No. 26-454

IN THE

Supreme Court of the United States

FIRSTBANK PUERTO RICO,

Petitioner,

v.

HARTHMAN LEASING III, LLLP,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE VIRGIN ISLANDS

BRIEF IN OPPOSITION

FREDERICK A. JOHNSON, JR.
Counsel of Record
KANAAN L. WILHITE
MOORE DODSON RUSSELL
& WILHITE, PC
5035 Norre Gade, Suite 201
St. Thomas, U.S.
Virgin Islands 00802
(340) 777-5490
andy@mdrvi.com

Attorneys for Respondent

132594

COUNSEL PRESS
A Proceed Service
The Appellate Experts®
(800) 274-3321 • (800) 359-6859

COUNTERSTATEMENT TO THE QUESTION PRESENTED

FirstBank frames the question to this Court as follows: "Whether the Due Process Clause, as extended to the Virgin Islands by § 3 of the Revised Organic Act of 1954, 48 U.S.C. § 1561, permits a court to impose liability, over the objection of the party held liable, on a claim that arose after the pleadings closed and was never asserted or amended or pleaded supplementally."

Harthman respectfully submits the question is better framed as follows: "Whether—in a notice pleading jurisdiction—a landlord who has plead a claim for damages against a defaulting tenant for 'late fees, penalties, interests and related damages to be proven at trial for all parcels' is required to amend the landlord's pleading when the tenant decides during the course of litigation to withhold additional rents from the landlord from the same parcels of property and the trial court holds that no amendment is necessary because the prior pleading was sufficiently broad to include the additional rents withheld."

CORPORATE DISCLOSURE STATEMENT

Respondent is properly named Harthman Leasing III, LLLP, and it is a United States Virgin Islands limited liability limited partnership. Respondent has no parent or publicly held company owning 10% or more of its corporation's stock.

TABLE OF CONTENTS

Page

COUNTERSTATEMENT TO THE QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS. iii

TABLE OF CITED AUTHORITIES iv

RESPONSE TO STATEMENT OF THE CASE 1

REASONS FOR NOT GRANTING THE WRIT 7

I. FirstBank's *Petition* mischaracterizes the holding of the V.I. Supreme Court in order to argue that its decision conflicts with this Court's precedents. 10

II. Due Process does not require Harthman to replead its claim for debt and unpaid rent to include FirstBank's post-pleading decision to withhold more rent. 11

III. FirstBank cannot credibly claim lack of notice 12

IV. FirstBank's reliance on the *Nelson* opinion is misplaced 13

V. The trial court determined that Harthman did not need to amend, and this Court should not disturb that holding 14

CONCLUSION 16

TABLE OF CITED AUTHORITIES

Page

Cases

Allis v. U.S.,
155 U.S. 117 (1894) 8

Bernhardt v. Bernhardt,
51 V.I. 341 (V.I. 2009) 6

Coney Island Auto Parts Unlimited, Inc. v. Burton Tr. for Vista-Pro Automotive, LLC,
607 U.S. 155 (2026) 8, 9

FirstBank Puerto Rico v. Harthman Leasing III, LLLP,
80 V.I. 584 (2025) 6

Foman v. Davis,
371 U.S. 178 (1962) 7, 15

Kontrick v. Ryan,
540 U.S. 443 (2004) 8

Lehtonen v. Payne,
57 V.I. 308 (V.I. 2012) 3

Nelson v. Adams USA, Inc.,
529 U.S. 460 (2000) 13, 14

U.S. v. Olano,
507 U.S. 725 (1993) 8

Cited Authorities

Page

Zenith Radio Corp. v. Hazeltine Research, Inc.,
401 U.S. 321 (1971) 14

Statutes and Other Authorities

Fed. R. Civ. P. 1 . . . . . 7, 15

Fed. R. Civ. P. 12 14

Fed. R. Civ. P. 15 . . . . . 7, 13, 14, 15

Fed. R. Civ. P. 15(a) 7

Fed. R. Civ. P. 15(b)(1) 4

U.S. Sup. Ct. R. 10(b) 9

V.I. R. App. 22(m)(3) 6

V.I. Super. Ct. R. 37 3

V.I.R.CIV.P 15(b)(1) 4

RESPONSE TO STATEMENT OF THE CASE

Harthman owns Parcels 17B, 17C, 17D and 17E, Estate Smith Bay, St. Thomas, Virgin Islands. East End Plaza, LLC ("EEP") obtained a 30-year ground lease from Harthman dated July 15, 2003 to develop Parcel 17B, as well as the option to lease Parcels 17C, 17D and 17E after those parcels were rezoned. EEP testified at trial that Parcels 17C, 17D and 17E were in fact rezoned, and that EEP subsequently took possession of all four (4) parcels.

In order to build the development EEP envisioned, it obtained financing from FirstBank, secured by a leasehold mortgage on EEP's 30-year lease with Harthman. Harthman consented to the leasehold mortgage; FirstBank gave EEP the money; and EEP built the commercial improvements commonly referred to as East End Plaza on Harthman's land. Subsequently, EEP defaulted in its obligations to both FirstBank and Harthman. FirstBank sued to foreclose its leasehold mortgage against EEP, but instead of foreclosing, it settled with EEP, and took an assignment of the 30-year lease. Thereafter, FirstBank operated East End Plaza for profit as Harthman's tenant.

When FirstBank took over the lease from EEP, FirstBank was required to cure EEP's defaults to Harthman in order to avoid termination of the 30-year lease. Despite originally agreeing to cure EEP's default for Parcels 17B, 17C, 17D and 17E, FirstBank subsequently reneged and claimed that the statute of frauds prevented the addition of 17E to the demised premises, and accordingly FirstBank claimed it was not required to cure EEP's default for 17E.

Although FirstBank eventually tendered a check to Harthman to allegedly cure EEP's default, the amount tendered was insufficient to cure the default for Parcels 17B, 17C and 17D because the amount tendered did not include all the rent, late fees, interest or penalties for those parcels—nor did the amount tendered include any payment for EEP's defaults on 17E.[1] Harthman then terminated the 30-year lease because FirstBank had failed to pay the appropriate rent, late fees, and interest owed by EEP for all four (4) parcels.

In response, FirstBank sued Harthman claiming that Harthman could not terminate the lease, which is the lawsuit that eventually resulted in this appeal (hereinafter referred to as the "VI Superior Court lawsuit"). Harthman counter sued for damages for FirstBank's rent withholding for Parcel 17E, and its failure to cure EEP's default for rent, late fees and interest for Parcels 17E, 17B, 17C and 17D. Specifically, Harthman's counterclaim against FirstBank alleged:

> FirstBank was obliged and obligated to continue paying rent without protest in the same manner and fashion as EEP for property EEP deemed necessary for its project. FirstBank failed and refused to pay rent due from May, 2012, specifically for Parcel 17-E, *but for that and in conjunction with late fees, penalties, interests*

1. The V.I. Supreme Court remanded this matter to the Superior Court for a finding as to exactly how much money FirstBank owed Harthman for rent, late fees, and interest for Parcels 17B, 17C and 17D sans 17E.

> *and related damages to be proven at trial for all parcels, Harthman has been damaged.*[2]

Initially, while the VI Superior Court lawsuit proceeded, FirstBank continued to pay base rent to Harthman for Parcel 17B, 17C and 17D, and it continued to withhold rent for 17E.

Suddenly, in September 2014, FirstBank started withholding rent for Parcels 17B, 17C and 17D (hereinafter "Withholding of Additional Rent")—despite the fact that FirstBank was undisputedly in possession, using, occupying and subletting those parcels and commercial improvements to third parties.[3] Harthman never interfered with FirstBank's possession and use of Parcels 17B, 17C and 17D, and FirstBank's Withholding of Additional Rent was a litigation tactic to apply financial leverage against Harthman and force Harthman to settle the VI Superior Court lawsuit.

---

2. FirstBank Petition, Appendix A, 33a–35a (emphasis added).

3. After a full year of FirstBank's wrongfully withholding all rent, even though FirstBank was profiting from its occupation of Harthman land, on approximately October 8, 2015, Harthman filed a Forcible Entry and Detainer case with the Virgin Islands Magistrate Division (hereinafter "FED lawsuit"). The Magistrate in the FED lawsuit is only empowered to evict FirstBank; the magistrate has no power to award rental damages to Harthman. *See* V.I. Super. Ct. R. 37; *Lehtonen v. Payne*, 57 V.I. 308, 313-314 (V.I. 2012). The magistrate did, in fact, order the eviction of FirstBank for failing to pay rent. However, Harthman's claim for monetary damages was required to be brought in the VI Superior Court lawsuit, which is exactly what Harthman did. *See* V.I. Super. Ct. R. 37; *Lehtonen v. Payne*, 57 V.I. 308, 313-314 (V.I. 2012).

Therefore, FirstBank's statement that Harthman's claim for the Withholding of Additional Rent "dropped out of nowhere, and without notice, days before the case was tried," is incorrect. FirstBank and Harthman had been embroiled in litigation for over eight (8) years, both in the Superior Court lawsuit and the FED lawsuit, regarding the scope of the leasehold, the legality of FirstBank's Withholding of Additional Rent, and the amount of rent and fees that FirstBank owed Harthman.

Indeed, when FirstBank first raised its objection, it did not make any Due Process arguments, or even present the Superior Court with argument (much less evidence) that FirstBank was surprised or prejudiced by Harthman's argument that its counterclaim included the Withholding of Additional Rent.[4] Nor does FirstBank's Petition to this Court articulate any prejudicial effect from the Superior Court's ruling.

The Superior Court correctly denied FirstBank's request to limit Harthman's counterclaim and held:

> Harthman clearly made a claim for late fees, penalties and interest and related damages for all parcels. In order for the jury to calculate late fees, penalties, interest and related damages, it must hear evidence of when payments were made and or when they were due. It is true that at the time the complaint and

4. As this Court well knows, trial courts can even allow pleading amendments during trial, as long as there is no prejudice to the opposing party. *See* V.I.R.CIV.P 15(b)(1); FED. R. CIV. P. 15(b)(1).

> counterclaims were filed, FirstBank had not yet begun to withhold rent on Parcels 17B, 17C and 17D. However, Harthman's counterclaim is sufficiently broad to include rent payments that became due on all parcels after the counterclaim was filed. Therefore, Harthman has a right to present evidence regarding what rents are outstanding for all four parcels and FirstBank is collaterally estopped from arguing that it had a right to withhold or escrow rent.[5]

Importantly, nothing in the Superior Court's holding pertained to Due Process.

At trial, the Jury awarded Harthman all the base rent (withheld or otherwise), late fees, and interest that FirstBank owed, which amounts included rent, late fees and interest on Parcels 17B, 17C and 17D.

FirstBank then appealed to the V.I. Supreme Court. In its Notice of Appeal and briefing, FirstBank failed to make any Due Process arguments, and it did not present any argument or evidence of prejudice. Instead, FirstBank only argued the "notice pleading" standard. The V.I. Supreme Court held:

> Harthman's counterclaim clearly references a broad range of disputed fees for all parcels, and this should have placed FirstBank on notice that disputes could arise concerning all parcels. Although FirstBank had not begun to

5. FirstBank Petition, p. 69a, *citing Superior Court Order dated July 19, 2019.*

> escrow rent payments when Harthman filed the counterclaim, the counterclaim encompassed damages for all parcels. Because this issue was sufficiently pled concerning rental payments for all parcels, the jury was entitled to hear evidence about FirstBank's actions to escrow the rent payments. Consequently, the Superior Court did not abuse its discretion in allowing Harthman's claims to proceed for all parcels. Under our liberal pleading standards, the Superior Court did not abuse its discretion in determining that Harthman's counterclaim was sufficiently broad to encompass unpaid rent on all the parcels.[6]

Notably, nothing in the V.I. Supreme Court's reasoning pertained to Due Process.

After the V.I. Supreme Court's opinion, FirstBank filed a *Petition for Rehearing* pursuant to V.I. R. App. P. 31. Therein, for the first time during the life of this litigation, FirstBank made a Due Process argument, which was improper because arguments not fully briefed and cited to the V.I. Supreme Court are waived.[7] In response to the *Petition for Rehearing*, the V.I. Supreme Court did not reach the merits or otherwise address FirstBank's Due Process argument, and instead denied

---

6. FirstBank Petition, Appendix A p. 33a–35a.

7. *Bernhardt v. Bernhardt*, 51 V.I. 341, 345 (V.I. 2009); *FirstBank Puerto Rico v. Harthman Leasing III, LLLP*, 80 V.I. 584, 608 (2025); V.I. R. App. 22(m)(3).

the petition because "no justice has voted to order an answer or grant the petition."[8]

FirstBank's *Petition for Writ of Certiorari* requests this Court to hold that Due Process required Harthman to refile or supplement its counterclaim to include the Withholding of Additional Rent. But no Court in the Virgin Islands has addressed that issue, and there is no conflicting Due Process decision for this Court to correct.

REASONS FOR NOT GRANTING THE WRIT

"The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."[9] "The Rules themselves provide that they are to be construed 'to secure the just, speedy, and inexpensive determination of every action.'"[10]

> Rule 15(a) declares that leave to amend shall be freely given when justice so requires; this mandate is to be heeded. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad

8. FirstBank Petition, Appendix H p. 107a 108a.

9. *Foman v. Davis*, 371 U.S. 178, 181–82 (1962).

10. *Id.* (*citing* FED. R. CIV. P. 1 & 15, which are basically identical to the Virgin Islands Rules of Civil Procedure).

> faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.' Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.[11]

Additionally, "[n]o procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."[12] Due process arguments that are not specifically and timely asserted are forfeited on appeal.[13]

---

11. *Id.*

12. *U.S. v. Olano*, 507 U.S. 725, 731 (1993).

13. *Allis v. U.S.*, 155 U.S. 117, 122 (1894) ("A party must make every reasonable effort to secure from the trial court correct rulings, or such at least as are satisfactory to him, before he will be permitted to ask any review by the appellate tribunal; and to that end he must be distinct and specific in his objections and exceptions"); *U.S. v. Olano*, 507 U.S. 725, 731 (1993) (any right can be forfeited); *Kontrick v. Ryan*, 540 U.S. 443, 458 (2004) (forfeited right to assert the untimeliness of amended complaint); *Coney Island Auto Parts Unlimited, Inc. v. Burton Tr. for Vista-Pro*

This Court should deny the *Petition* because neither the V.I. Superior Court nor the V.I. Supreme Court conducted any Due Process analysis, and FirstBank never timely made that argument to either court such that it is forfeited now. This *Petition* does not pertain to a "court of last resort" deciding "an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals."[14] Instead, the V.I. Supreme Court's decision was based on the application of the pleading standards in the U.S. Virgin Islands pursuant to the Virgin Islands Rules of Civil Procedures, which was the only timely argument FirstBank ever presented on the issue.

Prior to trial, the V.I. Superior Court determined that Harthman's counterclaim included the rent that FirstBank started withholding during the pendency of the litigation. If the trial court had determined that the counterclaims were not included, Harthman would have been entitled to seek leave to amend its complaint, which amendment would have been freely given unless FirstBank could establish prejudice. However, the trial court determined that no amendment was needed.

The V.I. Supreme Court correctly applied the Virgin Islands Rules of Civil Procedure when it held that the lower trial court did not abuse its discretion in concluding that Harthman's Counterclaim was broad enough to include the Withholding of Additional Rent.

Automotive, LLC, 607 U.S. 155, 161 (2026) (forfeited relief from judgment).

14. U.S. Sup. Ct. R. 10(b).

I. FirstBank's *Petition* mischaracterizes the holding of the V.I. Supreme Court in order to argue that its decision conflicts with this Court's precedents.

FirstBank's *Petition* misstates the holding of the Virgin Islands Supreme Court ("VISCT") in order to characterize it as a candidate for a *writ of certiorari* as deciding "an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals."[15] There was no federal question timely presented to the V.I. Supreme Court, and the Court's opinion had absolutely nothing to do with federal law.

FirstBank claims that the V.I. Supreme Court held "that a court may impose liability on a claim that did not exist when the pleadings closed, that was never asserted by amended or supplemental pleading, and that was placed before the jury over objection four days before trial."[16] None of those representations by FirstBank are correct.

First, the V.I. Supreme Court applied an abuse of discretion standard to the Superior Court's interpretation of a Virgin Islands local rule of procedure and held that, under the liberal pleading standards in the U.S. Virgin Islands, the Superior Court did not abuse its discretion by interpreting Harthman's counterclaim to include FirstBank's Withholding of Additional Rent. The V.I. Supreme Court certainly did not hold, as FirstBank characterizes, that "a court may impose liability on a claim

15. U.S. Sup. Ct. R. 10(b).

16. FirstBank Petition, p. 9.

that did not exist when the pleadings closed and that was never asserted by amended or supplemental pleading."

Likewise, the V.I. Supreme Court did not decide any federal question because, quite frankly, no federal question was timely presented to the V.I. Supreme Court.

Therefore, it is a misstatement for FirstBank to claim that the V.I. Supreme Court issued an opinion about Due Process or an important question of federal law. FirstBank failed to raise the issue with both the trial court and the V.I. Supreme Court, and it forfeited any right of appeal on the issue with this Court.

II. Due Process does not require Harthman to replead its claim for debt and unpaid rent to include FirstBank's post-pleading decision to withhold more rent.

In its *Petition*, FirstBank takes the position that there is a difference between Harthman's claim for debt and unpaid rent, and Harthman's claim that FirstBank wrongfully withheld rent. In the context presented, there is no distinction between these "claims." Withheld rent is unpaid rent, and Harthman did not need to replead its claim for unpaid rent simply because FirstBank decided mid-litigation to not pay more rent and/or to start calling it "withheld" or "escrowed."

Additionally, at the time that Harthman filed its counterclaim for rent due for all parcels, FirstBank was withholding rent for Parcel 17-E, but it had also failed to pay monies owed for Parcel 17B, 17C and 17D. Because FirstBank owed Harthman money for all four

(4) parcels, Harthman's counterclaim included damages for all parcels. Meaning, FirstBank was on notice that Harthman sought damages for withheld rent, late fees and interest on all four (4) parcels.

When FirstBank made the decision to withhold more rent for Parcels 17B, 17C and 17D, Harthman's counterclaim damages increased, but its claim remained the same (failure to pay rent), and the category of damages it was seeking from FirstBank remained the same (unpaid rent and lease charges). This point is fatal to FirstBank's belated and implausible assertion that it lacked sufficient notice of its own conduct—*e.g.* deliberately withholding rent—to constitute any Due Process violation.

Therefore, when FirstBank claims that the issue presented to this Court is whether "a court may impose liability on a claim that did not exist when the pleadings closed, [and] that was never asserted by amended or supplemental pleading," FirstBank mischaracterizes the record.

III. FirstBank cannot credibly claim lack of notice.

FirstBank's *Petition* also mischaracterizes—or at least conceals—its knowledge and notice.

Harthman's claim that it was entitled to recover the Withholding of Additional Rent did not "drop out of nowhere" "without notice," "days before the case was tried." As noted *supra* in Harthman's *Response to the Statement of the Case*, FirstBank's Withholding of Additional Rent was a litigation tactic to force settlement of the VI Superior Court lawsuit. In response to the

withholding tactic, as discussed *supra* footnote 3, Harthman filed the FED lawsuit, and FirstBank was ordered evicted precisely because it was Withholding Additional Rent.

In other words, FirstBank's feigned lack of notice—and hence its entire Due Process argument—is insincere.

IV. FirstBank's reliance on the *Nelson* opinion is misplaced.

In *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 462–63 (2000), the "litigation began when Ohio Cellular Products Corporation (OCP) sued respondent Adams USA, Inc. (Adams), claiming patent infringement."[17] The district court "dismissed OCP's claim and ordered OCP to pay Adams' costs and attorney fees."[18] "Adams feared that OCP might be unable to pay the fee award and therefore sought a means to recover from petitioner Nelson, president and sole shareholder of OCP, in his individual capacity."[19] "In pursuit of that objective, Adams moved under Rule 15 of the Federal Rules of Civil Procedure to amend its pleading to add Nelson as a party; Adams also asked the court, under Rule 59(e), to amend the fee award."[20] "The District Court granted the motion in full,

17. 529 U.S. 460, 462–63 (2000).

18. *Id.*

19. *Id.*

20. *Id.*

simultaneously making Nelson a party and subjecting him to judgment. The Court of Appeals affirmed."[21]

This Court reversed, holding that "the District Court erred in amending the judgment immediately upon permitting amendment of the pleading. Due process, as reflected in Rule 15 as well as Rule 12, required that Nelson be given an opportunity to respond and contest his personal liability for the award after he was made a party and before the entry of judgment against him."[22]

Nelson holds that a sole shareholder of a company cannot be personally responsible for the debts of the company unless he is named in the complaint and given an opportunity to respond and contest his personal liability. *Nelson* has no application here because FirstBank was always a party to the lawsuit, and FirstBank was afforded notice and an opportunity to contest its liability.

V. The trial court determined that Harthman did not need to amend, and this Court should not disturb that holding.

The trial court has broad discretion to grant leave to amend pleadings.[23] Critically, in this case, prior to trial, on July 19, 2019, the Superior Court held that Harthman's Counterclaim included a claim for unpaid rent for Parcels 17B, 17C and 17D, and that Harthman did not

21. *Id.*

22. *Id.*

23. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 331 (1971).

need to amend its pleadings to incorporate that claim.[24] Consequently, Harthman never sought leave to amend.

If this Court were to grant the *Petition* and reverse the V.I. Supreme Court, Harthman would be unduly punished for not amending its counterclaims when the trial court made the decision that an amendment was not required. In short, the result would be gamesmanship. Harthman would be forced to re-file another lawsuit to collect a debt that FirstBank undisputedly owes, which is certainly not a "just, speedy, and inexpensive determination."[25]

24. FirstBank Petition, p. 64a–69a.

25. *Foman v. Davis*, 371 U.S. 178, 181–82 (1962) (*citing* FED. R. CIV. P. 1 & 15, which are basically identical to the Virgin Islands Rules of Civil Procedure).

CONCLUSION

The Petition for Writ of certiorari should be denied.

Respectfully submitted,

Frederick A. Johnson, Jr.
Counsel of Record
Kanaan L. Wilhite
Moore Dodson Russell
& Wilhite, PC
5035 Norre Gade, Suite 201
St. Thomas, U.S.
Virgin Islands 00802
(340) 777-5490
andy@mdrvi.com

Attorneys for Respondent