

Rubin v George
2012 NY Slip Op 32948(U)
December 13, 2012
Sup Ct, New York County
Docket Number: 101786/11
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

ALICE SCHLESINGER

IA PART 16

PRESENT: ALICE SCHLESINGER

PART 16

Justice

Robert Rubin

INDEX NO.

101786/11

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

- v -

Adrian George, et al.

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

for summary judgment
is denied but leave to amend the
caption is granted in accordance
with the accompanying memorandum
decision.

FILED

DEC 17 2012

NEW YORK
COUNTY CLERK'S OFFICE

DEC 13 2012

Dated: _____

Alice Schlesinger

ALICE SCHLESINGER

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):

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

-----X
ROBERT RUBIN,

Plaintiff,

-against-

ADRIAN GEORGE and JOHN DOES 1 through 10,
such names being fictitious, etc.,

Defendants.
-----X

Index No. 101786/11
Motion Seq. No. 001

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SCHLESINGER, J.:

In this controversy between Robert Rubin and Adrian George, they do agree on several things. First, they agree that Mr. Rubin made a loan of \$300,000 to Mr. George on March 21, 2007, which to date has not been paid back. Second, there is no dispute that one Keith Stiles, someone casually known to both, brokered the deal for a fee of \$27,500. Third, this fee was paid to Mr. Stiles (and to a Carlos Orsini, who received \$5,000 out of the \$27,500) by Mr. George, soon after the deal was consummated. However, that is where the agreement ends. Each party's account then takes a vastly different turn. However, both versions concern an individual named Gene Boshes.

Mr. Boshes is also a broker, but unlike Mr. Stiles, Mr. Boshes has a broker's license whereas Mr. Stiles does not. Mr. Rubin says that Stiles was concerned about not being paid the fees he had earned and he told him that. He was worried that because he, Stiles, did not have a license, he would not be able to sue Mr. George if the payment was not made. So Mr. Rubin came up with an idea, one not entirely premised on the truth. He contacted Mr. Boshes, a friend, and asked him to serve as the "broker of record" and draw up a paper to that effect, which Mr. Rubin would have Mr. George sign. The fee in this

paper would be the agreed upon one of "about \$27,000" (Boshes Aff. ¶9). Boshes, in an affidavit, says he went along with this plan as an accommodation to Rubin, a friend and occasional partner in real estate endeavors, who as noted earlier had come up with this idea as a service to Stiles. Boshes then received a copy by fax of the commission agreement. He does not say who sent it. Presumably, it was Rubin.

After that, Boshes states that he and Rubin and George had some discussions about plans to develop George's building, for which the loan and mortgage was made. Nothing came of these discussions. However, Boshes says that some time during this period, George asked him to send him a copy of the original commission agreement. Boshes did this by fax. Finally, when it was clear there would be no deal, Boshes discarded the file, along with his copy of the agreement that was in the file.

Finally, Boshes says that he never claimed a commission from George because his role was only to be a backup. Further, he never acted as an agent or straw man for Rubin. Finally, he expresses his opinion that the document George now presents, showing a brokerage fee of \$250,000, is a "nonsense document," "absurd," "economically unfeasible and would defeat the purpose of the transaction". He says he would never have signed such a document and "I know that Mr. George did not, either". (¶9). Stiles actually was paid the fee due him.

But Mr. George tells a vastly different tale. He says that at the closing for the \$300,000 loan which he attended without counsel, when he and Rubin were alone, the latter presented to him the fee document with Boshes' name on it. However, the fee number in the paper did not show anything close to \$27,000. Rather, it showed \$250,000! Mr. George stated that he felt he had no choice but to sign because the loan was his only

option and his "back was against the wall". He says he did not get a copy of this document at the closing but, after several requests, finally received a copy of it. He says the document, Exhibit B to his papers, "is a true and correct copy of the document as I received it from plaintiff herein, unaltered in any manner by me" (¶13 of George's affidavit).

Clearly, if this number represents interest to Mr. Rubin for the original loan of \$300,000, it is usurious and nullifies the loan. That is the defense that George asserts in this foreclosure action. Rubin and Boshes assert that the original fee agreement was altered and the one presented to the Court is a counterfeit. Rather, the interest amount is 25% per annum.¹

Does this controversy lend itself to summary judgment? Rubin argues that it does, urging that George's story is just that, a story or made-up concoction by a person running away from his contractual obligation. George, of course, argues otherwise and urges that the usurious figure invalidates the loan completely. Therefore, he has no obligation to pay it and he has not. George, in his opposition papers, includes an earlier affidavit signed by Rubin in late December 2009, wherein he disclaims any knowledge of the commission document, one he says he had nothing to do with. Of course, as pointed out by George, that certainly differs from the account of the document Rubin gives now.

Both sides cite to different statutes, George, via his counsel, to Penal Law 190.40 and Rubin to §5-501(2) of the GOL. As to the latter, his counsel says the statute is clear that the interest amount must be paid to the lender. Here, he continues, that was not the case as the document presented calls for a payment of \$250,000, but solely to Boshes.

¹The loan was to be repaid in full in a year, by March 28, 2008, plus accrued interest of \$48,000.

However, George argues that clearly Boshes was acting on behalf of Rubin, who was the one who coerced him to sign it and made it a condition of the loan. Additionally, counsel for George points out that the loan document itself describes the non-payment of the broker's fee as an event of default by the borrower, George.

Rubin suggests to the Court that George's story is so preposterous that, as a matter of law, the Court should reject it and find for him. He also describes his own situation as a desperate one because the non-payment of the \$300,000 loan has placed his own home in jeopardy of foreclosure.

Each side cites cases which their counsel urge helps their position. But none do. All are clearly distinguishable from the somewhat bizarre facts here, which are irreconcilable to each other.

This controversy clearly does not lend itself to summary judgment. Even the GOL issue of the payment is riddled with factual disputes. That is so because even though the document does not say that payment is to be made to Rubin, there is enough of a connection between Boshes and Rubin, as well as the loan document itself which incorporates the commission agreement in it, that makes it impossible to resolve the issue in Rubin's favor at this point. One side has clearly made up a story. Who that is, is still very much a question. Even Rubin here, while accusing George of immoral and criminal acts, concedes that he himself does not come to court with entirely clean hands, having come up with the phoney (my word) broker idea. Therefore, Rubin's motion for summary judgment is denied.

However, because of the dire circumstances Mr. Rubin says he is in, he urges the Court to act expeditiously. At oral argument counsel for the parties agreed that discovery

here would serve no real purpose and so have agreed to waive it. Therefore, counsel for the plaintiff is directed to file his Note of Issue promptly upon receipt of this decision. Counsel shall request a trial by the court without a jury, as the dispute is equitable in nature as it sounds in foreclosure for security on the loan. Soon thereafter, or no later than January 2, 2013, counsel are directed to inform the Court and each other of available dates for a short (1-2 day) judge trial. Then, I will try to accommodate the parties by choosing a day for the trial convenient for all.

Accordingly, it is hereby

ORDERED that the motion for summary judgment is denied; and it is further

ORDERED that counsel shall appear on Wednesday, January 2 at 3:30 p.m. prepared to select a firm trial date; and it is further

ORDERED that plaintiff's motion to amend the caption is granted and Rashid Niang, a/k/a Jacob Niang is substituted as a defendant in place of "John Does 1 through 10," and upon counsel's filing of a copy of this Order with the Clerk in Trial Support (Room 119), the Clerk shall amend the records accordingly. Plaintiff shall serve the newly substituted defendant with this order and the pleadings.

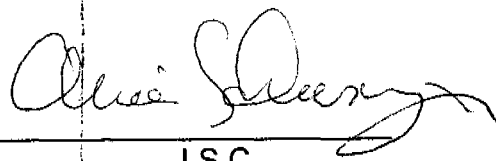
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J.S.C.

ALICE SCHLESINGER