

HSBC Bank USA, N.A. v Wireless Express, Inc.

2019 NY Slip Op 30788(U)

March 25, 2019

Supreme Court, New York County

Docket Number: 158279/2017

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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HSBC BANK USA, NATIONAL ASSOCIATION, SUCCESSOR BY
MERGER TO HSBC BANK USA,

Plaintiff,

INDEX NO. 158279/2017

MOTION SEQ. NO. 001

- v -

WIRELESS EXPRESS, INC. A&E WIRELESS, INC., WIRELESS
STATIONS INC. AND AL HABER AKA ALBERT HABER AKA
ALBERT M HABER,

Defendants.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15,
16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 33

were read on this motion to/for SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion is denied in all respects.

In this action sounding, inter alia, in breach of contract, plaintiff HSBC Bank USA, National Association, successor by merger to HSBC BANK USA (“HSBC”) moves: 1) pursuant to CPLR 3212, for summary judgment on its complaint as against defendants Wireless Express, Inc. (“WEI”), A&E Wireless, Inc. (“A&E”), Wireless Stations Inc. (“WSI”) and Al Haber a/k/a Albert Haber a/k/a Albert M. Haber (“Haber”) (hereinafter collectively “defendants”); 2) to strike defendants’ answer and all affirmative defenses; and 3) for such other relief as this Court deems just and proper. After oral argument, and after a review of the parties’ papers and the relevant statutes and case law, the motion is denied in all respects.

FACTUAL AND PROCEDURAL BACKGROUND:

On or about August 5, 2002, HSBC, a lending institution, entered into a “business line of credit agreement” (“BLOC”) with WEI, a corporation, pursuant to which HSBC agreed to provide WEI with a business line of credit up to \$200,000. Doc. 2; Doc. 12 at par 6. A security agreement simultaneously executed between HSBC and WEI granted HSBC a security interest in WEI’s assets (“the collateral”). Doc. 3; Doc. 12 at par. 6. At or about the same time, Haber (“the individual guarantor”) and A&E and WSI (“the corporate guarantors”) executed guarantees unconditionally guaranteeing the payment of all indebtedness in connection with WEI’s obligations to HSBC. Doc. 1 at par. 4; Doc. 4; Doc. 12 at par. 10.¹

HSBC commenced the captioned action on September 15, 2017, alleging, inter alia, that, by letter dated September 12, 2012 (“the modification letter”), it exercised its right to refuse to approve advance requests based on WEI’s failure to maintain a zero balance for at least 30 consecutive calendar days within a 12-month period. Doc. 1 at par. 10. The modification letter offered WEI the choice of 1) complying with the zero balance requirement, at which time HSBC would entertain requests for further advances, or 2) paying the current outstanding principal balance in 60 monthly installments, plus interest. Doc. 1 at par. 11.

In its complaint, HSBC alleges that defendants defaulted on the loan documents, as well as the modification letter, on March 23, 2017. Doc. 1 at par. 18. As a first cause of action, HSBC alleged a breach of contract claim as against WEI. Doc. 1 at pars. 27-30. As a second cause of action, HSBC alleged an account stated claim against WEI. Doc. 1 at pars. 32-35. HSBC’s third cause of action against WEI was for unjust enrichment. Doc. 1 at pars. 37-39. HSBC’s fourth cause of action, asserted against Haber, A&E, and WSI, was for breach of the guarantees. Doc. 1

¹ The BLOC, the security agreement and the guarantees are hereby collectively referred to as “the loan documents.”

at pars. 41-43. HSBC's fifth and final cause of action, sounding in replevin, was asserted against WEI. Doc. 1 at pars 45-48.

Defendants joined issue by service of their answer, filed November 6, 2017, in which they denied all substantive allegations of wrongdoing and asserted numerous affirmative defenses. Doc. 10.

HSBC now moves, pursuant to CPLR 3212, for "summary judgment against defendants . . . for the relief demanded in the [v]erified [c]omplaint, dated September 15, 2017, on the grounds that no triable issues of fact exist and that there are no defenses to this action." Doc. 11.

In an affirmation in support of the motion, HSBC's attorney asserts that defendants defaulted under the loan documents on or about February 16, 2012 "for failing to maintain a zero balance for at least thirty (30) consecutive calendar days." Doc. 19 at par. 9. HSBC terminated WEI's right to request advances on its account and, in the modification letter, offered WEI two options, one of which was to allow it to pay the then outstanding principal balance in 60 monthly installments, plus interest. Doc. 19, at par. 9. WEI accepted this option by signing the modification letter on February 27, 2012. Doc. 16; Doc. 19, at par. 9. HSBC's attorney further asserts that defendants defaulted under the loan documents and the modification letter by failing to pay HSBC the payment due March 23, 2017. Doc. 19 at par. 10. Although HSBC demanded the amount owed by letter dated March 27, 2017, defendants failed to make the payment and HSBC thus seeks all money due pursuant to the loan documents. Doc. 19 at par. 10.

In an affidavit in support of the motion, Christopher Gates, Vice President of HSBC, states, inter alia, that defendants defaulted under the loan documents on or about February 26, 2012. Doc. 12 at par. 9. Gates further represents that defendants defaulted under the loan documents, as modified, on or about March 23, 2017. Doc. 12 at par. 12. However, a loan history annexed to

Gates' affidavit reflects that defendants' last payment was on October 1, 2013 in the amount of \$1,810. Doc. 18 at p. 11 of 22.

In a memorandum of law in support of the motion, HSBC alleges that it is entitled to summary judgment on the loan documents but does not set forth the alleged date of default. Doc. 22. Plaintiff also asserts that defendants' affirmative defenses must be dismissed as conclusory. Doc. 22.

Defendants oppose the motion on the ground that material issues of fact exist which prohibit the granting of the application. Doc. 27. Specifically, defendants contend that, although HSBC argues that the default occurred on March 23, 2017, its own evidence, specifically the loan report, reflects that the last payment was made in or about October 1, 2013. Doc. 27 at par. 20. Defendants further maintain that, although HSBC wrote to defendants on March 27, 2017 asking for payment, that letter did not specify when the default occurred or what payments defendants failed to make. Doc. 27 at pars. 21-22.

In a reply affirmation in further support of the motion, HSBC's attorney argues that the application should not be denied based on "an alleged clerical error in identifying the default date set forth in [the] verified complaint and the [m]otion." Doc. 32 at 5 (emphasis provided). Counsel maintains that although a "clerical error" in the complaint and HSBC's motion papers reflect that the date of defendants' default was March 23, 2017, "it is clear from the [loan history] that [d]efendants defaulted under the [l]oan [d]ocuments on or about November 1, 2013 and thereafter." Doc. 32 at par. 11 (emphasis provided). HSBC asserts that the clerical errors are not prejudicial to defendants and do not raise an issue of fact. Doc. 32 at 6.

Gates, too, submits a reply affidavit, also arguing that defendants defaulted under the loan documents on November 1, 2013. Doc. 33 at par. 9.

LEGAL CONCLUSIONS:

It is well settled that the movant on a summary judgment motion “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (*see CPLR 3212*). The “facts must be viewed in the light most favorable to the non-moving party” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The “[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*” (*Vega*, 18 NY3d at 503 [internal quotation marks and citation omitted, emphasis in original]).

HSBC has failed to establish its prima facie entitlement to summary judgment on its complaint, since the papers it submits reveal the existence of a triable issue of fact regarding when defendants defaulted. *See generally Ciccone v Kendal on Hudson*, 72 AD3d 723 (2d Dept 2010). As defendants assert, although the complaint alleges that defendants defaulted on the loan documents and the modification letter on March 23, 2017, the loan history submitted as an exhibit to Gates’ affidavit reflects that the last payment by defendants was on or about October 1, 2013.²

² Given this contradiction, HSBC’s motion is denied in all respects without the need for this Court to consider defendants’ opposing papers. However, even were this Court to consider the reply papers, HSBC’s argument that, due to a clerical error, it failed to state in its initial moving papers that defendants defaulted on November 1, 2013 would be disregarded insofar as it is raised for the first time in reply. *See Wells Fargo Bank, N.A. v Osias*, 156 AD3d 942 (2d Dept 2017).

Additionally, that branch of the motion seeking to strike defendants' affirmative defenses is denied. HSBC's attorney argues that defendants' answer and their "unsubstantiated affirmative defenses" must be dismissed, with prejudice, "on the grounds that no triable issues of fact exist." Doc. 19 at par. 3. Since, as noted immediately above, HSBC's own papers raise an issue of fact, counsel's argument is without merit.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by plaintiff HSBC Bank USA, National Association, successor by merger to HSBC BANK USA, is denied in all respect; and it is further

ORDERED that within 20 days of the entry of this order, counsel for defendants shall serve this order, with notice of entry, on plaintiff's counsel; and it is further

ORDERED that the parties are to appear for a preliminary conference in this matter on June 25, 2019 at 80 Centre Street, Room 280, at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

3/25/2019

 DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN. FIDUCIARY APPOINTMENT REFERENCE

 KATHRYN E. FREED, J.S.C.