SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: I.A. PART 13

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BANK OF AMERICA, N.A.,

Plaintiff,

- against -

NADER OHEBSHALOM and CDMS, INC.,

Defendants.

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DECISION AND ORDER

Index No: 3824/11

Motion Sequence No: 002
Original Return Date: 02-22-12

P R E S E N T :
HON. JOEL K. ASARCH,
Justice of the Supreme Court.

The following named papers numbered 1 to 4 were submitted on this Notice of Motion on February 22, 2012:

	Papers numbered
Notice of Motion and Affirmation in Support	1-2
Affirmation in Opposition	3
Reply Affirmation	4

The motion by defendant Nader Ohebshalom (Ohebshalom) pursuant to CPLR 2221(d) to reargue that branch of plaintiff's prior motion which sought to dismiss the fourth and fifth affirmative defenses and the first through sixth counterclaims asserted in defendant Ohebshalom's answer is decided as follows:

Pursuant to the Decision and Order of this Court, dated December 13, 2011 and entered on December 15, 2011, the motion by plaintiff Bank of America to dismiss the fourth through eighteenth affirmative defenses and the six counterclaims asserted in the answer interposed by defendant Ohebshalom was granted to the extent that the fourth, fifth, eighth, ninth and eleventh through eighteenth affirmative defenses, as well as all six of his counterclaims, were dismissed.

Defendant Ohebshalom seeks to reargue that part of plaintiff Bank of America's motion which resulted in dismissal of his six counterclaims[1] and fourth and fifth affirmative defenses, all of which seek to hold the plaintiff Bank liable for the actions of Paul Miller, an authorized Bentley dealership, d/b/a Bentley of Parsippany (Paul Miller) based on the dealership's purported status as a *de facto* and/or *de jure* agent of plaintiff Bank of America.[2]

Defendant Ohebshalom predicates his request to reargue on the grounds that the Court failed to apprehend that, as argued by defendant, under the terms of Retail Dealer Agreement between Paul Miller and plaintiff Bank of America, Paul Miller acted as Bank of America's agent; and the mere designation of Paul Miller as an "independent contractor" in the Agreement neither precludes nor supplants the "clear intent" to have Paul Miller act as Bank of America's agent.

A motion to reargue is one 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." CPLR 2221(d)(2). Such a motion " 'is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented.' " *Mazinov v Rella*, 79 AD3d 979, 980 [2nd Dept 2010], quoting *McGill v Goldman*, 261 AD2d 593, 594 [2nd Dept 1999]. The determination of such a motion lies within the sound discretion of the Court. *V. Veeraswamy Realty v Yenom Corp.*, 71 AD3d 874 [2nd Dept 2010]. Here, defendant Ohebshalom's motion is an attempt to

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[1] The causes of action alleged in the counterclaims include: fraudulent inducement, conversion, constructive trust, negligent misrepresentation and fraud.

[2] In his answer defendant Ohebshalom alleges that "Paul Miller was and is an authorized Bentley dealership in the business of marketing and selling Bentley automobiles to the public at large through a system of authorized sales agents, including North Shore Motor Group, Inc., defendant CDMS, Inc. and Rick Cohen."

reargue the same issues and facts previously considered and decided by the Court.

Notwithstanding defendant Ohebshalom's assertions to the contrary, the finding by this Court that Paul Miller was not an agent of plaintiff Bank of America with regard to the Ohebshalom transaction is not erroneous. Nor, under the circumstances, are discovery and witness depositions necessary to ascertain the precise nature of plaintiff Bank of America's relationship with Paul Miller. The language of the Retail Dealer Agreement which delineates the relationship between Bank of America and Paul Miller is unambiguous.

The interpretation of a written agreement is within the province of the Court. If the language of the agreement at issue is free from ambiguity, its meaning may be determined as a matter of law on the basis of the writing alone, without resort to extrinsic evidence. Generally, the contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed. *Hickman v Saunders*, 228 AD2d 559, 560 [2nd Dept 1996].

As stated in the Decision and Order for which reargument is sought, the relationship between plaintiff Bank of America and Paul Miller is a contractual one governed by the terms of the Retail Dealer Agreement.

Although defendant Ohebshalom correctly argues that an individual's designation as an independent contractor in a contract does not preclude a finding that the individual also acted as an agent, and the terms "independent contractor" and "agent" are not mutually exclusive, the inquiry does not end there.

Here, the Retail Dealer Agreement unambiguously states that dealer (Paul Miller), when acting under the Retail Dealer Agreement, is an independent contractor, not an agent or representative of the Bank and has no express or implied right to bind the Bank of America in any manner whatsoever.

The December 13, 2011 Decision and Order notes that plaintiff Bank of American did not supervise or control the work performed by Paul Miller, nor did Paul Miller act for plaintiff Bank of America, at its request or under its direction. The first page of the Agreement, in fact, welcomes the individual dealer to Bank of America's competitive programs for automobile financing and talks of a retail relationship between the dealership and Bank of America.

It is well settled that an agency relationship generally results from the manifestation of consent by one party to allow another to act on his or her behalf and subject to his or her control and consent by the other to so act. *Art Fin. Partners, LLC v Christie's Inc.*, 58 AD3d 469, 471 [1st Dept 2009]. Independent contractors differ in the important respect that they are not subject to another's control as are agents, employees or servants. *Retta v 160 Water Street Associates, L.P.*, 94 AD3d 623 [1st Dept 2012]. "Whether one is an independent contractor or an employee depends on the presence or absence of various *indicia*, the most important of which is the right to control over the agent irrespective of the manner in which the work is to be done." *Szabados v Quinn*, 156 AD2d 186 [1st Dept 1989]. An independent contractor is a person who contracts with another to do something for him, but who is not controlled by the other or subject to the other's right to control him in the performance of the work. *E.B.A. Wholesale Corp. v S.B. Mechanical Corp.*, 127 AD2d 737, 739 [2nd Dept 1987].

While the terms "independent contractor" and "agent" may not be mutually exclusive (*Anchor Sav. Bank v Zenith Mortg. Co.*, 634 F2d 704, 707 n.2 [2nd Cir November 24, 1980]; *Time Warner City Cable v Adelphi Univ.*, 27 AD3d 551, 553 [2nd Dept 2006]), here the Retail Dealer Agreement specifically states that Paul Miller is not an agent of plaintiff Bank of America and has no right to bind plaintiff. In the undersigned's view, the cases on which defendant Ohebshalom relies are unavailing. None of the cases, with the exception of *LFS Realty Co. v Bank of N.Y.*, 31

Misc 3d 1717(A), 2011 N.Y. Slip Op. 50712(U) (N.Y.Sup. April 7, 2011), contains such express language. This is not, however, a situation as is *LFS Realty Co. v Bank of N.Y.* where it can be said that an intent is evident from the parties' agreement that one party is to act on behalf of another party in collecting payments and prosecuting tax liens such as a mortgage loan servicer would do.

Ordinarily, a principal is not liable for the acts of an independent contractor. The most commonly accepted rationale in support of the rule is that one who employs an independent contractor has no right to control the manner in which the work is done. *Brothers v New York State Elec. & Gas Corp.*, 81 NY2d 270, 273 [1993]; *Wecker v Crossland Group, Inc.*, 92 AD3d 870 [2nd Dept 2012].

In the absence of any *indicia* that plaintiff Bank of American controlled the manner in which Paul Miller performed its obligations (work), or evidence that can be gleaned from the parties' agreement that they intended that Paul Miller act as an agent of plaintiff Bank of America, **defendant Ohebshalom's motion to reargue is denied.**

The Court notes that plaintiff Bank of America's motion was predicated on both CPLR 32211(a)(1) and (a)(7). The Retail Dealer Agreement is dispositive on the issue of agency and defendant Ohebshalom's claims grounded on the theory of *respondeat superior*.

The foregoing constitutes the Decision and Order of the Court.

Dated: Mineola, New York
May 22, 2012

ENTER:

JOEL K. ASARCH, J.S.C.

Copies mailed to:

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