

<b>U.S. Bank N.A. v Zevallos</b>
2012 NY Slip Op 32685(U)
October 17, 2012
Sup Ct, Queens County
Docket Number: 22407/08
Judge: Howard G. Lane
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# M E M O R A N D U M

SUPREME COURT - QUEENS COUNTY  
IAS PART 6

<p>-----</p> <p>U.S. BANK NATIONAL ASSOCIATION, as Trustee of the Lehman Brothers Small Balance Commercial Mortgage Pass- Through Certificates, 2007-1, Plaintiff,</p> <p style="text-align: center;">-against-</p> <p>MANUEL ZEVALLOS, et al., Defendants.</p> <p>-----</p>	<p>Index No. 22407/08</p> <p>Motion Date March 6, 2012</p> <p>Motion Cal. No. 35</p> <p>Motion Sequence No. 4</p> <p>By: <b>Lane, J.</b></p>
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The motion by plaintiff for a judgment of foreclosure and sale pursuant to CPLR 1351; cross motion by defendant Manuel Zevallos for an order dismissing the action or in the alternative, granting him an extension of time to answer, and cross motion by defendant Eyya Realty Corp. for an order pursuant to RPAPL 1351(3) and 1354(3) directing payment of the indebtedness due upon the subordinate mortgage held by Eyya Realty Corp. from surplus, after payment to the first mortgage, all without necessity to institute a surplus money proceeding are hereby decided as follows:

In a decision and order of this court dated April 3, 2012, the cross motion of defendant Manuel Zevallos was granted solely to the extent that a traverse hearing was to be held to determine the propriety of service pursuant to CPLR 308 and to determine whether jurisdiction was properly obtained over moving

defendant and the parties' remaining issues were to be determined upon disposition of traverse hearing concerning this court's personal jurisdiction over defendant Manuel Zevallos. The traverse hearing on the issue of service was held on June 26, 2012.

Plaintiff presented credible evidence in the form of testimony by Monica Dopwell, a licensed process server. Ms. Dopwell testified that she served the Summons and Verified Complaint upon defendant Zevallos. Her affidavit of service was admitted into evidence without objection. Ms. Dopwell testified that she attempted service at the address of 102-11 43rd Avenue, Corona, New York 11368 on five occasions: on September 22, 2008 at 9:10 PM, on September 25, 2008 at 7:50 AM, October 2, 2008 at 8:30 PM, October 20, 2008 at 2:15 PM and on October 31, 2008 at 8:30 PM. She testified that when she attempted service on several occasions, she spoke with a person "next door" who managed a bar who informed her that defendant Zevallos owned the building and resided on the first floor. The affidavit of service indicates and Ms. Dopwell testified that after she was unable with due diligence to serve the defendant in person on October 31, 2008, she affixed to the door on the first floor at 102-11 43rd Avenue, Corona, New York 11368 a copy of the Summons and Verified Complaint, and she subsequently deposited a copy of the Summons and Verified Complaint in a postpaid, properly addressed plain envelope marked "Personal and Confidential" in an

official depository under the exclusive care and custody of the United States Post Office in the State of New York on May 15, 2008 to 102-11 43rd Avenue, Corona, New York 11368. Ms.

Dopwell's testimony clearly demonstrated that plaintiff complied with the service requirements of CPLR 308(4), also referred to as "nail and mail", in that after exercising due diligence to serve the defendant in person, she "nailed and mailed" the documents to the defendant's last known address.

The court finds that defendant failed to present sufficient evidence to refute plaintiff's prima facie case. Defendant admitted that although there are three apartments in the building, he does not include a specific apartment number as part of his mailing address and there is only one mailbox for the entire building. There are no separate mail boxes for each apartment. He admitted that he resided in apartment #1 in 2002. Defendant Zevallos testified that he never received a copy of the Summons and Complaint in or about November 4, 2008 when plaintiff claimed it was mailed to him. He further denied that any papers were attached to the door of the building. Defendant testified that he currently resides at 102-11 43rd Avenue, Corona, New York 11368 which is a three-family house. Defendant Zevallos maintains that he never received a Summons and Complaint by mail at his residence either.

Defendant's mere denials of receipt of process are insufficient to rebut plaintiff's evidence (see, Truscello v. Olympia Const., Inc., 294 AD2d 350 [2d Dept 2002]). Defendant's

bald assertion that he never received the Summons and Complaint by mail was insufficient to dispute the veracity of the process server's affidavit (see, Fairmont Funding Ltd. v. Stefansky, 235 AD2d 213 [1st Dept 1997]). Such a properly executed affidavit of service created a presumption of mailing by plaintiff and of receipt by defendant (see, Kihl v. Pfeffer, 94 NY2d 118 [NY 1999] [stating that a mere denial of receipt is not enough to rebut the presumption]).

The court does not credit defendant's testimony. As defendant failed to present any objective, competent evidence to rebut plaintiff's prima facie case, defendant's motion is denied (see, Sando Realty Corp. v. Aris, 209 AD2d 682 [2d Dept 1994]). The Court concludes that plaintiff properly obtained jurisdiction over defendant Zevallos when plaintiff properly served him pursuant to CPLR 308(4).

As it has been determined that moving defendant was indeed properly served, the court will now address the remainder of the parties' contentions.

Plaintiff's motion for a judgment of foreclosure and sale is granted. Plaintiff established a prima facie entitlement to foreclose on a mortgage by demonstrating the existence of the mortgage and note, ownership of the mortgage, and the defendant's default in payment (see, Campaign v. Barbra, 23 AD3d 327 [2d Dept 2005]; First Trust National Association v. Pinter, 264 AD2d 464 [2d Dept 1999]). No triable issues of fact have been raised in

opposition.

The cross motion by pro se defendant, Manual Zevallos for an order dismissing this action due to lack of service or in the alternative, permitting the defendant Manual Zevallos to interpose an answer is hereby denied. It is well-established law that: “[a] defendant who has failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action, when . . . moving . . . to compel the acceptance of an untimely answer” (Lipp v. Port Authority of New York and New Jersey, 34 AD3d 649 [2d Dept 2006]). Pursuant to CPLR 3012(d), the court has discretion to compel acceptance of a late pleading, “upon such terms as may be just and upon a showing of reasonable excuse for default”. Defendant Zevallos has failed to provide a reasonable excuse for the delay or a potentially meritorious defense to the action. Accordingly, the cross motion by defendant Zevallos is denied.

The cross motion by defendant, Eyya Realty Corp. for an order pursuant to RPAPL 1351(3) and 1354(3) directing payment of the indebtedness due upon the subordinate mortgage held by Eyya Realty Corp. from surplus, after payment to the first mortgage, all without necessity to institute a surplus money proceeding is hereby decided as follows:

“RPAPL 1361(2) provides that the court, by reference or

otherwise, shall ascertain the amount due to any claimants and the priority of any liens for purposes of the distribution of surplus moneys" (Citibank N.A. v. Schroeder, 266 AD2d 332 [2d Dept 1999]).

Richard M. Gutierrez, Esq., of 118-35 Queens Blvd., Suite 1500, Forest Hills, New York 11375, who was previously appointed in this matter, shall be appointed as Referee to conduct the sale of the mortgaged premises. Said Referee shall issue his report after holding a hearing and making a fair determination of the equities of the parties (see, RPAPL 1361; Chase Manhattan Mortg. Corp. v. Hall, 18 AD3d 413 [2d Dept 2005]).

Settle order.

A courtesy copy of this order is being mailed to counsel for the respective parties.

Dated: October 17, 2012

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**Howard G. Lane, J.S.C.**