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28UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIAGERALD ORNSTEIN, et al.,  
Plaintiffs,  
v.  
GIBSON T. CANITES, et al.,  
Defendants.

Case No. 18-cv-01616-PJH

**ORDER GRANTING SUMMARY  
JUDGMENT**

Re: Dkt. No. 81

Plaintiffs' motion for partial summary judgment came on for hearing before this court on May 1, 2019. Plaintiffs appeared through their counsel, TJ Lloyd and Jeffrey Lowenthal. Defendant Gibson Canites appeared pro se and defendants Rose Liang-Canites and Aaren Canites (together with Gibson Canites, the "Canites" or the "defendants") did not appear. Having read the papers filed by the parties and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby GRANTS plaintiffs' motion, for the following reasons.

**BACKGROUND****A. The Subject Loan**

The Canites are the owners of the real property located at 448 15th Avenue, San Francisco, California (the "Subject Property"). Dkt. 81-3, Kristul Decl. ¶¶ 3-4. In May of 2016, plaintiffs, through their agent Yeva, Inc. dba Saxe Mortgage Company ("Saxe"), agreed to lend the Canites \$1,600,000, with an interest rate of 10.5% (the "Subject Loan"), to pay off existing senior deeds of trust secured against the Subject Property, as well as property taxes and other assessments. *Id.* ¶ 4.

The Subject Loan required the Canites to make thirty-five monthly interest-only

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Northern District of California

1 payments in the amount of \$14,000 and a lump sum payment covering all remaining  
2 amounts due—\$1,614,000—on June 1, 2019. Kristul Decl., Ex. 1 at ¶ 3.

3 Plaintiffs’ loan was memorialized by a Note dated May 9, 2016 (the “Note”), which  
4 was secured against the Subject Property by a Deed of Trust (the “Deed of Trust”),  
5 recorded on May 19, 2016. Kristul Decl. ¶ 5, Exs. 1-2. The Note and the Deed of Trust  
6 provide for the payment of late fees, interest, and reasonable attorneys’ fees and costs in  
7 the event of a default. Kristul Decl., Ex. 1 ¶ 4(C)

8 **B. Liens Against the Subject Property**

9 At the time that plaintiffs made the Subject Loan to the Canites, plaintiffs believed  
10 that the subject property was encumbered by four senior deeds of trust:

Lien	Amount Paid from Proceeds of Subject Loan	Date Lien was Recorded
Long Beach DOT	\$409,708.76	10/18/2002
Sequoia DOT	\$609,413.80	11/21/2014
Karen Lum DOT	\$111,309.59	6/25/2015
Boen Liu DOT	\$215,000	1/11/2016

16 Kristul Decl. ¶¶ 7-9, Exs. 7-9. The Subject Loan paid off in full the then-outstanding  
17 balances of those four senior deeds of trust. Id. However, unbeknownst to plaintiffs, the  
18 following additional liens existed against the subject property, id. ¶ 9:

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Lien	Date Lien was Recorded
California EDD Tax Lien	7/24/1998
Long Beach DOT	10/18/2002
California EDD Tax Lien	2/27/2003
U.S. Internal Revenue Service Tax Lien	2/6/2009
Ford Motor Credit Company Judgment Lien	2/16/2010
Legal Solutions Corporation Judgment Lien	5/25/2010
Cavalry SPV Judgment Lien	9/10/2013
Ardashir Moinzadeh Judgment Lien (#1)	10/1/2013
Ardashir Moinzadeh Judgment Lien (#2)	10/1/2013
U.S. Internal Revenue Service Tax Lien	10/2/2013
California Franchise Tax Board Tax Lien	1/15/2014
Sequoia DOT	11/21/2014
Karen Lum DOT	6/25/2015
U.S. Internal Revenue Service Tax Lien	12/8/2015
Boen Liu DOT	1/11/2016

Kristul Decl. ¶ 14. While plaintiffs have named each of those additional lienholders as defendants in this action, not all of those lienholders have appeared in this action.

**C. The Canites' Default**

Initially, the Canites made payments on the loan for the months of July, August, and September 2016. Kristul Decl. ¶ 10. After those payments, the Canites made only five other payments, *id.* ¶¶ 10-12, Ex. 10, and the Canites have been in default since May 17, 2017. *Id.* ¶ 12.

As of March 20, 2019, the amount of the accelerated principal, interest and recoverable charges totals \$2,035,846.28. *Id.* ¶ 16, Ex. 11.

**D. Lien Priority Stipulation**

Plaintiffs and the appearing lienholder defendants stipulated to, and the court approved, a schedule of priority for those parties' respective liens against the subject property. Dkt. 55.

Plaintiffs now move for summary judgment on three of their seven causes of action: (1) Equitable Subrogation, (2) Judicial Foreclosure of the Subject Deed of Trust, and (3) Judicial Foreclosure of Equitable Lien.<sup>1</sup> The Canites, for their part, have neither disputed the above facts nor provided any independent evidence in support of their

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<sup>1</sup> Though plaintiffs' motion also sought a deficiency judgment against the Canites, plaintiffs' counsel subsequently withdrew that request.

1 opposition to plaintiffs’ motion.

2 **DISCUSSION**

3 **A. Legal Standard**

4 Summary judgment is proper where the pleadings, discovery, and affidavits show  
5 that there is “no genuine dispute as to any material fact and the movant is entitled to  
6 judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those which may  
7 affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248  
8 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a  
9 reasonable jury to return a verdict for the nonmoving party. Id.

10 The moving party for summary judgment bears the initial burden of identifying  
11 those portions of the pleadings, discovery, and affidavits which demonstrate the absence  
12 of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986);  
13 Nissan Fire & Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102 (9th Cir. 2000). When  
14 the moving party has met this burden of production, the nonmoving party must go beyond  
15 the pleadings and, by its own affidavits or discovery, set forth specific facts showing that  
16 there is a genuine issue for trial. Id. If the nonmoving party fails to produce enough  
17 evidence to show a genuine issue of material fact, the moving party wins. Id.

18 At summary judgment, the court must view the evidence in the light most favorable  
19 to the nonmoving party: if evidence produced by the moving party conflicts with evidence  
20 produced by the nonmoving party, the judge must assume the truth of the evidence set  
21 forth by the nonmoving party with respect to that fact. See Tolan v. Cotton, 134 S. Ct.  
22 1861, 1865 (2014); Leslie v. Grupo ICA, 198 F.3d 1152, 1158 (9th Cir. 1999).

23 **B. Analysis**

24 **1. Whether Summary Judgment Should be Granted On Plaintiffs’ Judicial**  
25 **Foreclosure Claims**

26 California Code of Civil Procedure §§ 725a, et seq., governs judicial foreclosure  
27 procedures. Section 725a provides that “the beneficiary or trustee named in a deed of  
28 trust . . . with power of sale upon real property or any interest therein to secure a debt or

1 other obligation . . . shall have the right to bring suit to foreclose the same in the manner  
2 and subject to the provisions, rights and remedies relating to the foreclosure of a  
3 mortgage upon such property.” In short, plaintiffs “must prove that the subject loan is in  
4 default and the amount of default.” Coker v. JPMorgan Chase Bank, N.A., 62 Cal. 4th  
5 667, 672 (2016) (internal quotation marks omitted).

6 Here, it is undisputed that the Deed of Trust names the plaintiffs as the  
7 beneficiary. Kristul Decl., Ex. 2 at 1, 7. It is also undisputed that the Canites are in  
8 default, see Kristul Decl. ¶¶ 10-12, and that the Deed of Trust provides that, in the event  
9 of default, plaintiffs may accelerate all sums secured by the loan and the Deed of Trust  
10 and seek foreclosure. Kristul Decl., Ex. 1 ¶ 4, Ex. 2 ¶ 18.

11 The only other fact plaintiff must prove is the amount of the default. Plaintiffs have  
12 presented evidence that, as of March 20, 2019, the default totals \$2,035,846.28. In  
13 response the Canites argue only (1) that the requested attorneys’ fees, which are  
14 provided for under the contract, are unreasonable and (2) that the contractual interest  
15 rate is usurious. The court finds those arguments unpersuasive.

16 As to the former, plaintiffs seek \$28,991.65 in attorneys’ fees and costs. The court  
17 finds that amount to be reasonable and supported by the evidence. See Dkt. 81-1,  
18 Brown Decl. ¶ 3; Dkt. 81-2, Lloyd Decl. ¶¶ 13-15. The Canites’ challenge to that amount  
19 lacks any evidentiary support or relevant legal argument.

20 Invoking Article XV § 1(1) of the California Constitution, the Canites’ latter  
21 argument contends that the contractual 10.5% interest rate is usurious. See Cal. Const.  
22 Art. XV § 1(1) (setting ten percent per annum interest rate cap for certain types of loans).  
23 That provision, however, does not apply to the Subject Loan because it was arranged by  
24 a licensed real estate broker and secured by a lien on real property. See Cal. Civ. Code  
25 § 1916.1; Dkt. 88-1, Kristul Supp. Decl. ¶ 3.

26 Accordingly, the court finds that plaintiffs’ motion for summary judgment on its two  
27 foreclosure claims, causes of action three and five, must be GRANTED.

28 **2. Whether Summary Judgment Should Be Granted on Plaintiffs’**

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**Equitable Subrogation Claim**

Plaintiffs next move for summary judgment on their equitable subrogation claim, which would, if granted, give portions of their lien senior priority over certain lienholders. The Canites do not oppose plaintiffs’ motion for equitable subrogation. And the appearing lienholder defendants have stipulated to their respective lien priorities. Thus, only the non-appearing lienholder defendants have an interest in this issue.

Here, plaintiffs only request equitable subrogation of their lien to the extent the proceeds of the Subject Loan were used to pay off the four senior deeds of trust discussed above. See Kristul Decl. ¶ 14; Lloyd Decl. ¶¶ 6-7, Exs. 15, 17-18. That request properly applies California’s “first in time, first in right” system of lien priorities. See JP Morgan Chase Bank, N.A. v. Banc of Am. Practice Sols., Inc., 209 Cal. App. 4th 855, 860 (2012). Under that system, where, as here, a lender pays off a senior encumbrance in order to secure a new loan with a first trust deed, the lender has sufficient interest to entitle it to subrogation to the rights of the senior encumbrance. See Smith v. State Savings & Loan Assn., 175 Cal. App. 3d 1092, 1099. (1985).

Accordingly, the court GRANTS plaintiffs’ motion for summary judgment on its second cause of action for equitable subrogation.

**CONCLUSION**

For the foregoing reasons, plaintiffs’ motion for summary judgment is GRANTED on plaintiffs’ second, third, and fifth causes of action.

A Further Case Management Conference shall be held on July 18, 2019, at 2:00 p.m., in Courtroom 3, 3rd Floor, Federal Building, 1301 Clay Street, Oakland, California, to address the resolution of the remaining claims.

The parties shall appear in person or through lead counsel and shall be prepared to discuss all items referred to in Fed. R. Civ. P. 16(c) and Civil L. R. 16-10. The parties shall file a joint case management statement no later than seven (7) days before the date of the conference. If any party is proceeding without counsel, separate statements may

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be filed by each party.

**IT IS SO ORDERED.**

Dated: May 24, 2019



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PHYLLIS J. HAMILTON  
United States District Judge