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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

CAROL FRANCIS, as Trustee, etc., Plaintiff, Cross-defendant and Appellant, v. JP MORGAN CHASE BANK, N.A. Defendant, Cross-complainant and Respondent.	B261027 (Los Angeles County Super. Ct. No. LC094233)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frank J. Johnson, Judge. Modified and affirmed.

Law Offices of Steven K. Perrin and Steven K. Perrin for Plaintiff, Cross-defendant and Appellant.

Fidelity National Law Group, Susan M. Hutchison and Jordan Trachtenberg for Defendant, Cross-complainant and Respondent.

INTRODUCTION

Carol Francis (Francis), as trustee of the Natalie C. Bartley Trust (Bartley Trust),[1] appeals from a judgment entered after the trial court granted summary judgment in favor of JP Morgan Chase Bank, N.A. (Chase). The dispute concerns the priority of deeds of trust held by Francis and Chase. Applying the doctrine of equitable subrogation, the trial court determined that Chase was entitled to an equitable first priority lien in the amount paid by Chase's predecessor to pay off a prior first deed of trust. Francis contends Chase failed to establish a right to an equitable lien, and there are triable issues of fact precluding summary judgment. Francis also contends the trial court erred by failing to sustain her evidentiary objections to and considering an allegedly forged beneficiary payoff demand stating that no money was due on the deed of trust now held by Francis as trustee.

We conclude that the trial court properly found that Chase is entitled to an equitable lien, Francis failed to create a triable issue of fact, and summary judgment was proper. However, the amount of the equitable lien must be reduced by the amount paid by Chase's predecessor as a prepayment penalty. We also conclude that Francis has shown no error in the court's consideration of the zero payoff demand. We therefore modify and affirm the judgment.

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1 Francis is Natalie C. Bartley's daughter.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Undisputed Facts at Summary Judgment*

Eustacio B. Jorge and Aurora G. Jorge (the Jorges) owned real property located at 24656 Vista Cerritos in Calabasas. They obtained a $873,750 loan secured by a deed of trust that was recorded on January 12, 2006. Washington Mutual Bank (WaMu) later acquired the $873,750 deed of trust.

Mr. Jorge subsequently obtained a $150,000 loan from the Bartley Trust secured by a deed of trust that was recorded on May 1, 2006. Natalie Bartley (Bartley), as trustee of her personal trust, was the lender and beneficiary of the $150,000 deed of trust. Bartley understood that her $150,000 deed of trust was junior to the prior $873,750 deed of trust. She had previously made two other loans secured by second priority deeds of trust to augment her income. The $150,000 note provided for payment of interest only (at 9 percent) for a period of one year and full repayment on May 1, 2007. Mr. Jorge did not pay the balance due on May 1, 2007, or at any other time, and Bartley never recorded a notice of default in relation to that loan.

In August 2007, the Jorges opened escrows for two refinancing loans from WaMu. The escrow holder was Q Escrow. A preliminary title report dated July 13, 2007 prepared by Ticor Title in connection with the refinancing showed the $873,750 WaMu deed of trust in first priority position and the $150,000 Bartley deed of trust in second position. WaMu's closing instructions provided to Q Escrow required title to be free of all liens before the funding of a new $910,000 loan to be secured by a first deed of trust, and also provided for a new $258,700 loan to be secured by a second deed of trust. The refinancing loans

totaling $1,168,700 were sufficient to pay off both the $873,750 first deed of trust and the $150,000 second deed of trust.

On September 6, 2007, the WaMu refinancing loans funded, and deeds of trust in the amounts of $910,000 and $258,700 were recorded. The refinancing loan proceeds paid off the amount then due on the $873,750 deed of trust ($946,543.15), and a full reconveyance of the $873,750 deed of trust was recorded.[2] The refinancing loan proceeds, however, did not pay off the $150,000 Bartley deed of trust. Instead, $220,271.25 in excess loan proceeds was paid to the Jorges.

Nearly a year after the new trust deeds were recorded, Mr. Jorge entered into a written agreement with Bartley on August 26, 2008, modifying the $150,000 note by increasing the interest rate to 10 percent and extending the repayment date to August 1, 2009. In agreeing to modify the note in August 2008, neither Bartley nor Francis obtained an appraisal of the property, nor did they do any due diligence to determine whether Mr. Jorge was creditworthy. Mr. Jorge did not pay the balance due on August 1, 2009, or at any other time, and Bartley did not record a notice of default prior to the initiation of the instant action.

On December 17, 2009, Chase recorded a notice of default on the $910,000 deed of trust.[3]

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[2] The $946,543.15 payoff amount included unpaid principal, accrued interest, recording and demand fees, and a $29,707.50 prepayment penalty.

[3] In September 2008, Chase acquired the $910,000 deed of trust and the $258,700 deed of trust from the Federal Deposit Insurance Corporation as WaMu's receiver.

Francis later contacted Ticor Title company to determine why the $150,000 loan from her mother's trust had not been paid off with the proceeds from the refinance. According to Francis, a title officer at the company sent her a copy of a payoff demand dated September 4, 2007 on Q Escrow's letterhead. The payoff demand purportedly bore Bartley's signature and stated that the amount required to satisfy the $150,000 deed of trust was "zero" dollars. The title officer explained that her mother had not been paid off because the payoff demand showed that nothing was owed. According to Francis, Bartley's signature on the document is a forgery.

B. *Francis's Complaint and Chase's Cross-Complaint*

On July 15, 2011, Francis, as trustee of the Bartley Trust, filed a complaint against the Jorges, Chase, and Q Escrow. She alleges causes of action for (1) breach of contract, against the Jorges; (2) elder financial abuse, against the Jorges and Q Escrow; (3) judicial foreclosure, against Jorge; and (4) declaratory relief, against Chase.

Francis alleges in her first cause of action that in November 2009, the Jorges breached the $150,000 Bartley promissory note by failing to make monthly payments. She alleges in her second cause of action that Jorge and Q Escrow "prepared and submitted forged documents" in connection with the September 2007 refinancing "to enable [the Jorges] to refinance and borrow more money against the real property securing the obligation in favor of [Francis] without paying off the loan." Francis alleges that the defendants' conduct constitutes elder abuse under Welfare and Institutions Code sections 15657 and 15610.30.

In her third cause of action, Francis seeks a judicial foreclosure on the $150,000 Bartley deed of trust. In her fourth cause of action, Francis alleges that she and Chase dispute the priority of their respective deeds of trust. She seeks a declaration that the $150,000 Bartley deed of trust is a first priority lien.[4]

On June 21, 2012, Chase filed a cross-complaint against Francis and the Jorges. Chase alleges causes of action for (1) equitable subrogation against Francis; (2) declaratory relief against Francis, and (3) judicial foreclosure against Francis and the Jorges.

Chase alleges in its first cause of action that it should be equitably subrogated to the rights of the holder of the $873,750 deed of trust, which was senior to the $150,000 Bartley deed of trust, because the refinancing loan proceeds paid off the $873,750 deed of trust in the amount of $946,543.15. Chase alleges that it is entitled to an equitable first priority lien in the amount of $946,543.15. Chase alleges in its second cause of action that Chase and Francis dispute the priority of their respective deeds of trust. Chase seeks a declaration that it holds an equitable first priority lien in the amount of $946,543.15 as of January 12, 2006. In its third cause of action, Chase seeks a judicial foreclosure on its equitable lien.[5]

C. *Chase's Summary Judgment Motion*

On March 27, 2014, Chase filed a motion for summary judgment on both Francis's complaint and its cross-complaint, or

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[4] The Jorges defaulted on Francis's complaint.

[5] The Jorges defaulted on Chase's cross-complaint.

alternatively for summary adjudication on the fourth cause of action in Francis's complaint and on each of the three causes of action in its cross-complaint. Chase argued that under the law of equitable subrogation, it was entitled to an equitable first priority lien in the amount paid by its predecessor, WaMu, to extinguish the prior $873,750 first deed of trust, that is, $946,543.15. Chase filed declarations and other evidence in support of the motion.

Francis argued in opposition to the summary judgment motion that Chase was not entitled to equitable subrogation because WaMu had actual knowledge of the intervening Bartley $150,000 deed of trust and Chase did not have superior equities. Francis also argued that there were triable issues of fact precluding summary judgment. Francis also filed evidentiary objections.

D. *The Ruling on the Summary Judgment Motion*

On August 6, 2014, the trial court filed an order granting Chase's summary judgment motion, finding the facts to be undisputed. Bartley bargained for and received a second priority deed of trust. Although WaMu was aware of Bartley's prior deed of trust at the time of the refinancing, WaMu intended to obtain a first priority lien and reasonably relied on the escrow company to ensure that it received a first priority lien. The court stated that equitable subrogation would place the parties in the positions they expected and would not prejudice Francis's rights. The court did not expressly rule on the parties' evidentiary objections.

E. *Francis's New Trial Motion*

On August 21, 2014, Francis filed a new trial motion challenging the order granting summary judgment. Francis argued that the trial court erred by failing to rule on her evidentiary objections and that Chase was not entitled to summary judgment. On September 30, 2014, the court denied the new trial motion.

F. *The Judgment and Appeal*

On October 6, 2014, the trial court filed a judgment in favor of Chase on Francis's fourth cause of action for declaratory relief and Chase's first cause of action for equitable subrogation, second cause of action for declaratory relief, and third cause of action for judicial foreclosure. The judgment states that Chase has an equitable first priority lien against the property in the amount of $946,543.15 as of January 12, 2006, senior to the Bartley deed of trust and to any other lien recorded against the property after that date. On October 27, 2014, the court filed an amended judgment.

Francis timely appealed from the judgment, the amended judgment, and the order denying her new trial motion.[6]

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[6] The amended judgment is identical to the original judgment. We need not decide whether the trial court retained jurisdiction to file an amended judgment because the two judgments are identical, no party served a notice of entry of judgment, and the notice of appeal was timely whether measured from the date of filing of the original or the amended judgment.

The denial of a new trial motion is not separately appealable, but is encompassed within an appeal from the judgment. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 18.)

DISCUSSION

A. *Standard of Review*

A party is entitled to summary judgment if the party shows that there is no triable issue of material fact and the party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment has the initial burden of presenting evidence that a cause of action lacks merit because the plaintiff cannot establish an element of the cause of action or there is a complete defense. (*Id.*, subd. (p)(2).) If the defendant satisfies this burden, the burden shifts to the plaintiff to present admissible evidence creating a triable issue of material fact. (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 525.)

Ordinarily the ruling on a summary judgment motion concerns the legal effect of undisputed facts and whether the material facts are truly undisputed. We review such a ruling de novo, liberally construing the evidence in favor of the party opposing summary judgment and resolving all doubts concerning the evidence in favor of that party. (*Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407, 415; *State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1017-1018.)

Equitable subrogation is an equitable doctrine. (*Branscomb v. JPMorgan Chase Bank, N.A.* (2014) 223 Cal.App.4th 801, 806 (*Branscomb*).) The trial court exercises discretion in deciding whether a party is entitled to equitable subrogation, and we ordinarily review the ruling for abuse of discretion. (*Ibid.*)

Some courts hold that, to the extent the trial court exercised discretion in granting summary judgment, the standard

of review on appeal is abuse of discretion. (See, e.g., *GuideOne Mutual Ins. Co. v. Utica National Ins. Group* (2013) 213 Cal.App.4th 1494, 1501 [equitable contribution]; *Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 639-640 [equitable tolling and estoppel]; *Centennial Ins. Co. v. United States Fire Ins. Co.* (2001) 88 Cal.App.4th 105, 111 [equitable contribution]; see also *Dieden v. Schmidt* (2002) 104 Cal.App.4th 645, 654 [equitable subrogation].) Other courts hold that review is de novo, in accordance with the ordinary standard of review on appeal following summary judgment, without distinguishing the line of authority just cited. (See, e.g., *JP Morgan Chase Bank, N.A. v. Banc of America Practice Solutions, Inc.* (2012) 209 Cal.App.4th 855, 859 (*JP Morgan*) [equitable subrogation]; *State Farm General Ins. Co. v. Wells Fargo Bank, N.A.* (2006) 143 Cal.App.4th 1098, 1105 [same].) We need not decide which standard of review applies to the trial court's ruling that Chase is entitled to equitable subrogation in this case, because our conclusion is the same whether we review the ruling de novo or for abuse of discretion.

B. *The Law of Equitable Subrogation*

A lender that pays off an encumbrance with the understanding that the loan will be secured by a lien of the same priority is entitled to an equitable lien of the same priority unless the lender is chargeable with culpable and inexcusable neglect or such an equitable lien would prejudice the superior or equal equities of another. (*Simon Newman Co. v. Fink* (1928) 206 Cal. 143, 146 (*Simon*); *Branscomb*, *supra*, 223 Cal.App.4th at p. 806; *JP Morgan*, *supra*, 209 Cal.App.4th at pp. 860-861.) If the lender reasonably expects to receive a lien with the same priority as the

extinguished lien, the lender is equitably subrogated to the rights of the prior lienholder to the extent of the payment made, provided that there is no prejudice to another lienholder.[7] (*JP Morgan*, at p. 862 [affirmed a summary judgment establishing equitable liens in the amounts paid to extinguish two prior liens]; see Civ. Code, § 2903.[8]) A lienholder who bargained for and obtained a junior lien suffers no prejudice if equitable subrogation results in the lienholder obtaining exactly what the

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[7] *Golden Eagle Ins. Co. v. First Nationwide Financial Corp.* (1994) 26 Cal.App.4th 160, 171, cited by Francis, stated, "the right of subrogation 'may be invoked against a third party only if he is guilty of some wrongful conduct which makes his equity inferior to that of plaintiff.'" *Golden Eagle* is distinguishable because it involved a surety's claim for equitable subrogation. A surety or insurer that pays a claim has a right of equitable subrogation against a third party responsible for the loss. (*Valley Crest Landscape Development, Inc. v. Mission Pools of Escondido, Inc.* (2015) 238 Cal.App.4th 468, 483; see *Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1296.) Thus, in the suretyship or insurance context, as distinguished from the equitable lien context, equitable subrogation can arise in favor of a surety or insurer only against a wrongdoer. (*San Diego Assemblers, Inc. v. Work Comp for Less Ins. Services, Inc.* (2013) 220 Cal.App.4th 1363, 1368.)

[8] "Every person, having an interest in property subject to a lien, has the right to redeem it from the lien, at any time after the claim is due, and before his right of redemption is foreclosed, and, by such redemption, becomes subrogated to all the benefits of the lien, as against all owners of other interests in the property, except in so far as he was bound to make such redemption for their benefit." (Civ. Code, § 2903.)

lienholder bargained for. (*JP Morgan*, at p. 862; see *Branscomb*, at pp. 810-811.)

The California Supreme Court in *Simon*, *supra*, 206 Cal. at page 146 held, "'One who advances money to pay off an encumbrance on realty at the instance of either the owner of the property or the holder of the [e]ncumbrance, either on the express understanding, or under circumstances from which an understanding will be implied, that the advance made is to be secured by a first lien on the property, is not a mere volunteer; and in the event the new security is for any reason not a first lien on the property, the holder of such security, if not chargeable with culpable and inexcusable neglect, will be subrogated to the rights of the prior encumbrancer under the security held by him, unless the superior or equal equities of others would be prejudiced thereby, and to this end equity will set aside a cancellation of such security, and revive the same for his benefit.' [Citations.]" (Accord, *Branscomb*, *supra*, 223 Cal.App.4th at p. 806; *JP Morgan*, *supra*, 209 Cal.App.4th at p. 860.)

Caito v. United California Bank (1978) 20 Cal.3d 694 (*Caito*) explained, "One who claims to be equitably subrogated to the rights of a secured creditor must satisfy certain prerequisites. These are: '(1) Payment must have been made by the subrogee to protect his own interest. (2) The subrogee must not have acted as a volunteer. (3) The debt paid must be one for which the subrogee was not primarily liable. (4) The entire debt must have been paid. (5) Subrogation must not work any injustice to the rights of others.' [Citations.] 'As now applied [the doctrine of equitable subrogation] is broad enough to include every instance in which one person, not acting as a mere volunteer or intruder, pays a debt for which another is primarily liable, and which in

equity and good conscience should have been discharged by the latter.' [Citations.]" (*Id.* at p. 704.)

C. *Chase Is Entitled to Equitable Subrogation*

The undisputed evidence shows that Bartley had bargained for and received a second deed of trust behind the $873,750 WaMu first deed of trust. Some time later, $946,543.15 of the proceeds of the WaMu refinancing loans paid off the prior WaMu first deed of trust. The escrow instructions required the new $910,000 loan to be secured by a first deed of trust and required the new $258,700 loan to be secured by a second deed of trust. The refinancing loans were sufficient to pay off both the $873,750 first deed of trust and the $150,000 second deed of trust securing the Bartley Trust loan. The escrow company evidently relied on the zero payoff demand purportedly received from Bartley and did not pay off the $150,000 Bartley deed of trust. There is no evidence of any misconduct by Chase.

As in *Branscomb*, *supra*, 223 Cal.App.4th at page 808, the undisputed evidence at summary judgment shows that WaMu reasonably expected to receive a senior lien and did not act with culpable and inexcusable neglect. As the trial court found, WaMu was not negligent in relying on the escrow company's determination that the Bartley demand had been paid off. In so ruling, the court relied on *Branscomb*'s rejection of a similar argument as that advanced by Francis, seeking to charge the lender with inexcusable neglect based on an escrow company's neglect or complicity in handling a forged zero payoff demand.

The balance of equities favor Chase, the court found, as the bank reasonably relied on the escrow company to follow its instructions and not finance the loans unless the Bartley loan

was repaid or deemed paid off. Further, the undisputed evidence shows Francis did not seek to enforce her first note to the Jorges, even when they defaulted on the loan repayment requirement. Instead, she agreed to modify and extend the loan *after* WaMu had refinanced the loan and recorded two new deeds, including the deed in dispute here. Had the Bartley Trust performed any due diligence before extending the loan, it would have determined that the Jorges had borrowed additional funds, the escrow company had been given a forged payoff demand, and the loan had not been repaid, despite the escrow instructions and refinancing terms.

Most significantly, equitable subrogation here places the parties in the same position for which they had initially bargained when they loaned money to the Jorges and recorded their respective deeds. Bartley bargained for a second trust deed, which is what she received with the application of equitable subrogation. Case law supports a finding of equitable subrogation under the circumstances. (*Copp v. Millen* (1938) 11 Cal.2d 122, 130 (*Copp*) ["if, notwithstanding the mortgagee had some knowledge or notice, the intervening lienholder is not prejudiced by the continuance of the priority of the original mortgage and is in no different position than he would have been had the release not been recorded, equity will place the parties in their original position"]; *Shaffer v. McCloskey* (1894) 101 Cal. 576, 581 [equitable subrogation properly applied because the beneficiary of the trust could not complain he was misled, as he was left in the same position he would have expected to occupy when the trust deed was taken]; *Smith v. State Sav. & Loan Ass'n* (1985) 175 Cal.App.3d 1092, 1097-1098 (*Smith*) [equities

favor equitable subrogation where parties are left in the same position as before].)

The undisputed evidence shows that all of the elements of equitable subrogation set forth in *Caito*, *supra*, 20 Cal.3d at page 704, are satisfied. WaMu made the refinancing loans with the understanding that it would receive a first priority lien, acting to protect its own interest and not as a mere volunteer. (See *Simon*, *supra*, 206 Cal. at p. 146; *Branscomb*, *supra*, 223 Cal.App.4th at p. 806; *JP Morgan*, *supra*, 209 Cal.App.4th at p. 860.) WaMu was not primarily liable for the debt paid and paid off the entire first deed of trust. Finally, our modification of the judgment (discussed *post*) ensures that subrogation will not cause any injustice because the parties will receive the lien priorities for which they had initially bargained, and Chase's new first priority lien will not exceed the amounts due under the prior encumbrance.

"'Subrogation must not work any injustice to the rights of others.'" (*Caito*, *supra*, 20 Cal.3d at p. 704.) Accordingly, subrogation should be limited to the extent necessary to avoid any injustice to third parties. (*Katsivalis v. Serrano Reconveyance Co.* (1977) 70 Cal.App.3d 200, 214-215 [held that the new lender was entitled to an equitable lien by subrogation limited to the amounts payable under the initial loan].) In our view, it would unfairly prejudice junior lienholders if, in addition to the amount of unpaid principal, accrued interest, and ordinary fees, Chase's new first lien also included the $29,707.50 paid as a prepayment penalty. We therefore will modify the judgment by

reducing the amount of the equitable first priority lien from $946,543.15 to $916,835.65.[9]

D. *WaMu's Actual Knowledge of the Second Deed of Trust Does Not Preclude Equitable Subrogration*

Francis argues that, as a matter of law, equitable subrogation is appropriate only if the payor had no actual knowledge of an intervening lien. We disagree. In some circumstances the payor's actual knowledge may show that the payor did not reasonably expect to receive a senior lien. In other circumstances, however, actual knowledge of an intervening lien does not preclude a reasonable expectation that the payor would receive a senior lien. Whether the payor reasonably expected to receive a senior lien or, to the contrary, is "'chargeable with culpable and excusable neglect'" (*Simon*, *supra*, 206 Cal. at p. 146), depends on the particular facts in each case. (See *Branscomb*, *supra*, 223 Cal.App.4th at p. 808; cf. *Copp*, *supra*, 11 Cal.2d at p. 130; see also Rest.3d Property, Mortgages, § 7.6 & com. e, pp. 519-520;[10] but see *Smith*, *supra*, 175 Cal.App.3d at

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[9] $946,543.15 – $29,707.50 = $916,835.65.

[10] The Restatement Third of Property, Mortgages takes the position that a payor's actual knowledge of an intervening lien does not necessarily preclude equitable subrogation. Instead, the controlling question is whether the payor reasonably expected to receive a lien with the same priority as the encumbrance being paid. (*Id.*, § 7.6, com. e, pp. 519-520; see Comment, Subrogation of Mortgages in California: A Comparison with the Restatement and Proposals for Change (2001) 48 UCLA L.Rev. 1633, 1655-1657 [favoring the Restatement position and criticizing the emphasis in some opinions on actual knowledge].) We agree.

p. 1098 [stated in dicta, "Although equitable subrogation will be denied to a new lender who has actual knowledge of the junior encumbrance, it has long been the rule in California that the fact the junior encumbrance was recorded will not by itself bar equitable subrogation"].)

The plaintiff in *Simon*, *supra*, 206 Cal. 143, made a loan to an individual, the proceeds of which paid off a personal property mortgage held by a bank. The bank mortgage was released, and the plaintiff received a new mortgage. During the loan negotiations, a bank officer had informed the plaintiff of the bank mortgage and two unsecured loans made by the bank officer personally, but had failed to disclose a junior mortgage securing another loan made by the bank officer personally. The plaintiff sued the bank officer and others, seeking to be equitably subrogated to the bank's interests as holder of the prior mortgage. The trial court concluded that the plaintiff was entitled to equitable subrogation despite the intervening lien. (*Id.* at pp. 144-145.)

The California Supreme Court affirmed, holding that a person who pays off an encumbrance with the understanding, express or implied, that he or she will receive a lien with the same priority as the lien that is paid off is equitably subrogated to the rights of the prior lienholder, provided that the payor is "'not chargeable with culpable and excusable neglect'" and there is no prejudice to third parties with superior or equal equities. (*Simon*, *supra*, 206 Cal. at p. 146.)

Simon determined that evidence in the record supported the trial court's factual finding that the plaintiff had no actual knowledge of the bank officer's intervening mortgage. (*Simon*, *supra*, 206 Cal. at pp. 145-146.) *Simon* also concluded that

constructive notice based on the recordation of the intervening mortgage did not preclude equitable subrogation, stating, "That such a right would not be so affected in the absence of actual knowledge is intimated in the case of *Darrough v. Herbert Kraft Co. Bank* [(1899)] 125 Cal. 272 [57 Pac. 983]." (*Id.* at p. 147.) In *Simon* the payor's expectation of a first priority lien depended on its total lack of knowledge of the existence of an intervening lien.[11] (*Id.* at p. 145.) *Simon* did not suggest that actual knowledge of an intervening lien necessarily precludes equitable subrogation. Instead, *Simon* supports the proposition that in some cases, actual knowledge of an intervening lien precludes a reasonable expectation that the payor would receive a senior lien.

The plaintiff in *Copp*, *supra*, 11 Cal.2d 122, was the assignee of a mortgage and a deed of trust. After the property owner had defaulted on the payments due, the property owner executed a new mortgage in the amount of the outstanding balance, and the original mortgage and deed of trust were

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[11] In *Darrough v. Herbert Kraft Co. Bank*, *supra*, 125 Cal. 272, the plaintiff purchased property and then paid off a deed of trust unaware of a junior encumbrance arising from a judgment against the prior owner. The plaintiff sought to be equitably subrogated to the rights of the prior senior lienholder in order to foreclose on the lien. (*Id.* at p. 274.) *Darrough* stated that when a property owner pays off a senior lien "without actual knowledge" of a junior lien, the payment presumably is made for the owner's benefit and not for the benefit of the junior lienholder, so the senior lien will be revived and enforced for the owner's benefit. (*Id.* at pp. 274-275.) In *Darrough*, as in *Simon*, *supra*, 206 Cal. 143, the payor's reasonable expectation that the property would be unencumbered depended on his total lack of knowledge of the existence of the junior lien.

discharged. In the interim between the recording of the original mortgage and deed of trust and the recording of the new mortgage, the owner entered into a land sale contract with a third party. The plaintiff filed an action to foreclose on the new mortgage and sought to be equitably subrogated to the rights of the holder of the original mortgage and deed of trust. (*Id.* at pp. 124-125.) The trial court found that the plaintiff had actual knowledge of the land sale contract and therefore denied relief against the purchaser under the land sale contract. (*Id.* at p. 125.) The California Supreme Court in *Copp* held that this was error. (*Id.* at pp. 130-131.)

Copp stated that there was evidence that the plaintiff and the property owner intended to substitute the new mortgage for the original security and mistakenly believed that the new mortgage would be a first priority lien. (*Copp*, *supra*, 11 Cal.2d at p. 126.) In those circumstances, the plaintiff would be entitled to a first priority lien to the extent that there was no prejudice to the intervening lienholder. (*Id.* at p. 130.) *Copp* stated that "some knowledge or means of knowledge of the existence of other person's rights in the property does not in every case preclude the court from granting the relief sought. So that if, notwithstanding the mortgagee had some knowledge or notice, the intervening lienholder is not prejudiced by the continuance of the priority of the original mortgage and is in no different position than he would have been had the release not been recorded, equity will place the parties in their original position." (*Ibid.*)

Copp explained that the plaintiff's knowledge of the land sale contract did not compel the conclusion that the plaintiff knew or reasonably should have known that the land sale contract was not subject to the new mortgage. (*Copp*, *supra*, 11

Cal.2d at p. 130.) *Copp* stated further: "The trial court apparently concluded that the plaintiff's knowledge of the existence of [the land sale] contract was alone sufficient to exclude the plaintiff from any relief by way of foreclosure. The court refused to admit evidence offered by the plaintiff to show the circumstances under which the release and renewal of the mortgage and trust deed were made." (*Ibid.*) *Copp* held that the exclusion of evidence was error. (*Id.* at pp. 130-131.) Thus, *Copp* supports the proposition that actual knowledge of an intervening lien does not preclude equitable subrogation if, despite such knowledge, the party seeking subrogation reasonably expected to receive a first priority lien.

Lawyers Title Ins. Corp. v. Feldsher (1996) 42 Cal.App.4th 41, on which Francis relies heavily, affirmed a summary judgment against the assignee of a lender seeking to be equitably subrogated to the rights of a senior lienholder. The lender was an experienced hard money lender who had actual knowledge of an intervening trust deed and knew that the holders of the intervening trust deed had agreed to subordinate their trust deed only on certain terms, including a written subordination agreement. (*Id.* at pp. 44, 52.) Yet the lender made no affirmative effort to obtain a subordination agreement before completing the loan, and there was no evidence that anyone had agreed to obtain a subordination agreement. (*Id.* at p. 52.) *Lawyers Title* concluded that the lender's failure to protect his interests despite his actual knowledge and experience constituted "'culpable and inexcusable neglect'" precluding equitable subrogation. (*Id.* at p. 54.) *Lawyers Title* did not hold or suggest that actual knowledge of an intervening trust deed precludes equitable subrogation as a matter of law in all circumstances, but

instead held that the evidence compelled the conclusion that the lender's neglect in those circumstances was inexcusable. (*Id.* at pp. 52, 54.)

On facts very similar to here, *Branscomb*, *supra*, 223 Cal.App.4th 801, held that the trial court erred by denying two lenders' claims for equitable subrogation. The plaintiff had made a short-term $500,000 loan to the property owner, but the deed of trust stated that the loan amount was only $100,000. The plaintiff's deed of trust was junior to two prior deeds of trust in favor of WaMu and a group of lenders referred to as "MMB." WaMu and MMB later made new refinancing loans to the property owner. WaMu's new loan paid off its prior first deed of trust. The escrow instructions required WaMu's new deed of trust to be in first position. MMB made a modified loan in the same amount as its prior loan on the condition that its new deed of trust would be in second position behind the WaMu deed of trust. Unbeknownst to WaMu, in connection with the refinancing loans, the plaintiff's agent had forged the plaintiff's signature and submitted to escrow a zero payoff demand together with plaintiff's original note and deed of trust. As a result, the plaintiff's loan was not paid off in the refinancings, and the plaintiff's $100,000 deed of trust remained of record. (*Id.* at pp. 804-805.)

The plaintiff filed a complaint for reformation of his deed of trust to secure a $500,000 debt rather than a $100,000 debt. (*Branscomb*, *supra*, 223 Cal.App.4th at p. 803.) Chase, as WaMu's successor, and MMB claimed they were entitled to equitable subrogation. (*Id.* at p. 805.) The trial court concluded that the lender defendants were not entitled to equitable subrogation in part because they had actual knowledge of the

plaintiff's lien. The Court of Appeal in *Branscomb* held that this was error. (*Id.* at pp. 807-809.) The *Branscomb* court held:

"We conclude the lender defendants' actual knowledge of the $100,000 deed of trust prior to the refinance transactions does not preclude equitable subrogation in the circumstances of this case. Although the lender defendants knew of the $100,000 lien, the evidence does not show they had actual knowledge the lien would remain on the property, and rise to first position, after the refinance transactions closed. To the contrary, each lender defendant required, as a prerequisite to closing the transaction, that its new deed of trust be in the same position as its prior deed of trust. Moreover, the escrow officer received from [the plaintiff's agent] a zero payoff demand and request for reconveyance of plaintiff's trust deed. There is no evidence the lender defendants knew, expected, or agreed that (1) plaintiff's lien would remain on the property after the refinance transactions and rise to first position, or (2) the lender defendants would forfeit their first and second priority positions as a result of those transactions. Under these circumstances, the fact the lender defendants knew of the existence of plaintiff's $100,000 deed of trust does not constitute culpable and inexcusable neglect precluding equitable subrogation." (*Branscomb*, *supra*, 223 Cal.App.4th at p. 808.)

These authorities establish that actual knowledge of an intervening lien does not preclude equitable subrogation if, as here, despite such knowledge, the party seeking subrogation reasonably expected to receive a senior lien.

Francis has shown no material factual dispute. Based on established law, the trial court properly found Chase, as WaMu's successor, should be equitably subrogated to the rights of the

prior senior lienholder. The trial court properly awarded Chase an equitable first priority lien.

D. *The Trial Court Properly Considered the Zero Payoff Demand*

Francis argues that the zero payoff demand purportedly signed by Bartley "was inadmissible for the reasons stated in her written evidentiary objections." She also argues that Chase "did not lay the required evidentiary foundation" for admission of the document. The trial court did not rule on any of the evidentiary objections presented. Francis's filing of evidentiary objections prior to summary judgment preserved those objections for appeal. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 526.)

Nonetheless, an appellant challenging the ruling on an evidentiary objection must cite and discuss the particular objection, and cannot simply argue that the court erred by overruling unspecified objections. (*Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1074.) In her opening brief Francis only argues, in a cursory manner, lack of foundation. We construe her argument on appeal to be that the court erred by impliedly overruling her objection based on lack of authentication and lack of personal knowledge.[12]

Chase argued in its summary judgment motion that it was entitled to equitable subrogation because it had paid off the prior

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[12] Francis objected to the zero payoff demand in the trial court based on lack of "foundation, authentication and personal knowledge." While Francis also asserted objections to the escrow instructions in the trial court, on appeal she did not raise any objection as to the instructions, and so we deem those objections waived.

first deed of trust with the reasonable expectation that its new loans would be secured by senior liens, and Francis would suffer no prejudice because Bartley had bargained for and received a junior lien. Chase cited the zero payoff demand and argued that there was no evidence that Chase was aware of the alleged forgery or that Chase was complicit in any wrongdoing. Chase did not claim that Bartley's signature on the zero payoff demand was authentic. Instead, Chase presented the zero payoff demand as a document purportedly bearing Bartley's signature.

Chase's counsel, Jordan Trachtenberg, stated in a declaration that Francis had produced the zero payoff demand at her deposition and that the evidentiary foundation for the document was set forth in the attached pages from Francis's deposition transcript. Those pages showed that Francis testified in her deposition that she had received the zero payoff demand from Ticor Title company, the title company used by Q Escrow to perform the title search and comply with WaMu's closing instructions. She further testified that Ticor's title officer informed her that the payoff demand document showed her mother was owed "zero," and for that reason, she did not receive any funds when WaMu refinanced with the Jorges.

"Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." (Evid. Code, § 1400.) Francis's testimony that she had received the zero payoff demand from a title company constitutes sufficient evidence to support a finding that the document was what Chase claimed it was, that is, a zero payoff demand purportedly bearing Bartley's signature. Francis's testimony that she personally

received the zero payoff demand from the title company also satisfies the requirement of personal knowledge (*id.*, § 702). Francis has shown no error in the implied overruling of her evidentiary objections.[13]

Francis also argues that there is no evidence that WaMu or Q Escrow ever received the document. This argument contradicts Francis's own pleading and deposition testimony. Francis alleges in her complaint that Jorge and Q Escrow "prepared and submitted forged documents" in connection with the September 2007 refinancing. In her deposition, Francis identified the zero payoff demand as a forged document, stating that her mother's signature on the document was an obvious forgery. Francis cannot avoid summary judgment by contradicting the facts alleged in her own pleading, that the defendants "prepared and submitted forged documents," and arguing that there is no evidence that the zero payoff demand was ever received. (*Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1271 [facts alleged in pleadings are judicial admissions, and no evidence need be offered to prove such facts].)

We conclude that Francis has shown no error in the trial court's implied overruling of her evidentiary objection and consideration of the zero payoff demand.[14] Indeed, the

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[13] If the trial court does not expressly rule on evidentiary objections on a summary judgment motion, as here, the reviewing court will deem the objections impliedly overruled. (*Reid v. Google, Inc.*, *supra*, 50 Cal.4th at p. 534.)

[14] Francis challenges the denial of her new trial motion on the same grounds that she challenges the order granting summary judgment, so we need not separately address the denial of her new trial motion.

undisputed evidence given the admissions in the pleading and Francis's own deposition testimony was that Q Escrow had the zero payoff demand in its possession when it was processing the final escrow instructions. There was no triable issue raised that WaMu knew the document was forged or suspected that Q Escrow would not comply faithfully with its instructions. Based on this undisputed evidence, the court could reasonably hold, as it did, that WaMu's conduct did not constitute inexcusable neglect and deprive it of the right to seek equitable subrogation.

DISPOSITION

The judgment is modified by reducing the amount of the equitable first priority lien from $946,543.15 to $916,835.65, and as so modified is affirmed. Chase is entitled to recover its costs on appeal.

KEENY, J.*

We concur:

ZELON, Acting P. J. SEGAL, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.