In *Corsini*, the First Department found that the Trial Court did not abuse its discretion in declining to recuse itself, where the content of the *ex parte* communication with plaintiff was fully disclosed and placed upon the record by the trial court and did not involve either the merits of the case or the content of the settlement negotiations. The *ex parte* communication here was not made between the Court and an interested party and were disclosed to all parties.

Upon review of the procedural history of this case, the Memorandum Decision, and the parties' arguments, this Court determines that its *ex parte* communications with Referee Blank did not violate any of the Canons alleged, did not serve as a basis for this Court's decision on the order to show cause so as to warrant vacatur thereof, and that there was no appearance of impropriety established. Therefore, defendant's order to show cause for recusal and vacatur of this Court's March 29, 2006 order is denied.

The Court further notes that for the reasons above, there is no basis to disqualify Helene Blank as Referee on this case.

Based on the foregoing, it is hereby

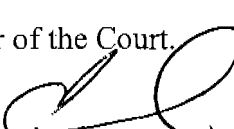

ORDERED that the defendant's order to show cause for an order (a) recusing this Court from presiding over this action based on alleged impermissible and unethical *ex parte* communications concerning the merits of this action between Justice Carol Edmead and Referee Helene Blank, Esq., in violation of Canons 1, 2(A), and 3(B)(6) of the Code of Judicial Conduct and Sections 100.1, 100.2(A) and 100.3(B)(6) of the Rules governing Judicial Conduct, and (b) vacating the Interim Order herein, dated March 29, 2006, is denied; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated 5/30/06

ENTER:

  **FILED**  
J.S. JUN 02 2006

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

CLERK'S OFFICE  
NEW YORK