

**Bank of Am., N.A. v Ohebshalom**

2011 NY Slip Op 33393(U)

December 13, 2011

Sup Ct, Nassau County

Docket Number: 3824/11

Judge: Joel K. Asarch

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU: PART 17

-----X  
BANK OF AMERICA, N.A.,

Plaintiff,

- against -

NADER OHEBSHALOM and CDMS, INC.

Defendants.  
-----X

**DECISION AND ORDER**

Index No: 3824/11

Motion Sequence No: 001

Original Return Date: 07-29-11

**P R E S E N T :**

**HON. JOEL K. ASARCH,  
Justice of the Supreme Court**

The following named papers numbered 1 to 6 were submitted on this Notice of Motion on August 26, 2011:

	<u>Papers numbered</u>
Notice of Motion, Affirmation and Affidavit in Support	1-3
Affirmation and Affidavit in Opposition	4-5
Reply Affirmation	6

The motion<sup>1</sup> by plaintiff, Bank of America, N.A. (Bank of America), to dismiss the fourth through eighteenth affirmative defenses asserted in defendant Nader Ohebshalom's answer and the first through sixth counterclaims therein, and for a declaration of default against defendant CDMS, INC. pursuant to CPLR 3215 is determined as hereinafter set forth.

**FACTUAL BACKGROUND**

<sup>1</sup>Plaintiff's motion does not address defendant's first through third affirmative defenses wherein defendant Nader Ohebshalom alleges that he never entered into an agreement, that his signature is forged and that he signed the purported document under false pretenses.

Plaintiff, Bank of America, the assignee of a retail installment sales contract dated June 26, 2009, brings this action to recover possession of a 2009 Rolls Royce Phantom Drophead Coupe (VIN # SCA2D685X9UX16370) from defendant CDMS, Inc. as buyer and defendant Nader Ohebshalom as co-buyer, or alternatively, the balance due under the sales contract. According to the complaint, defendants defaulted under the terms of the contract by failing to make timely payment of principal and interest as of September 22, 2010, leaving a principal balance due and owing of \$177,43.87. Claiming that he never entered into the purported retail installment contract (financing agreement) alleged herein, and has paid the full purchase price of \$449,000 for the vehicle, defendant Nader Ohebshalom has answered the complaint asserting eighteen affirmative defenses and six counterclaims. His defenses and counterclaims hinge on the claim that the signature on the retail sales installment contract, which purports to be his signature, and on which plaintiff relies, is fraudulent and/or was procured by fraud.

Plaintiff, Bank of America, seeks dismissal of the fourth through eighteenth affirmative defenses and the six counterclaims asserted in defendant Nader Ohebshalom's answer. The affirmative defenses at issue, beginning with the fourth, include respectively: fraud in the inducement, *respondeat superior*, accord and satisfaction, lack of privity between plaintiff and defendant Nader Ohebshalom, failure to join necessary/indispensable parties, statute of limitations, failure to state a cause of action, plaintiff's own breach of contract, waiver/estoppel, plaintiff's failure to mitigate damages, damages not caused by defendant Nader Ohebshalom, unjust enrichment, unclean hands, lack of personal jurisdiction and statute of frauds. The six counterclaims assert claims sounding in: fraud in the inducement, conversion, constructive trust, negligent misrepresentation, fraud through forgery and fraud in execution.

## ANALYSIS

Pursuant to CPLR 3211(b), a party may move for judgment dismissing one or more defenses on the ground that a defense is not stated or has no merit. *Greco v Christoffersen*, 70 AD3d 769, 771 [2<sup>nd</sup> Dept. 2010]. When moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is without merit as a matter of law because it either does not apply under the factual circumstances of the case or fails to state a defense. *Bank of America, N.A. v 414 Midland Ave. Associates, LLC*, 78 AD3d 746, 748 [2<sup>nd</sup> Dept. 2010]; *Vita v New York Waste Servs., LLC*, 34 AD3d 559 [2<sup>nd</sup> Dept. 2006]. In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleading in favor of the party asserting the defense and give that party the benefit of every reasonable inference. *Courthouse Corporate Ctr. LLC v Schulman*, 74 AD3d 725, 727 [2<sup>nd</sup> Dept. 2010].

The eighth, ninth and eleventh through eighteenth affirmative defenses, i.e., failure to join necessary parties, statute of limitations, plaintiff's own breach of contract, waiver/estoppel, failure to mitigate damages, damages not caused by plaintiff, unjust enrichment, unclean hands, lack of jurisdiction and statute of frauds respectively, are pled as single sentences, and are totally bereft of any supporting factual data. They are, therefore, fatally deficient. Affirmative defenses which are pled as conclusions of law, and are not supported by facts, are insufficient and should be dismissed. *Plemmenou v Arvanitakis*, 39 AD3d 612, 613 [2<sup>nd</sup> Dept. 2007] abrogated on other grounds by *Butler v Catinella*, 58 AD3d 145, 148 [2<sup>nd</sup> Dept. 2008].

The fourth and fifth affirmative defenses, based upon the alleged fraud perpetrated by non-

party Paul Miller GT, Inc. d/b/a Bentley of Parsippany<sup>2</sup> (Paul Miller), an alleged *de facto* and/or *de jure* agent of plaintiff Bank of America, which defendant Nader Ohebshalom claims acted in concert with defendant CDMS, Inc., its president Rick Cohen and non-party North Shore Motor Group to perpetrate a fraud against him, are not viable. The record is devoid of any basis to support defendant's allegation that Paul Miller acted as an agent of plaintiff Bank of America.

In each of the counterclaims for fraud in the inducement, conversion, constructive trust, negligent misrepresentation, forgery and fraud in the execution respectively, as well as in the fourth and fifth affirmative defenses, defendant Nader Ohebshalom alleges that plaintiff Bank of America knew or should have known about the conduct of its agent Paul Miller, whom defendant claims functioned as the accomplice of Rich Cohen, the president of defendant CDMS, Inc. and CEO of North Shore Motor Group, Inc., the dealership from which defendant Nader Ohebshalom purchased the Rolls Royce at issue herein. Defendant Nader Ohebshalom alleges that Paul Miller provided defendant CDMS, Inc. and Rick Cohen with all the necessary documentation for the fraudulent transaction herein, including but not limited to the purported retail installment contract documents which defendant asserts he did not sign. He further alleges that Paul Miller failed, *inter alia*, to verify whether said defendant actually wished to finance the purchase of the subject vehicle.

Under the theory of *respondeat superior*, defendant Nader Ohebshalom seeks to hold plaintiff liable for the alleged fraud committed by Paul Miller and his agents, whom defendant claims

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<sup>2</sup>According to the complaint, on or about March 30, 2007, plaintiff Bank of America and Paul Miller entered in a Retail Dealer Agreement, pursuant to which Bank of America would purchase retail installment contracts from Paul Miller which would then be assigned to Bank of America. Defendant Nader Ohebshalom alleges in his answer that Paul Miller is an authorized Bentley dealership in the business of marketing and selling of Bentley automobiles through a system of authorized agents including North Shore Motor Group, defendant CDMS, Inc. and Rick Cohen.

deceived him into signing multiple documents relating to the purchase of the 2009 Rolls Royce Phantom Drophead Coupe without advising him that they were loan documents, and further, represented to him (Nader Ohebshalom) that in consideration of his payments he would be the lawful owner of said vehicle free and clear of any and all liens.

Since the relationship between Bank of America and Paul Miller is a contractual one, governed by the terms set forth in the Retail Dealer Agreement, the counterclaims based on the theory of *respondeat superior* are unsustainable. The factual underpinnings of this case do not constitute a basis to impose liability on plaintiff Bank of America for the alleged fraudulent acts of non-party Paul Miller under the doctrine of *respondeat superior*.

A legal entity necessarily functions through its officers, agents and employees whose knowledge and conduct may be imputed to the entity under the doctrine of *respondeat superior*. An employer may not, however, be held accountable to third persons for the conduct of employees who, while ostensibly acting for their employer, in fact totally abandon the employer's interest and act entirely for their own or others' purposes. *Prudential-Bache Sec., Inc. v Citibank*, 73 NY2d 263, 276 [1989].

Under the doctrine of *respondeat superior*, a principal is liable for the negligent acts committed by its agent within the scope of its agency. *Fils-Aime v Ryder TRS, Inc.*, 40 AD3d 917, 918 [2<sup>nd</sup> Dept. 2007]. A principal-agent relationship may be established by evidence that of the "consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other so to act." *Maurillo v Park Slope U-Haul*, 194 AD2d 142, 146 [2<sup>nd</sup> Dept. 1993].

Paul Miller is neither an employee nor agent of plaintiff Bank of America. Plaintiff did not

supervise or control the work performed by Paul Miller nor did it act for plaintiff Bank of America at its request or under its direction for the Bank's benefit.

Significantly, ¶ 26(G) of the Retail Dealer Agreement specifically provides as follows:

“When acting under the Retail Agreement, Dealer shall be an independent contractor and not an agent or representative of Bank. Dealer is not granted any express or implied right to bind Bank in any manner whatsoever.”

Accordingly, the motion by defendant Bank of America to dismiss the fourth through eighteenth affirmative defenses, and six counterclaims asserted in the answer interposed by defendant, is **granted to the extent that** the fourth, fifth, eighth, ninth and eleventh through eighteenth affirmative defenses are dismissed. The sixth, seventh and tenth affirmative defenses alleging accord and satisfaction based on defendant Nader Ohebshalom's alleged payment in full for the vehicle at issue, lack of privity between defendant and plaintiff Bank of America and the plaintiff's failure to state a cause of action, are continued, as are the first, second and third affirmative defenses which were not the subject of this motion.

Even affording the allegations of the counterclaims asserted against plaintiff Bank of America the benefit of every favorable inference (*Ginsburg Dev. Cos., LLC v Carbone*, 85 AD3d 1110, 1111 [2<sup>nd</sup> Dept. 2011]), the allegations of fraud in the inducement, conversion, constructive trust, negligent misrepresentation, fraud through forgery and fraud in the execution are deficient in that they seek to hold plaintiff Bank of America liable for the alleged fraudulent actions of defendant CDMS, Inc., Rick Cohen and Paul Miller based on the theory of agency/*respondeat superior* in the absence of any such relationship. As such, they are hereby **dismissed**.

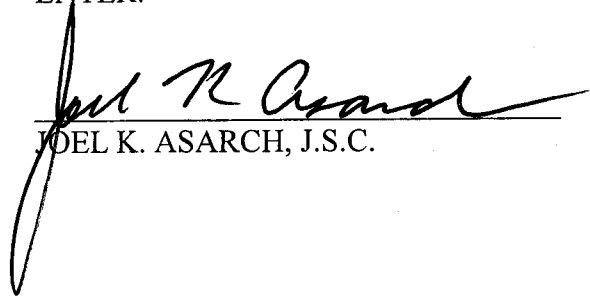
With respect to defendant CDMS, INC., this corporation was served with the summons and complaint by service on March 31, 2011 upon the Secretary of State pursuant to BCL §306. More

than thirty days have elapsed since service was deemed complete and defendant CDMS, Inc. has failed to timely answer or otherwise move with respect to the complaint. Accordingly, the Court finds **defendant CDMS, Inc. to be in default**; however, as there has been no proof submitted that additional notice has been given to said defendant pursuant to CPLR 3215(g)(4)(i), entry of judgment is unavailable at this time. Cf CPLR 3215(c).

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York  
December 13, 2011

ENTER:



JOEL K. ASARCH, J.S.C.

Copies mailed to:

Stim & Warmuth, P.C.  
Attorneys for Plaintiff

Wenger & Arlia, LLP.  
Attorneys for Defendant

CDMS< Inc.  
Defendant (in default)

**ENTERED**  
DEC 15 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE