

HSBC Bank USA v Wireless Express, Inc.
2020 NY Slip Op 31717(U)
June 3, 2020
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 DATE 02/27/2020

Plaintiff,

MOTION SEQ. NO. 003

- v -

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

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98

were read on this motion to/for JUDGMENT - SUMMARY.

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, pursuant to CPLR 3212, for an order granting it summary judgment against defendants Wireless Express, Inc. ("Wireless"), 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"), on the grounds that no triable issues of fact exist and that there are no viable defenses in this action (Doc. 68-84). Defendants oppose the motion (Doc. 87-96). After a review of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

The underlying facts of this case are set forth in detail in the decision and order of this Court entered March 27, 2019 ("the 3/27/2019 order"), which denied HSBC's motion seeking, *inter alia*, summary judgment against defendants on its causes of action (Doc. 79). The relevant facts may be summarized as follows.

On or about August 5, 2002, HSBC, a lending institution, entered into a "business line of credit" agreement ("BLOC") with WEI, a corporation, to provide WEI a business line of credit of up to \$200,000 (Doc. 79). Contemporaneously with this BLOC agreement, HSBC and WEI executed a security agreement whereby WEI granted HSBC a security interest in WEI's assets as collateral (*id.*). Additionally, Haber (the individual guarantor) and A&E and WSI (the corporate guarantors), executed unconditional guarantees, assuming responsibility for all debts relating to WEI's obligations to HSBC (*id.*).¹

By letter dated February 16, 2012 ("the modification letter"), HSBC exercised its right to no longer approve advance requests based on WEI's failure to maintain a zero balance for at least thirty (30) consecutive days within any 12-month period (Docs. 71, 81 ¶ 10). However, the modification letter offered WEI the choice of either (i) complying with the zero balance requirements, at which time HSBC would accept requests for future advances, or (ii) paying the current outstanding principal balance in sixty (60) monthly installments, plus interest at the agreed upon rate (Docs. 71, 81 ¶ 11). WEI allegedly agreed to the latter as reflected by the executed modification letter dated February 27, 2012 (Docs. 71, 81 ¶ 12).

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

Defendants allegedly defaulted on the loan documents, as modified, on November 1, 2013 (Doc. 81 ¶ 18).² On or about March 27, 2017, counsel for HSBC sent defendants a notice demanding, *inter alia*, that the outstanding principal amount of \$157,370.02 be paid in full, plus interest, fees, costs, disbursements and attorneys' fees continuing to accrue, within ten (10) business days (Docs. 81 ¶ 24; 83). However, in September 2017, upon their alleged failure to comply with the March 27, 2017 demand, HSBC commenced this action against defendants by filing a summons and complaint (Docs. 1; 81). In the complaint, HSBC asserted causes of action for (1) breach of contract against WEI; (2) an account stated claim against WEI; (3) a claim based on unjust enrichment against WEI; and (4) a claim for breach of the guarantees against A&E, WSI and Haber (Doc. 81).

On February 15, 2018, after issue was joined, HSBC moved for, *inter alia*, summary judgment against defendants on each of its causes of action (motion sequence 001) (Doc. 11). In its 3/27/19 order, this Court held that HSBC failed to establish its *prima facie* entitlement to this relief because, although HSBC alleged in the complaint that defendants had defaulted on the loan documents and the modification letter on March 23, 2017, this date conflicted with the loan history chart attached as an exhibit to its motion papers (Doc. 63).

On May 14, 2019, HSBC moved, pursuant to CPLR 3025(b), to amend its complaint to correct the date of defendants' default (motion sequence 002) (Doc. 38). By decision and order of this Court entered November 7, 2019, HSBC was granted leave to amend the complaint to reflect a default date of November 1, 2013 (Doc. 63). HSBC filed an amended complaint on November 12, 2019 (Doc. 65), and defendants interposed a verified answer to said complaint on

² As detailed below, the complaint was amended to change the defendants' default date from March 23, 2017 to November 1, 2013.

November 20, 2019, denying all substantive allegations and raising numerous affirmative defenses (Doc. 67).

On December 19, 2019, HSBC filed the instant motion for summary judgment against defendants arguing, *inter alia*, that executed copies of the loan documents upon which the claims are based, as well as account records demonstrating the alleged default under the loan documents, establish HSBC's entitlement to summary judgment against defendants (Doc. 84 at 4-5). Additionally, HSBC contends that defendants' affirmative defenses are without merit and must be dismissed (Doc. 84 at 6-11).

In support of its motion, HSBC submits, *inter alia*, the affidavit of Christopher Gates ("Gates"), its vice president, who affirms, in pertinent part, that, based on his review of the business records kept and maintained in the ordinary course of its business, "defendants defaulted under the [l]oan [d]ocuments, as modified, by virtue of [WEI's] failure to adhere to its contractual obligations including, *inter alia*, failing to remit the agreed upon payment pursuant to the terms thereunder" (Doc. 69 ¶ 17). He further avers that, "[d]efendants are currently in default under the terms of the [l]oan [d]ocuments so that the principal amount of \$157,370.02, plus interest as of December 6, 2019, in the sum of \$49,673.19, plus late charges in the sum of \$9,539.27 as of December 6, 2019, plus interest continuing to accrue at the [d]efault [i]nterest [r]ate subsequent to December 6, 2019 through and including the date of entry of judgment herein, plus reasonable and actual attorneys' fees, costs and expenses is due and owing to [HSBC]" (Doc. 69 ¶ 24). In support of this claim, Gates annexes, *inter alia*, a document which purports to be a true and accurate copy of WEI's loan history ("the loan history chart") (Doc. 75).

In opposition to HSBC's motion, defendants claim, *inter alia*, that HSBC has failed to establish its *prima facie* entitlement to summary judgment and dismissal of their verified answer

because the "instant motion is very unclear regarding the details of the [d]efendants' alleged breach of the underlying agreements and how [d]efendants supposedly breached the same" (Doc. 87 ¶ 20). Moreover, defendants represent that nowhere in its motion papers does HSBC identify "what exact payments were missed, when those payments were missed, or how exactly the payments became due and owing" (Doc. 87 ¶ 25). Such issues, claim defendants, must be fully explored during discovery (Doc. 87 ¶ 25).

Defendants submit the affidavit of Haber, who affirms, in pertinent part, that, it is unclear from the loan history chart submitted in support of HSBC's motion what the required monthly payment under the modification agreement was (Doc. 88 ¶ 4). Haber further maintains that the letter allegedly sent to defendants on March 27, 2017 also fails to identify the default date or the payment amount that WEI allegedly failed to make on that date (Doc. 88 ¶ 6).

LEGAL CONCLUSIONS:

It is well-established that "[t]he proponent of 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] [emphasis added] [citations omitted]; *see* CPLR 3212 (b); *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The movant's failure to make a *prima facie* showing will result in the denial of the motion, regardless of the opposing papers (*see Pappalardo v NY Health & Racquet Club*, 279 AD2d 134, 140 [1st Dept 2000]). If, however, the moving party makes a *prima facie* showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a

genuine, triable issue of fact (*see Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]).

HSBC's motion is denied. Although Gates affirms that "[o]n or about November 1, 2013, [d]efendants defaulted under the [l]oan [d]ocuments, as modified, by virtue of [WEI's] failure to adhere to its contractual obligations including, *inter alia*, failing to remit *the agreed upon payments* pursuant to the terms thereunder" (emphasis added) (Doc. 69 ¶ 17), it cannot be discerned from HSBC's motion papers what the amounts of "monthly agreed upon" payments were and, more importantly, what payment amount was due on November 1, 2013, when WEI allegedly defaulted.

In the modification letter dated February 16, 2012, HSBC advised WEI that its "monthly payment would be a principal amount of 1/60th of the present principal balance on [the] account, plus interest at the rate set forth in [the] [a]ccount agreement" (Doc. 71). The loan history chart reflects that, from April 1 through September 1, 2012, WEI paid \$3,333.33 towards the principal, plus interest (Doc. 75). However, from October 12, 2012 through October 1, 2013, HSBC accepted WEI's monthly payments of \$1,810 and, according to HSBC's own records, it appears that no interest was due during this period (Doc. 75).³ No payment schedule identifying WEI's monthly obligation under the modification agreement is provided by HSBC, and it fails to proffer any explanation for the payments reflected in the loan history chart. Thus, it is unclear from these records whether the parties were indeed operating under the terms of the modification agreement. Further, nowhere in its motion papers does HSBC identify the amount that was due on November

³ Although the loan history chart reflects that no interest was due from October 12, 2012 through October 1, 2013, it appears that HSBC nevertheless applied part of WEI's October 12 and December 3, 2012 payments to interest rather than to the principal amount (Doc. 18 at 10).

1, 2013. Thus, HSBC has failed to establish its *prima facie* entitlement to the drastic remedy of summary judgment.

In light of HSBC's failure to make out a *prima facie* case for summary judgment, this Court need not address the sufficiency of defendants' opposition papers (*see Zabawa v Sky Mgt. Corp.*, ___AD3d___, ____, 2020 NY Slip Op 02737 [2020], *2 [1st Dept 2020]; *Clarke v Am. Truck & Trailer, Inc.*, 171 AD3d 405, 406 [1st Dept 2019]).

HSBC moved to dismiss the amended verified answer and the "unsubstantiated affirmative defenses interposed therein, with prejudice, on the grounds that no triable issues of fact exist" (Docs. 69 ¶ 3; 76 ¶ 3). Since an issue of fact exists with respect to defendants' alleged default, this Court need not address HSBC's argument concerning dismissal of the verified answer and affirmative defenses.

The remaining arguments are either without merit or need not be addressed given the findings above.

Therefore, in accordance with the foregoing, it is hereby:


ORDERED that plaintiff HSBC BANK, USA, NATIONAL ASSOCIATION, successor by merger to HSBC BANK USA's motion is denied in its entirety; and it is further

ORDERED that counsel for defendants shall serve a copy of this decision and order, with notice of entry, upon plaintiff within 30 days; and it is further

ORDERED that the parties are to appear for a compliance conference on August 18, 2020, at 80 Centre Street, New York, NY in Room 280 at 2:15 p.m.; and it is further

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

6/3/2020
DATE


 KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE