

1 Michael L. Withem (SBN 83002)
2 ROSENTHAL, WITHEM & ZEFF
3 16027 Ventura Boulevard, Suite 201
4 Encino, California 91436-2763
5 Telephone: (818) 789-7711
6 Facsimile: (818) 986-3875

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7 Attorneys for Plaintiff,
8 DEUTSCHE BANK NATIONAL TRUST COMPANY

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF CONTRA COSTA

11 DEUTSCHE BANK NATIONAL)
12 TRUST COMPANY)

13 Plaintiff,)

14 vs.)

15 HERMENEGILDO J. CAPARAS;)
16 JUANITA R. CAPARAS)
17 and DOES 1 to 10,)
18 Inclusive,)

19 Defendants.)

CASE NO. PS09-1331

**NOTICE OF MOTION AND MOTION TO STRIKE
PORTIONS OF THE ANSWER BY PLAINTIFF
DEUTSCHE BANK NATIONAL TRUST
COMPANY; MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF;
DECLARATION OF MICHAEL L. WITHEM**

Date: November 25, 2009
Time: 2:30 p.m.
Dept: TBA by Court _____

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Mot. Cut-Off: n/a
Disc. Cut-Off: n/a
Trial Date: Not Assigned

22 TO DEFENDANTS HERMENEGILDO CAPARAS and JUANITA R. CAPARAS, AND TO
23 THEIR ATTORNEY OF RECORD:

24 PLEASE TAKE NOTICE that on November 25, 2009 at 2:30 p.m. or as soon thereafter as the
25 matter may be heard in Department TBA by Court _____ of the above-entitled court located at
26 45 Civic Avenue, Pittsburg, California 94565, Plaintiff DEUTSCHE BANK NATIONAL TRUST
27 COMPANY, will and hereby moves the Court for an Order striking portions of the Answer filed by
28 Defendants HERMENEGILDO CAPARAS and JUANITA R. CAPARAS.

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This Motion is made pursuant to *California Code of Civil Procedure* §§435 and 436, and California Rule of Court 3.1222. Specifically, Plaintiff seeks to strike the following provisions and affirmative defenses contained in Defendant's Answer to Plaintiff's Complaint for Unlawful Detainer as follows:

1. That portion of Defendant's Answer, page 5 through page 7, and the Exhibits attached to Defendants' Answer, which is attached to the Declaration of Michael L. Withem as Exhibit "A".

This Motion is further based upon this Notice of Motion, the subject Motion to Strike, the Memorandum of Points and Authorities, the Complaint and exhibits attached thereto, as well as the Answer to the Complaint, and any other papers on file herein and such additional material as the Court may consider at the time of hearing on this matter, as well as such oral argument as may be presented.

DATED: November 3, 2009

ROSENTHAL, WITHEM & ZEFF

BY 
MICHAEL L. WITHEM
Attorneys for Plaintiff,
DEUTSCHE BANK NATIONAL TRUST COMPANY

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 Plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY'S Complaint for Unlawful
4 Detainer is based upon the acquisition of a parcel of residential real property, commonly described as
5 3554 Lovebird Way, Antioch, CA 94509 of which DEUTSCHE BANK NATIONAL TRUST
6 COMPANY acquired as a result of a foreclosure sale. Plaintiff acquired the property on June 4, 2009
7 in accordance with *California Civil Code* §2924 under power of sale contained in the Deed of Trust,
8 executed by Defendant HERMENEGILDO CAPARAS and JUANITA R. CAPARAS, and title under
9 the sale was duly perfected.

10 Defendant's Answer attempts to raise numerous issues that are not properly before a court
11 involving a post-foreclosure eviction summary proceeding. The specific affirmative defenses raised by
12 Defendant, at:

- 13 1. That portion of Defendant's Answer, page 5 through page 7, and all Exhibits attached
14 to Defendants' Answer, which is attached to the Declaration of Michael L. Withem as
15 Exhibit "A"

16
17 **II.**

18 **DEFENDANT'S AFFIRMATIVE DEFENSE ATTEMPTS TO ATTACK**
19 **THE UNDERLYING LOAN AND SUBSEQUENT FORECLOSURE SALE**
20 **IS NOT A PROPER DEFENSE IN AN UNLAWFUL DETAINER**
21 **SUMMARY PROCEEDING AND MUST BE STRICKEN**

22 Plaintiff's Motion to Strike the improper affirmative defenses raised by Defendant in its Answer
23 is proper. *California Code of Civil Procedure* §435 provides as follows:

24 "435. (a) As used in this section:

25 (1) The term "complaint" includes a cross-complaint.

26 (2) The term "pleading" means a demurrer, answer, complaint, or cross-complaint.

27 (b) (1) Any party, within the time allowed to respond to a pleading may serve and file a
28 notice of motion to strike the whole or any party thereof, but this time limitation shall not

1 apply to motions specified in subdivision (e).

2 (2) A notice of motion to strike the answer or the complaint, or a portion thereof, shall
3 specify a hearing date set in accordance with Section 1005.

4 (3) A notice of motion to strike a demurrer, or a portion thereof, shall set the hearing
5 thereon concurrently with the hearing on the demurrer.

6 (c) If a party serves and files a notice of motion to strike without demurring to the
7 complaint, the time to answer is extended and no default may be entered against that
8 defendant, except as provided in Sections 585 and 586.

9 (d) The filing of a notice of motion to strike an answer or complaint, or portion thereof,
10 shall not extend the time within which to demur.

11 (e) A motion to strike, as specified in this section, may be made as part of a motion
12 pursuant to subparagraph (A) of paragraph (1) of subdivision (I) of Section 438.”

13
14 *California Code of Civil Procedure 436* provides as follows:

15 “436. The court may, upon a motion made pursuant to the Section 435, or at any time
16 in its discretion, and upon terms it deems proper:

17 (a) Strike out any irrelevant, false, or improper matter inserted in any pleading.

18 (b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws
19 of this state, a court rule, or an order of the court.”

20
21 Pursuant to *California Code of Civil Procedure* §431.10(c), the relevant matter as used in §436
22 is the equivalent of an immaterial allegation. An “immaterial allegation” is further defined in *California*
23 *Code of Civil Procedure* §431.10(b) where it states as follows:

24 “An immaterial allegation in a pleading is any one of the following:

25 1. An allegation that is not essential to the statement of the claim or defense.

26 2. An allegation is neither pertinent to, or supported by, an otherwise sufficient claim
27 of defense.

28 3. A demand for judgment or requesting relief not supported by the allegations of the

1 compliant or cross-complaint.”

2
3 Unlawful Detainer actions are necessarily expedited because of the limitations imposed on
4 pleadings and issues that may be litigated. The only triable issue is the right to possession and incidental
5 damages resulting from the unlawful detention. *Vasey v. California Dance Co., Inc.* (1977) 70
6 Cal.App.3d 742, 746-747, 139 CR 72, 74-75; *Underwood v. Corsino* (2005) 133 Cal.App.4th 132, 135
7 34 CR3d 542, 544; *Glendale Fed'l Bank v. Hadden* (1999) 73 Cal.App.4th 1150, 1153, 87 CR2d 102,
8 104. As a general rule, Unlawful Detainer actions may not adjudicate questions of title. *Drybread v.*
9 *Chipain Chiropractic Corp.* (2007) 151 Cal.App.4th 1063, 1072, 60 CR3d 580 587; *High v. Cavanaugh*
10 (1962) 205 Cal.App.2d 495, 498-499, 23 CR 121, 122-123. Issues of title cannot be raised in unlawful
11 detainers and, if raised in the Answer, they are subject to a Motion to Strike. *High v. Cavanaugh* (1962)
12 205 Cal.App.2d 495, 498-499, 23 CR 121, 122-123.

13 It is clear that the Affirmative Defenses found at:

- 14 1. That portion of Defendant's Answer, page 5 through page 7, and the Exhibits
15 attached to Defendants' Answer, which is attached to the Declaration of Michael
16 L. Withem as Exhibit "A"

17 goes far beyond the scope of an Unlawful Detainer action, and is the type of affirmative defense raising
18 issues that belong in a separate judicial proceeding and not this action.

19 Please note, the subject Answer in the Unlawful Detainer Complaint, Jury Trial and Demand,
20 Notice of Non Stipulation to Commisioner was never served upon counsel for Plaintiff DEUTSCHE
21 BANK NATIONAL TRUST COMPANY. This is a repeated pattern of this firm who represents
22 numerous post foreclosure eviction Defendants. Attached to the Declaration of Michael L. Withem as
23 Exhibit "B" is a true and correct copy of a letter sent by our firm to the Court seeking a copy of
24 Defendants' Answer. The Answer that we obtained from the Court, does not contain, a proof of service.
25 A true and correct copy of Defendants' Answer to the Unlawful Detainer Complaint is attached to the
26 Declaration of Michael L. Withem as Exhibit "A". It also includes various Exhibits.

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III.

CONCLUSION

Defendant's affirmative defenses that attempt to attack the foreclosure and subject loan are not proper affirmative defenses in a post-foreclosure summary Unlawful Detainer proceeding and must be stricken. For all the reasons stated herein, Plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY respectfully requests that this Court strike that portion of Defendant's Answer noted herein that is not proper in this proceeding.

DATED: October 16, 2009

ROSENTHAL, WITHEM & ZEFF

BY 

MICHAEL L. WITHEM
Attorneys for Plaintiff,
DEUTSCHE BANK NATIONAL TRUST COMPANY