

**Deutsche Bank Natl.Trust Co. v Billing**

2014 NY Slip Op 31385(U)

February 27, 2014

Supreme Court, Suffolk County

Docket Number: 20467-09

Judge: Joseph A. Santorelli

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK  
IAS PART 10 - SUFFOLK COUNTYPRESENT: Hon. JOSEPH A. SANTORELLI  
Justice of the Supreme CourtMOTION DATE 5-22-13  
ADJ. DATE \_\_\_\_\_  
Mot. Seq. #003-MotD

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DEUTSCHE BANK NAT'L TRUST CO AS  
TRUSTEE FOR WAMU MORTGAGEPASS-THROUGH  
CERTIFICATES SERIES 2005-AR8 GL

Plaintiff,

McCABE, WEISBERG & CONWAY, PC.  
Attorneys for Plaintiff  
145 Huguenot Street, Suite 499  
New Rochelle, N. Y. 10801

-against-

DONNA BILLING, WASHINGTON MUTUAL  
BANK F/K/A WASHINGTON MUTUAL BANK, FAJOSEPH B. MILLER, ESQ.  
Former Attorney for Defendant  
Donna Billing  
125-10 Queens Blvd.  
Suite 311  
Kew Gardens, N. Y. 11201JOHN DOE (Said name being fictitious, it being the  
intention of plaintiff to designate any and all  
occupants of premises being foreclosed herein, and  
any parties, corporations or entities, if any, having or  
claiming an interest or lien upon the mortgaged  
premises.)

Defendants.

DONNA BILLING  
Defendant Pro Se  
1144 N Sea Road  
Southampton, NY 11968  
  
1340 NW 3<sup>rd</sup> Avenue  
Delray Beach, FL 33444

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Upon the following papers numbered 1 to 12 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers \_\_\_\_\_; Replying Affidavits and supporting papers \_\_\_\_\_; Other \_\_\_\_\_; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this unopposed motion by the plaintiff for, inter alia, an order awarding summary judgment in its favor and against the defendant Donna Billing, fixing the defaults of the non-answering defendants, appointing a referee, and amending the caption is granted solely to the extent indicated below, otherwise denied, and it is

**ORDERED** that the branch of the motion for an order amending the name of the plaintiff in the caption to Deutsche Bank National Trust Company As Trustee for WAMU Mortgage Pass through Certificates Series 2005-AR8 is denied, without prejudice, renewal granted upon proper evidentiary proof; and it is

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**ORDERED** that the cross-claim asserted by the defendant Donna Billing against the defendant Washington Mutual Bank formerly known as Washington Mutual Bank, FA is severed and dismissed; and it is

**ORDERED** that the plaintiff is directed to serve a copy of this order with notice of its entry upon the Calendar Clerk of this Court; and it is further

**ORDERED** that the plaintiff is directed to serve a copy of this Order with notice of entry upon all parties who have appeared herein pursuant to CPLR 2103(b)(1), (2) or (3) within thirty (30) days of the date herein, and to file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on residential real property known as 1144 N. Sea Road, Southampton, New York 11968. On January 5, 2005, the defendant Donna Billing (the defendant mortgagor) executed an adjustable-rate note in favor of Washington Mutual Bank, FA (WAMU) in the principal sum of \$525,000.00. To secure said note, the defendant mortgagor gave the WAMU a mortgage also dated January 5, 2005 on the property. By way of an endorsed note, and by way of a Purchase and Assumption Agreement between the Federal Deposit Insurance Corporation (FDIC) as Receiver for WAMU and JPMorgan Chase Bank, National Association dated September 25, 2008, Deutsche Bank Natl. Trust Co as Trustee for WAMU MortgagePass-Through Certificates Series 2005-AR8 GL (the plaintiff) allegedly acquired the subject loan. Thereafter, the transfer of the note and mortgage to the plaintiff was memorialized by an assignment dated May 27, 2009, and duly recorded in the Office of the Suffolk County Clerk on July 9, 2009.

The defendant mortgagor allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on November 1, 2008, and each month thereafter. After the defendant mortgagor allegedly failed to cure her default, the plaintiff commenced the instant action by the filing of a lis pendens, summons and verified complaint on June 1, 2009. According to the electronic records maintained by the Suffolk County Clerk's computerized database, the plaintiff re-filed the notice of pendency on May 17, 2012.

Issue was joined by service of the defendant mortgagor's answer dated August 26, 2009. By her answer, the defendant mortgagor admits the execution of the note by her as well as her ownership interest in the property, but generally denies the remaining allegations in the complaint. In the answer, the defendant mortgagor also asserts twenty-one affirmative defenses, alleging, inter alia, the following: failure to state a cause of action; lack of subject matter jurisdiction; fraud and misrepresentation; predatory lending practices; payment; unclean hands; incorrect and/or impermissible charges; unjust enrichment; an unconscionable note and mortgage; unconscionable acts and practices relating to the procurement of the note and mortgage as well as the servicing of same; standing; a breach of fiduciary duty by the plaintiff and the lender, bad faith and a violation of consumer collection practices; a non-transferable, negotiable note; and failure to: provide a notice of default; engage in loss mitigation; comply with statutory and contractual conditions precedent as well as foreclosure servicing guidelines; act fairly and in good faith by failing to follow applicable

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servicing standards and protocols; and provide access to debt management relief.

The answer also includes one cross-claim against WAMU, by which the defendant mortgagor seeks contractual and common law indemnification based upon, among other things, certain alleged fraudulent, predatory and negligent lending activities. Parenthetically, no counterclaims are included in the answer, even though the face of the answer includes such a designation. Further, in the cross-claim and in the fourth affirmative defense, the defendant mortgagor admits that she executed both the note and the mortgage. The remaining defendants have not appeared or answered the complaint (*see*, CPLR 3018 [a]; 3019 [d]), and it is noted that the cross-claim does not require an answer (*see*, CPLR 3011).

In compliance with CPLR 3408, two settlement conferences were held before Foreclosure Conference Part 10 on April 15 and June 16, 2010, but the parties did not reach a settlement. Thereafter, an additional settlement/status conference was held before Foreclosure Conference Part 10 on May 17, 2013, but this action again was not settled. Accordingly, no further conference is required pursuant to any statute, law or rule.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the defendant mortgagor, striking her answer and dismissing the affirmative defenses therein; (2) pursuant to CPLR 3215 fixing the defaults of the non-answering defendants; (3) pursuant to RPAPL § 1321 appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels; and (4) amending the caption. No opposition has been filed in response to this motion.

A plaintiff in a mortgage foreclosure action establishes a prima facie case for summary judgment by submission of the mortgage, the note, bond or obligation, and evidence of default (*see*, *Valley Natl. Bank v Deutsch*, 88 AD3d 691, 930 NYS2d 477 [2d Dept 2011]; *Wells Fargo Bank v Das Karla*, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; *Washington Mut. Bank, F.A. v O'Connor*, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]). The burden then shifts to the defendant to demonstrate "the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff" (*Capstone Bus. Credit, LLC v Imperia Family Realty, LLC*, 70 AD3d 882, 883, 895 NYS2d 199 [2d Dept 2010], *quoting Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 467, 644 NYS2d 345 [2d Dept 1997]).

By its submissions, the plaintiff established its prima facie entitlement to summary judgment on the complaint (*see*, CPLR 3212; RPAPL § 1321; *Wachovia Bank, N.A. v Carcano*, 106 AD3d 724, 965 NYS2d 516 [2d Dept 2013]; *U.S. Bank, N.A. v Denaro*, 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; *Capital One, N.A. v Knollwood Props. II, LLC*, 98 AD3d 707, 950 NYS2d 482 [2d Dept 2012]). In the instant case, the plaintiff produced the endorsed note, the mortgage, the assignment and evidence of nonpayment (*see*, *Federal Home Loan Mtge. Corp. v Karastathis*, 237 AD2d 558, 655 NYS2d 631 [2d Dept 1997]; *First Trust Natl. Assn. v Meisels*, 234 AD2d 414, 651 NYS2d 121 [2d

Dept 1996]). Furthermore, the plaintiff submitted proof of compliance with the notice requirements of RPAPL §§ 1303 and 1304 (*cf.*, ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]). Moreover, the plaintiff submitted an affidavit from a representative whereby it is alleged that the note and mortgage were transferred to the plaintiff prior to the commencement of this action (*see*, ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]; *see also*, ***Chase Home Fin., LLC v Miciotta***, 101 AD3d 1307, 956 NYS2d 271 [3d Dept 2012]; ***GRP Loan, LLC v Taylor***, 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]). Under these circumstances, the plaintiff demonstrated its prima facie burden as to the merits of this foreclosure action and as to its standing.

The plaintiff also submitted sufficient proof to establish, prima facie, that the affirmative defenses set forth in the defendant mortgagor's answer are subject to dismissal due to their unmeritorious nature (*see*, ***Becher v Feller***, 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009]; ***Wells Fargo Bank Minn., N.A. v Perez***, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; ***Coppa v Fabozzi***, 5 AD3d 718, 773 NYS2d 604 [2d Dept 2004] [unsupported affirmative defenses are lacking in merit]; *see also*, ***Mandarin Trading Ltd. v Wildenstein***, 16 NY3d 173, 178, 919 NYS2d 465 [2011]; ***Morales v AMS Mtge. Servs., Inc.***, 69 AD3d 691, 692, 897 NYS2d 103 [2d Dept 2010] [CPLR 3016(b) requires that the circumstances of fraud be "stated in detail," including specific dates and items]; ***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012]; ***Connecticut Natl. Bank v Peach Lake Plaza***, 204 AD2d 909, 612 NYS2d 494 [3d Dept 1994] [defense based upon the doctrine of unclean hands lacks merit where a defendant fails to come forward with admissible evidence of showing immoral or unconscionable behavior]; ***Patterson v Somerset Invs. Corp.***, 96 AD3d 817, 817, 946 NYS2d 217 [2d Dept 2012]; [ "a party who signs a document without any valid excuse for having failed to read it is 'conclusively bound' by its terms"]; ***Baron Assoc., LLC v Garcia Group Enters., Inc.***, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012] [unconscionability generally not a defense]; ***Emigrant Mtge. Co, Inc. v Fitzpatrick***, 95 AD3d 1169, 945 NYS2d 697 [2d Dept 2012] [claimed violations of General Business Law § 349 and/or engagement in deceptive business practices do not generally give rise to claims against a lender]; ***Argent Mtge. Co., LLC v Mentasana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010] [unaffordability of loan will not support damages claim against lender and is not a defense to a foreclosure action]; ***Grogg v South Rd. Assoc., L.P.***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010] [the mere denial of receipt of the notice of default is insufficient to rebut the presumption of delivery]; ***Charter One Bank, FSB v Leone***, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007] [no competent evidence of an accord and satisfaction]; ***La Salle Bank N.A. v Kosarovich***, 31 AD3d 904, 820 NYS2d 144 [3d Dept 2006]; ***CFSC Capital Corp. XXVII v W. J. Bachman Mechanical Sheet Metal Co.***, 247 AD2d 502, 669 NYS2d 329 [2d Dept 1998] [an affirmative defense based upon the notion of culpable conduct is unavailable in a foreclosure action]; ***Manufacturers & Traders Trust Co. v Schlosser & Assoc.***, 242 AD2d 943, 665 NYS2d 949 [4<sup>th</sup> Dept 1997] [conclusory allegations of conduct constituting an alleged waiver are insufficient to raise a triable issue of fact]; ***FGH Realty Credit Corp. v VRD Realty Corp.***, 231 AD2d 489, 647 NYS2d 229 [2d Dept 1996] [no valid defense or claim of estoppel where mortgage provision bars oral modification]; ***HSBC Bank USA v Picarelli***, 36 Misc3d 1218 [A], 959 NYS2d 89 [Sup Ct, Queens County 2012] [TILA requirements satisfied where the lender provided the required information and forms to the obligor at the closing]; ***Deutsche Bank Natl. Trust Co. v Campbell***, 26 Misc3d 1206 [A],

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906 NYS2d 779, 2009 NY Slip Op 526780 [U] [Sup Ct, Kings County 2009] [a disclosure violation of the Real Estate Settlement Procedures Act, 12 USC § 2601, *et seq.*, does not constitute a valid defense to a mortgage foreclosure]).

Self-serving and conclusory allegations do not raise issues of fact, and do not require the plaintiff to respond to alleged affirmative defenses which are based on such allegations (*see, Charter One Bank, FSB v Leone*, 45 AD3d 958, 845 NYS2d 513 [2d Dept 2007]; *Rosen Auto Leasing, Inc. v Jacobs*, 9 AD3d 798, 780 NYS2d 438 [3d Dept 2004]). In instances where a defendant fails to oppose a motion for summary judgment, the facts, as alleged in the moving papers, may be deemed admitted and there is, in effect, a concession that no question of fact exists (*see, Kuehne & Nagel v Baiden*, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also, Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1<sup>st</sup> Dept 2012]; *Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Additionally, "uncontradicted facts are deemed admitted" (*Tortorello v Carlin*, 260 AD2d 201, 206, 688 NYS2d 64 [1<sup>st</sup> Dept 1999] [internal quotation marks and citations omitted]).

The defendant mortgagor's answer is insufficient, as a matter of law, to defeat the plaintiff's unopposed motion (*see, Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, *supra*). In this case, the affirmative defenses asserted by the defendant mortgagor are factually unsupported and without apparent merit (*see, Becher v Feller*, 64 AD3d 672, *supra*). In any event, the failure by the defendant mortgagor to raise and/or assert each of her pleaded defenses in opposition to the plaintiff's motion warrants the dismissal of the same as abandoned under the case authorities cited above (*see, Kuehne & Nagel v Baiden*, 36 NY2d 539, *supra*; *see also, Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, *supra*).

By her first affirmative defense, the defendant mortgagor asserts that the complaint fails to state a cause of action, however, she has not cross moved to dismiss the complaint on this ground (*see, Butler v Catinella*, 58 AD3d 145, 868 NYS2d 101 [2d Dept 2008]). Also, as indicated above, the plaintiff has established its prima facie entitlement to summary judgment. Therefore, the first affirmative defense is surplusage, and the branch of the motion to strike such defense is denied as moot (*see, Old Williamsburg Candle Corp. v Seneca Ins. Co., Inc.*, 66 AD3d 656, 886 NYS2d 480 [2d Dept 2009]; *Schmidt's Wholesale, Inc. v Miller & Lehman Constr., Inc.*, 173 AD2d 1004, 569 NYS2d 836 [3d Dept 1991]).

Under these circumstances, the Court finds that the defendant mortgagor failed to rebut the plaintiff's prima facie showing of its entitlement to summary judgment requested by it (*see, Flagstar Bank v Bellafiore*, 94 AD3d 1044, *supra*; *Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, *supra*; *Rossrock Fund II, L.P. v Commack Inv. Group, Inc.*, 78 AD3d 920, 912 NYS2d 71 [2d Dept 2010]; *see generally, Hermitage Ins. Co. v Trance Nite Club, Inc.*, 40 AD3d 1032, 834 NYS2d 870 [2d Dept 2007]). The plaintiff, therefore, is awarded summary judgment in its favor against the defendant mortgagor (*see, Federal Home Loan Mtge. Corp. v Karastathis*, 237 AD2d 558, *supra*; *see generally, Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Accordingly, the

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defendant mortgagor's answer is stricken, and the second through the twenty-first affirmative defenses set forth therein are dismissed in their entirety.

The branch of the motion wherein the plaintiff seeks an order amending its name in the caption to Deutsche Bank National Trust Company As Trustee for WAMU Mortgage Pass through Certificates Series 2005-AR8 is denied, without prejudice, renewal granted upon proper proof (*see*, CPLR 1018; 3025[b]; *cf.*, **Citibank, N.A. v Van Brunt Props., LLC**, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]). Although counsel requests, in his affirmation, an amendment of the caption changing the name of the plaintiff, the moving papers do not set forth any legal basis for the amendment. Nor has the plaintiff submitted any evidence proof in support of this branch of the motion, leaving the Court in the untenable position of having to guess whether the plaintiff's name was misspelled in the caption, or whether a different entity is to be substituted in its place.

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by substituting Pamela Branch (Branch) and Dunia Viegos (Viegos) for the fictitious named defendant, John Doe, is granted (*see*, **Flagstar Bank v Bellafiore**, 94 AD3d 1044, *supra*; **Neighborhood Hous. Servs. of N.Y. City, Inc. v Meltzer**, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]). By its submissions, the plaintiff established the basis for this relief. All future proceedings shall be captioned accordingly.

By its moving papers, the plaintiff further established the default in answering on the part of the defendant WAMU as well as the newly substituted defendants, Branch and Viegos (*see*, RPAPL § 1321; **HSBC Bank USA, N.A. v Roldan**, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the default in answering of all of the above-noted defendants is fixed and determined. Since the plaintiff has been awarded summary judgment against the defendant mortgagor, and has established the default in answering by the remaining defendants, the plaintiff is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*see*, RPAPL § 1321; **Ocwen Fed. Bank FSB v Miller**, 18 AD3d 527, 794 NYS2d 650 [2d Dept 2005]; **Vermont Fed. Bank v Chase**, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; **Bank of E. Asia v Smith**, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

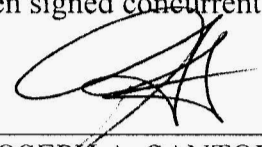
Upon searching the record, the Court finds that WAMU is entitled to summary judgment dismissing the cross-claim asserted against it, as neither contractual nor common law indemnification may be asserted by the defendant mortgagor against it based upon the facts presented herein (*see*, CPLR 3212[b]). With respect to the cross-claim in the answer, a duty to indemnify is created only by express or implied contract (**Smith v Hooker Chem. & Plastics Corp.**, 83 AD2d 199, 201, 443 NYS2d 922 [4<sup>th</sup> Dept 1981]). There was no express contract between the defendant mortgagor and WAMU, and the pleadings do not set forth facts from which a claim for common law indemnity can be implied. To maintain a cause of action for common law indemnification, the party seeking indemnity must show that the proposed indemnitor owed it a duty to perform the act in question (**Ramirez v National R. R. Passenger Corp.**, 576 F. Supp 95, 99 [S.D.N.Y. 1983]; **Smith v Hooker Chem. & Plastics Corp.**, 83 AD2d 199, *supra* at 201). The Court notes that any recovery for the cross-claim set forth in the defendant mortgagor's answer is predicated upon proof of her own non-

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payment and breach of contract, and thus, by the very nature of this claim, indemnity cannot be implied (see, e.g., *Commonwealth Ins. Co. v Thomas A. Green & Co.*, 709 F. Supp 86 [S.D.N.Y. 1989]; *Massachusetts Mut. Life Ins. Co. v Weinbach*, 635 F. Supp 1460 [S.D.N.Y. 1986]; *Gorin v Deluxe Van Lines, Inc.*, 101 Misc2d 465, 421 NYS2d 157 [Sup Ct, Nassau County 1979]; see also, *Pilewski v Solymosy*, 266 AD2d 83, 698 NYS2d 660 [1<sup>st</sup> Dept 1999]). Therefore, the defendant mortgagor is also precluded from common law indemnification. Accordingly, the cross-claim asserted in the defendant mortgagor's answer against WAMU is dismissed in its entirety.

Accordingly, this motion for, inter alia, summary judgment and for an order of reference is determined as indicated above. The proposed long form order appointing a referee to compute pursuant to RPAPL § 1321, as modified by the Court, has been signed concurrently herewith.

Dated: FEB 27 2014



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Hon. JOSEPH A. SANTORELLI, J.S.C.

\_\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION