

HSBC Bank USA v Wireless Express, Inc.
2019 NY Slip Op 33326(U)
November 7, 2019
Supreme Court, New York County
Docket Number: 158279/2017
Judge: Kathryn E. Freed
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**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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INDEX NO. 158279/2017

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

MOTION SEQ. NO. 002

Plaintiff,

- v -

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

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 51, 52, 53, 54, 55, 56, 57, 58

were read on this motion to/for

AMEND CAPTION/PLEADINGS

In this action sounding in, *inter alia*, breach of contract, plaintiff HSBC Bank USA, National Association, successor by merger to HSBC Bank USA ("HSBC") moves, pursuant to CPLR 3025 (b), to amend the verified complaint (Docs. 38-47). Defendants oppose the motion (Docs. 51-55). After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motion is **granted**.

FACTUAL AND PROCEDURAL HISTORY

The underlying facts of this case are set forth in detail in the decision and order of this Court entered March 27, 2019 ("the 03/27/19 order") (Doc. 36). Other relevant facts are set forth below. In September 2017, HSBC commenced this action 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”) (Doc. 1). In the complaint, HSBC alleged that defendants defaulted under the loan documents, as modified, on March 23, 2017 (Doc. 1 at 8). The complaint was verified by Christopher Gates (“Gates”), the vice president of HSBC (Doc. 1 at 16-17). After joinder of issue (Doc. 10), plaintiff moved for summary judgment on its complaint (Doc. 11). In support of its motion, HSBC submitted, *inter alia*, the affidavit of Gates, who stated that defendants defaulted on or about March 23, 2017 (Doc. 12). This Court denied HSBC’s motion seeking summary judgment, reasoning that a triable issue of fact existed with respect to the default date (Doc. 36 at 5). As this Court noted, although the complaint alleged 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 reflected that defendants made their last payment on October 1, 2013 (Doc. 36 at 5). This Court rejected HSBC’s argument that this was a clerical error on the ground that HSBC raised it for the first time in its reply papers (Doc. 36 at 5).

In the instant motion, HSBC argues, *inter alia*, that this Court should grant it leave to amend the default date from March 23, 2017 to November 1, 2013 to conform the pleadings to the books and records of HSBC (Doc. 39). In opposition, defendants argue, *inter alia*, that HSBC’s motion should be denied because the proposed amendment would contradict both the verified complaint and Grant’s affidavit (Doc. 51).

LEGAL CONCLUSIONS:

HSBC’s motion is granted since “leave to amend a pleading is freely granted as a matter of discretion in the absence of prejudice or surprise” (*Stroock v Stroock & Lavan v Beltramini*, 157 AD2d 590, 591 [1st Dept 1990]; *see* CPLR 3025 (b); *Global Liberty Ins. Co. v Tyrell*, 172

AD3d 499, 500 [1st Dept 2019]; *Crossbeat New York, LLC v LIIRN, LLC*, 169 AD3d 604, 604 [1st Dept 2019]). Although defendants argue that the amendment would contradict the verified complaint and Grant's affidavit, this Court accepts HSBC's argument, in light of its records reflecting defendants' last payment as October 1, 2013, that the default date of March 27, 2017 contained in its papers in the underlying motion was a clerical error (*compare Burriesci v Paul Revere Ins. Co.*, 255 AD2d 993, 994 [4th Dept 1998]).¹ The amendment will result in no substantive changes to the allegations in the complaint. Defendants have failed to show that the default date is central to their theory of the case such that this amendment will cause them prejudice or surprise (*see Dockery v UPACA Site 7 Assoc., LP*, 148 AD3d 580, 580 [1st Dept 2017]; *Bank of New York v Stein*, 130 AD3d 552, 553 [2d Dept 2015]; *47 West 14th St. Corp. v New York Wigs & Plus, Inc.*, 106 AD3d 527, 527 [1st Dept 2013]).

In accordance with the foregoing, it is hereby:

ORDERED that HSBC's motion for leave to amend the complaint to change the date of defendants' alleged default from March 23, 2017 to November 1, 2013 is granted, and the

¹ Defendants argue, *inter alia*, that HSBC's motion should be denied because it failed to submit an affidavit from Grant with its motion papers (Doc. 51). Since HSBC included Grant's affidavit of merit only in its reply to defendants' opposition papers, it will not be considered by this Court (*BP 399 Park Avenue LLC v Pret 399 Park, Inc.*, 150 AD3d 507, 509 [1st Dept 2017]; *TrizecHahn, Inc. v Timbil Chiller Maintenance Corp.*, 92 AD3d 409, 410 [1st Dept 2012]). However, the absence of an affidavit of merit from Grant is not fatal to HSCB's motion to amend the complaint (*see Boliak v Reilly*, 161 AD3d 625, 625 [1st Dept 2018]).

amended complaint in the proposed form annexed to the moving papers (Doc. 44), shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the defendants shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that counsel are directed to appear for a previously scheduled compliance conference in Room 280, 80 Centre Street, on January 21, 2020, at 2:15 PM; and it is further

ORDERED that this constitutes the decision of the court.

11/7/2019

DATE

CHECK ONE:

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CASE DISPOSED

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GRANTED

☐

DENIED

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NON-FINAL DISPOSITION

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GRANTED IN PART

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OTHER

APPLICATION:

☐

SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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FIDUCIARY APPOINTMENT

☐

REFERENCE

KATHRYN E. FREED, J.S.C.