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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

LAWYERS TITLE INSURANCE CORPORATION, Plaintiff and Appellant, v. JASON P. DEDMORE ET AL., Defendants and Respondents.	A136422, A136676 (Sonoma County Super. Ct. No. SCV 247708)

In this consolidated appeal, plaintiff Lawyers Title Insurance Company (LTIC) challenges the trial court's judgment in favor of defendants Jason P. Dedmore and Lisa Biddle-Dedmore (Dedmores),[1] issued after a court trial.[2] LTIC, as an assignee of a home equity line of credit (HELOC) issued by E-Trade,[3] sued the Dedmores following the short sale[4] of their residence. On appeal, LTIC contends the trial court erroneously applied

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[1] For clarity, we will sometimes refer to the Dedmores by their first names.

[2] Upon LTIC's request, we consolidated the appeals challenging the judgment (case no. A136422) and award of attorney fees (case no. A136676), for purposes of the record on appeal, briefing, argument, and decision.

[3] As noted by LTIC, the name "E-Trade" is used interchangeably in the record on appeal with the names "E*Loan" and/or "E-Loan." For purposes of consistency, we shall use the name "E-Trade."

[4] Later in the opinion, we discuss "short sales" and their significance to the issues on appeal. For now, it is sufficient to note that a short sale occurs when a property is sold for less than the balance of the outstanding debt secured by a deed of trust. (See 1

Code of Civil Procedure[5] section 726, also known as the "one form of action rule," to prevent LTIC from seeking repayment of the HELOC. The one-action rule and the antideficiency laws protect borrowers in default on loans secured by real property. (See §§ 726, 580a-580e.) They are designed to limit the remedies available to lenders for recovery of such debt. We conclude the trial court did not err in preventing LTIC from obtaining repayment of the HELOC by the Dedmores and, accordingly affirm the judgment.

I. BACKGROUND

A. Underlying Real Estate Transactions

The Dedmores purchased their residence in 2003 with a loan from World Savings. In March 2005, they took out a HELOC with E-Trade for $55,000, which they secured with a deed of trust on the property. In June 2005, the Dedmores refinanced their loan with World Savings, paying off the principal mortgage and paying down their HELOC. At the closing, World Savings simultaneously reconveyed its interest in the property and obtained a deed of trust from the Dedmores securing the new loan. E-Trade, however, did not close the HELOC and mistakenly failed to reconvey its interest in the Dedmores' property at the time of the refinance. Due to this oversight, the HELOC deed of trust remained in place and it acquired a position superior to the deed of trust held by World Savings.

In 2006, Wachovia purchased the assets of World Savings, including the Dedmores' loan. After acquiring the loan, Wachovia offered the Dedmores another HELOC for $55,000; the Dedmores took the deal.

In 2008, the Dedmores sought to sell their residence by means of a short sale. During this process, it was discovered that the World Savings deed of trust was, in fact, junior to the E-Trade HELOC deed of trust. Having previously acquired a title insurance policy with LTIC, World Savings tendered its claim to LTIC. As a result of this claim,

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Bernhardt, Mortgages, Deeds of Trust, and Foreclosure Litigation (Cont. Ed. Bar 4th ed. 2011) Debtor Strategies, § 7.12A, p. 532.)

[5] All further undesignated statutory references are to the Code of Civil Procedure.

LTIC paid off the HELOC, and took an assignment and reconveyance of the HELOC deed of trust from E-Trade. Thereafter, the Dedmores completed the short sale of their residence.

B. Collection Litigation

In July 2010, LTIC sued the Dedmores to recover the $60,000 it paid to E-Trade for the assigned HELOC. In its complaint, LTIC alleged two causes of action against the Dedmores, to wit: 1) money due on a promissory note; and 2) unjust enrichment. Following an unsuccessful summary adjudication motion by LTIC, the matter proceeded to a court trial.

1. Evidence at Trial

John Dedmore testified that he knew LTIC had made a mistake and that LTIC needed to "fix" it. He knew that the title issue had to be cleared up before the short sale could be finalized, and that as part of this process a "reconveyance" needed to occur. John, however, did not understand what the term "reconveyance" meant.

Lisa Biddle-Dedmore testified that in the process of short selling her residence, she first learned that LTIC had made a mistake and that LTIC needed to "clear that mistake" in order for the short sale to proceed. She testified that she "understood there was a title problem and that the second was recorded as the first." Lisa testified that she wanted the mistake fixed so that she and John could proceed with the short sale.

In September 2008, the Dedmores had received an offer of $331,000 for the short sale of their home. At the prospective buyers' request, the Dedmores moved out of the house; the Dedmores subsequently signed a one-year lease for a rental property. While the short sale was pending, the title problem was discovered. The title issue took nearly a year and a half to resolve. During this time, the subject property remained vacant and substantially decreased in value. The Dedmores continued to pay for the upkeep of the subject property, along with the rent for their new residence.

On January 15, 2010, the Dedmores were advised by their broker that the title had cleared and that they were able to proceed with the short sale, which occurred in March 2010. They knew only that the mistake had been "fixed." Lisa testified that she did not know what LTIC did to clear the title. At no time prior to the close of escrow on the short sale did anyone ever explain to the Dedmores how the problem was fixed. In fact, prior to the filing of the instant action, the Dedmores had no communications with LTIC or any of its agents.

Nancy Van Tassel, testified as a corporate representative for LTIC. Van Tassel was an attorney and had been in the title insurance business for 41 years. She explained that LTIC, as a title insurer, had a duty to defend World Savings or else risk a bad faith action. Van Tassel further explained that LTIC was not obligated to reconvey the deed. Rather, LTIC could have purchased the HELOC and then subordinated it, or made it junior, to the World Savings loan. Van Tassel opined that a reconveyance was necessary in the instant case, explaining that without one, the Dedmores would not have been able to short sell their home. According to Van Tassel, there was not enough equity in the house to cover both the HELOC and World Savings loan. Van Tassel testified that LTIC purchased the HELOC and reconveyed it to avoid foreclosure of the HELOC. She further explained that a foreclosure with the HELOC in first position would have "wiped out . . . completely" the World Savings loan, eliminating its secured interest in the property. Van Tassel conceded that the only reconveyance in the record was from E-Trade to LTIC. She explained that although this reconveyance did not constitute a reconveyance from LTIC to the Dedmores, it was "just a clerical situation," adding that "any title examiner looking at the public record would see the reconveyance for the deed of trust recited in the instrument, [and] know that it had been reconveyed."

2. Trial Court's Ruling

In its statement of decision, the trial court noted that it was tasked with deciding whether LTIC's reconveyance of the HELOC deed of trust was "done with the knowledge and consent" of the Dedmores and whether the Dedmores "knowingly waived the protections afforded to them in the anti-deficiency statutes." Relying on *Hibernia Savings & Loan Society v. Thornton* (1895) 109 Cal. 427 (*Hibernia*), *Simon v. Superior Court* (1992) 4 Cal.App.4th 63 (*Simon*), and *Pacific Valley Bank v. Schwenke* (1987) 189

Cal.App.3d 134 (*Schwenke*), the court ruled that LTIC "did not secure" the Dedmores' consent prior to releasing (i.e. reconveying) its security on the property.

The trial court further rejected LTIC's claim of unjust enrichment, explaining that LTIC's position "would nullify the purpose and protections underlying the anti-deficiency statutes." (Fn. omitted.) The court further reasoned that a " 'creditor is not allowed to circumvent the [anti-deficiency statute] by divesting himself of his security without the consent of the debtor.' " (Original emphasis omitted.) In so holding, the court expressly rejected the Dedmores' argument that the entire action was barred by section 580e, which prohibits the collection of deficiencies after short sales under certain specified conditions. The court explained that section 580e was not applicable in the instant case as it became effective after the subject short sale, and nothing suggested that section 580e was intended to apply retroactively.

In conclusion, the trial court ruled that LTIC failed to establish that it reconveyed the HELOC deed of trust with the consent of the Dedmores. And, as such, "the underlying note was retired and any personal action on that note is barred by the anti-deficiency statutes." Lastly, the court ruled that there was no evidence that the Dedmores "knowingly waived their protections under the anti-deficiency statutes."

II. DISCUSSION

A. General Background: Real Property Security Interests, Deficiency Judgments, and Short Sales

"California has an elaborate and interrelated set of foreclosure and antideficiency statutes relating to the enforcement of obligations secured by interests in real property. Most of these statutes were enacted as a result of 'the Great Depression and the corresponding legislative abhorrence of the all too common foreclosures and forfeitures [which occurred] during that era for reasons beyond the control of the debtors.' " (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1236 (*Rothwell*); see also *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 237 [noting "California's complex web of foreclosure and antideficiency laws].") Section 726 is part of that statutory framework and it operates alongside the antideficiency statutes. (*Walker* *v. Community Bank* (1974) 10 Cal.3d 729, 733.) Section 726 provides, in part, as follows: "There can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage upon real property or an estate for years therein, which action shall be in accordance with the provisions of this chapter." (§ 726, subd. (a).)

Pursuant to this statutory scheme, a creditor generally must rely on the security first before looking to the debtor to recover on a debt. This is the so-called "one form of action" rule. (See *Roseleaf Corp. v. Chierighino* (1963) 59 Cal.2d 35, 38, 39 (*Roseleaf*); see also § 726, subd. (a).) "That action is foreclosure, which may be either judicial or nonjudicial." (*Rothwell, supra*, 10 Cal.4th at p. 1236; see § 726, subd. (a).) "In a judicial foreclosure, if the property is sold for less than the amount of the outstanding indebtedness, the creditor may seek a deficiency judgment, or the difference between the amount of the indebtedness and the fair market value of the property, as determined by a court, at the time of the sale. [Citation.] However, the debtor has a statutory right of redemption, or an opportunity to regain ownership of the property by paying the foreclosure sale price, for a period of time after foreclosure. [Citations.] [¶] In a nonjudicial foreclosure, also known as a 'trustee's sale,' the trustee exercises the power of sale given by the deed of trust. [Citations.] Nonjudicial foreclosure is less expensive and more quickly concluded than judicial foreclosure, since there is no oversight by a court, '[n]either appraisal nor judicial determination of fair value is required,' and the debtor has no postsale right of redemption. [Citation.] However, the creditor may not seek a deficiency judgment. [Citation.] Thus, the antideficiency statutes in part 'serve to prevent creditors in private sales from buying in at deflated prices and realizing double recoveries by holding debtors for large deficiencies.' [Citation.]" (*Rothwell, supra,* 10 Cal.4th at p. 1236.)

"The purpose of the [one form of action] rule is to limit a secured creditor to a single suit to enforce its security interest and collect its debt and to compel the exhaustion of all security before a monetary deficiency judgment may be obtained against the debtor." (*National Enterprises, Inc. v. Woods* (2001) 94 Cal.App.4th 1217, 1221

(*Woods*).) However, "[t]here are a number of contexts in which section 726 is not applicable. For example, where nonjudicial foreclosure is pursued, there is no court 'action' and therefore section 726 does not apply, but in that case antideficiency legislation would preclude an action for a deficiency. (*Walker v. Community Bank, supra,* 10 Cal.3d at p. 736; *National Enterprises, Inc. v. Woods, supra,* 94 Cal.App.4th at p. 1232, fn. 9.) Another instance in which section 726 is not applicable is with respect to a sold-out junior lienor: ' "The prohibition against a deficiency judgment does not apply to the beneficiary of a junior deed of trust whose security has been rendered valueless by a foreclosure sale of the property under a senior encumbrance. After the security has been lost by the foreclosure sale of the senior lien, the junior lienor can sue the debtor directly on the promissory note, which is then considered unsecured." ' (*Bank of America v. Graves* (1996) 51 Cal.App.4th 607, 612 [(*Graves*)].) Similarly, section 726 does not apply where bringing a foreclosure action would be an idle act because the security has become worthless. ([]. *Schwenke[,supra,]* 189 Cal.App.3d [at p.] 140.) Finally, we note that a debtor can waive the protection of section 726 by failing to insist that the creditor first proceed against the security ([*Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d 991,] at p. 1005 [*Wozab*]), or by consenting to an arrangement in which the beneficiary of the trust deed relinquishes the security without retiring the note ([]*Schwenke, supra,* at pp. 141-142)." (*Bank of America, N.A. v. Roberts* (2013) 217 Cal.App.4th 1386, 1397-1398 (*Roberts*).)

In instances where the security is insufficient to make the creditor whole, the creditor's right to a judgment against the debtor personally for the deficiency may be limited or barred by specific statutory provisions. (*Roseleaf, supra*, 59 Cal.2d at pp. 38-39.)

For example, section 580b altogether bars deficiency judgments "after any sale" of property subject to a purchase money mortgage or deed of trust. (§ 580b, subds. (a), (b); see *Guild Mortgage Co. v. Heller* (1987) 193 Cal.App.3d 1505, 1510–1511 & fn. 7 (*Guild Mortgage Co*.).) Sections 580a and 726 concern nonjudicial and judicial foreclosures, respectively. The Legislature initially allowed the collection of deficiencies under those provisions (other than in purchase money transactions), but included in both the limitation that any recovery may not exceed the difference between the amount of the indebtedness and the fair market value at the time of the sale (irrespective of the actual sale proceeds). (§§ 580a, 726, subd. (b).) The purpose of such "fair value" provisions was "to prevent creditors from buying in at their own sales at deflated prices and realizing double recoveries by holding debtors for large deficiencies." (*Roseleaf, supra,* 59 Cal.2d at p. 40.) Although the right to obtain a deficiency was the same under both statutes, "it was to the creditor's advantage to exercise a power of sale rather than to foreclose by judicial action" because "judicial foreclosure was subject to the debtor's statutory right of redemption [citation], whereas the debtor had no right to redeem from a sale under the power." (*Id.* at p. 43.)

Section 580d was enacted in response to this perceived discrepancy in debtor protection after nonjudicial foreclosure sales. (*Roseleaf, supra,* 59 Cal.2d at p. 43 ["It seems clear . . . that section 580d was enacted to put judicial enforcement on a parity with private enforcement"].) That provision states in part: "No judgment shall be rendered for deficiency on a note secured by a deed of trust or mortgage on real property or an estate for years therein *has been sold by the mortgagee or trustee under power of sale contained in the mortgage or deed of trust*." (§ 580d, italics added.) As a consequence of section 580d, a creditor has an election of remedies: "If the creditor wishes a deficiency judgment," he must proceed via a *judicial* foreclosure, and "his sale is subject to statutory redemption rights. If he wishes a sale resulting in nonredeemable title," he may proceed via a nonjudicial foreclosure, but then "he must forego the right to a deficiency judgment. In either case the debtor is protected." (*Roseleaf, supra,* at pp. 43-44.) Read together, these antideficiency statutes "embrace a complete legislative scheme for foreclosure for defaulted debts." (*Guild Mortgage Co., supra,* 193 Cal.App.3d at p. 1511.)

Although California's antideficiency laws already limited or barred a creditor's ability to collect a deficiency in a number of situations, they did not do so expressly with respect to deficiencies arising after short sales until 2010. (*Roberts, supra*, 217 Cal.App.4th at pp. 1393-1394.) That year, the Legislature enacted section 580e, which became effective on January 1, 2011. (*Espinoza v. Bank of Am., N.A.* (S.D. Cal. 2011) 823 F.Supp.2d 1053, 1057-1058 (*Espinoza*).) In its current version, section 580e prohibits the collection of deficiencies after short sales under various specified conditions. "A 'short sale' is a sale of property for a price that is less than the amount of debt on the property, resulting in a shortfall of sales proceeds to pay off the existing loans." (4 Miller & Starr, Cal. Real Estate (3d ed. 2011, 2013–2014 Supp.) Deeds of Trust and Mortgages, § 10:66.10, p. 16; see Civ. Code, § 2943 [setting forth, inter alia, requirements pertaining to "short-pay agreement[s]" and related transactions].) A short sale generally requires the lender's approval. (See *Espinoza, supra,* 823 F.Supp.2d at p. 1055.) "While a lender takes a loss on a short sale, there are several benefits that make it more attractive than foreclosure. The savings can be huge when the lender avoids attorneys' fees, a judicial foreclosure, and the hassles of statutory or equitable redemption . . . . Further, the seller takes no money from the closing table. Most importantly, the property does not sit vacant and deteriorate, further reducing the value of the asset. The lender trades a slow moving or greatly depreciated asset for liquidity." (Miller, *Short Sales Overview with an Emphasis on Broker Issues; Until the market improves, more property owners will cut their losses and move on*, Practical Real Estate Lawyer (May 2010), Vol 26,No. 3, p. 9.)

In addition to the foregoing statutes, a body of common law has developed over the years to address a variety of situations for which the statutory provisions do not apply. For example, it is now well established that, notwithstanding the " 'one form of action rule,' " "when the value of the security has been lost through no fault of the creditor, the creditor may [immediately] bring a personal action on the debt." (*Graves, supra*, 51 Cal.App.4th at p. 611; see also *Cadlerock Joint Venture, L.P. v. Lobel* (2012) 206 Cal.App.4th 1531, 1539 (*Cadlerock*).) Attempting to first foreclose on the secured property in such an instance would be an "idle" act. (*Hibernia, supra,* 109 Cal. at p. 429.) This exception does not apply, however, if the creditor is itself responsible for the loss of the security. (*Ghirardo v. Antonioli* (1996) 14 Cal.4th 39, 48 (*Ghirardo*).) Thus, it has been long the rule that "a creditor may not unilaterally divest its security interest without the consent of the debtor." (*Cadlerock*, *supra*, 206 Cal.App.4th at p. 1539; *Hibernia, supra*, 109 Cal. at p. 429 [the mortgagee "will not be permitted without the consent of the mortgagor to release the mortgage for the purpose of bringing an action upon the note"].)

Similarly, the California Supreme Court has interpreted the antideficiency laws as protecting a debtor from a creditor's use of mechanisms that have the effect of evading or "thwarting the purpose of [the antideficiency laws] by a subterfuge." (*Freedland v. Greco* (1955) 45 Cal.2d 462, 468, see *id*. at p. 467 [where creditor gave debtor two notes covering only a single obligation, it could not, after default, nonjudicially foreclose on one note and then attempt to collect a deficiency judgment under the second note: "It is unreasonable to say the Legislature intended that section 580d could be circumvented by such a manifestly evasive device"].)

B. Section 726

LTIC contends that in light of the agreed short sale, in which it consented to the release of its lien, the Dedmores had knowledge of and consented to the reconveyance of the HELOC deed of trust. Thus, according to LTIC, section 726 was not applicable. We disagree.

Preliminarily, we note that the record does not include a reconveyance from LTIC to the Dedmores. Rather, it appears that the only recorded reconveyance was from E-Trade to LTIC. In common parlance, a reconveyance represents the extinguishment of a lien. (4 Miller & Star Cal. Real Estate, Ch. 10 Deeds of Trusts and Mortgages, § Reconveyance; definition.) Ordinarily, when a secured obligation has been paid and satisfied, the lien is discharged and a reconveyance issues. (*Ibid.*) Whether a creditor, following a reconveyance of secured interest *for less than full payment*, may retain an unsecured obligation against the debtor depends whether the debtor knowingly waived the protection of the one-action rule. (*Ibid.*) It is well established that a creditor may not unilaterally waive the security, but where the debtor has requested the creditor to reconvey without full satisfaction of the debt, the reconveyance is not a bar to a subsequent action for the unsecured deficiency (unless the debt is a purchase money obligation protected by the section 580b). (*Ibid.*)

Over a century ago in *Hibernia,* our Supreme Court held that when a secured creditor, "by his own act or neglect, deprives himself of the right to foreclose the mortgage, he at the same time deprives himself of the right to an action upon the note. He will not be permitted without *the consent of the [debtor]* to release the mortgage for the purpose of bringing an action upon the note." (*Hibernia, supra,* 109 Cal. at p. 429, italics added.) The court explained the bank in that case had been obligated to foreclose on the mortgage first. (*Id*. at pp. 429-430.)

Other decisions since *Hibernia* and the enactment of the antideficiency laws have reaffirmed the basic rule that a secured creditor may sue to collect on the debt directly if the security is lost through no fault of its own and foreclosure would thus be a futile act, but if the secured creditor destroys or devalues its security interest in the subject property through its own willful or negligent act, it may not then proceed directly against the debtor to collect the underlying debt—at least not without the debtor's consent. (See, e.g., *Ghirardo, supra,* 14 Cal.4th at p. 48 [lender who made a payoff demand, received the payment, and then reconveyed the deed of trust is barred from seeking under section 726 an additional sum he allegedly inadvertently failed to include in the payoff demand].

For example, in *Schwenke, supra,* 189 Cal.App.3d 134, the secured creditor, without the debtor's consent, released the security through a separate transaction with a third party (the debtor's business partner). (*Id.* at pp. 137-138.) Finding in favor of the debtor, the court held that "a creditor is not allowed to circumvent [section 726] by divesting himself of his security without the consent of the debtor." (*Id.* at p. 140.) "If he does so he has waived his right to proceed on the note." (*Ibid.*)

Similarly, in *Simon, supra,* 4 Cal.App.4th 63, one bank held two trust deeds on a single parcel of real property. The bank foreclosed on the first trust deed, and then attempted to sue the debtor directly on the second trust deed, arguing that, with regard to that deed, it was a sold-out junior lienholder. (*Id.* at pp. 70-71.) There, the bank was not considered a sold-out junior lienholder because, "[a]s the holder of both the first and second liens, [the bank] was fully able to protect its secured position." (*Id.* at p. 72.) By foreclosing on the first deed, the bank itself eliminated the security for the second deed. Thus, the court held that a deficiency action was barred. (*Ibid.*)

Hibernia, Schwenke, and *Simon* make clear that the *Hibernia* rule prevents secured creditors from acting, without the debtors' knowledge, to extinguish a security in order to circumvent the requirements for secured creditors to "rely on the security before enforcing the underlying debt." (*See Graves, supra,* 51 Cal.App.4th at p. 611.)

The trial court properly applied this line of authority in the case at bar. LTIC purportedly executed a reconveyance deed to the Dedmores, and thus lost its security interest in the HELOC. However, nothing in the record supports LTIC's assertion that it waived its interest while expressly continuing to hold the Dedmores liable for any unpaid balance. (*C.f. Espinoza, supra,* 823 F.Supp.2d at p. 1061 [holding *Hibernia* rule not applicable where, inter alia, deed used by bank to reconvey property in short sale "expressly states—in bold print—that it did not satisfy Plaintiffs' debt"].) Indeed, the first contact LTIC had with the Dedmores regarding the HELOC came in the form of the instant collection action.

Here, there is no evidence that the Dedmores agreed to remain liable for the HELOC. At trial, they each testified that they knew the title needed to be "fixed" and that a reconveyance was necessary. Contrary to LTIC's suggestion, this evidence does not establish that the Dedmores knowingly waived protection of the one-action rule. Although the Dedmores actively sought a short sale, nothing in the record establishes that they agreed to remain liable for the HELOC.

In this regard, the instant case is distinguishable from *Roberts, supra,* 217 Cal.App.4th 1386, a case which we asked the parties to address in supplemental briefing.[6]

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[6] We also asked the parties to address *Coker v. JP Morgan Chase Bank, N.A.* (2013) 218 Cal.App.4th 1, which held that the protections of the antideficiency law (§ 580b) for purchase money loans applied in a short sale. Following supplemental briefing by the parties, the California Supreme Court granted review in *Coker* (rev. granted Nov. 20, 2013). In any event, inasmuch as the instant case does not involve a purchase money, *Coker* is not relevant to our analysis.

In *Roberts, supra,* 217 Cal.App.4th 1386, the court held a lender was entitled to seek a deficiency judgment with respect to a HELOC following a short sale. (*Id.* at p. 1398.) There, the court determined that neither section 580e[7] nor section 726 barred the lender's action. Unlike here, in *Roberts*, it was "undisputed that [the borrower] agreed that, after the short sale was completed, she would remain obligated to repay the balance" of her HELOC. (*Roberts, supra,* 217 Cal.App.4th at p. 1392.) *Roberts* is also distinguishable from the instant case because there the HELOC was a second mortgage or junior lien. (*Id.* at p. 1390.) Here, the HELOC was actually the senior lien due to LTIC's negligence. Accordingly, LTIC was not in the position of a sold-out junior lien holder. And, as such, the exception to section 726 for sold-out junior lien holders discussed in *Roberts* is not applicable in the instant case.

Wozab, supra, 51 Cal.3d 991, upon which LTIC relies, is distinguishable. In *Wozab,* the court determined that even if a creditor takes steps that result in the loss or waiver of the security interest under section 726, that does not necessarily mean the creditor loses the right to sue to recover the debt—i.e., the security may be extinguished, but the debt is not. (*Wozab, supra,* 51 Cal.3d at p. 1004.) There, the bank lost its security interest by immediately taking improper setoffs against the debt from the debtors' bank accounts instead of foreclosing first. (*Id*. at p. 1001-1002, 1005.) Nevertheless, the court held that because the debtors acquiesced in the bank's decision not to foreclose, and accepted reconveyance of the trust deed, they could not be heard to complain, under section 726, that the bank failed to properly proceed against the security first, in an effort to prevent the bank from suing them on the underlying debt. (*Wozab*, *supra*, 51 Cal.3d at p. 1005.) To rule otherwise, the court observed, "would be to encourage gamesmanship," would constitute a "gross injustice" and would result in a windfall to the debtors. (*Ibid.*)

Contrary to LTIC's contention, *Wozab* does not stand for the proposition that mere acquiescence to a reconveyance precludes the application of the one form of action rule. Rather, the court held that an improper bank setoff did not result in forfeiture of the

[7] *Roberts* declined to apply section 580e retroactively. (*Roberts, supra,* 217 Cal.App.4th at p. 1395.)

underlying debt, where the debtors accepted the bank's reconveyance without ever requesting a refund of the setoff. (*Wozab*, *supra*, 51 Cal.3d at p. 1005.) The court explained that by doing so, the debtors "voluntarily relinquished the protection of the security-first rule. Put plainly, the bank erred in taking the setoff. For reasons unknown to us–[]—the [debtors] seized the opportunity to reclaim their deed of trust, preventing the bank from first proceeding against the security as required by section 726." (*Wozab*, *supra*, 51 Cal.3d at p. 1005.)

The gamesmanship at issue in *Wozab* is lacking in the instant case. Here, at the time the Dedmores commenced the short sale proceedings they were unaware of LTIC's error that caused the HELOC to be in the primary lienholder position. Moreover, the conduct of LTIC in fixing the mistake was entirely unilateral and without the consent of the Dedmores. Accordingly, Dedmores could not acquiesce to an error that they knew nothing about. (See *Wozab, supra,* 51 Cal.3d at p. 1005.) As explained *post*, there is no gross injustice to LTIC or a corresponding windfall to the Dedmores, by applying the one form of action rule in the instant case.

C. Unjust Enrichment

LTIC asserts that the equities are in its favor. In so arguing, LTIC is keen to remind us that in its role of title insurer it was obligated to act on World Savings' behalf and, as such, its reconveyance of the HELOC was required. Preliminarily, we note that the reconveyance was not LTIC's only option, it could have subordinated its lien to that of its insured. (See, e.g., *Lawyers Title Ins. Corp. v. Feldsher* (1996) 42 Cal.App.4th 41, 46-48.) If LTIC had done so, it might have taken on the role of a sold-out junior lien holder. (See *Roseleaf, supra*, 59 Cal.2d at pp. 39-44.) In addition, however, it could have sought and possibly obtained the Dedmores' express agreement to allow the reconveyance and to be personally liable on the debt. (See, e.g., *Espinoza, supra,* 823 F.Supp. at p. 1061.) As mentioned, LTIC did not pursue either alternative.

Moreover, LTIC's obligation to pay the HELOC arose from its own negligence, not from any conduct of the Dedmores. In excusing LTIC from application of the one form of action rule would, in essence, require the Dedmores to indemnify LTIC for its own negligence. To allow a negligent title insurer to seek repayment from innocent homeowners raises obvious public policy concerns. (See, e.g., *Wozab, supra,* 51 Cal.3d at p. 1005.)

Additionally, recovery under a theory of unjust enrichment is limited to circumstances where the enrichment was the result of mistake and where the person receiving the benefit knew of the mistake. (See *First Nationwide Savings v. Perry* (1992) 11 Cal.App.4th at 1657, 1664.) If the person receiving the benefit is unaware of the mistake, the enrichment cannot be said to be unjust. (*Ibid.*; *California Federal Bank v. Matreyek* (1992) 8 Cal.App.4th 125, 132-134.) Here, the Dedmores did not know the nature of the mistake in the title at the time they commenced the short sale proceedings. They were also completely unaware of how LTIC intended to fix the mistake.

Finally, requiring LTIC to comply with the one form of action rule did not result in a windfall to the Dedmores. Indeed, the record establishes quite the opposite. The Dedmores moved out of the subject property in September 2008 because they had agreed to a short sale. When the short sale was terminated due to the title problem, the Dedmores were burdened with the maintenance costs for their former residence, along with the lease obligations for their rented property. Moreover, during the time it took to clear the title, the Dedmores' property significantly dropped in value, which was reflected in the diminished sales price.

D. Sanctions on Appeal

Finally, we address the Dedmores' claim that LTIC should be sanctioned for filing a frivolous appeal. The Dedmores filed a motion for sanctions shortly after they submitted their respondents' brief on appeal. We deferred ruling on the merits of motion and now deny it.

"California courts have the inherent power to dismiss frivolous appeals. (*San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees' Retirement Assn.* (2004) 125 Cal.App.4th 343, 349; *People ex rel. Lockyer v. Brar* (2004) 115 Cal.App.4th 1315, 1318.) In addition, . . . section 907 provides that '[w]hen it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just.' California Rules of Court, rule 8.276(e)(1) allows the court to impose sanctions on a party or an attorney for the taking of a frivolous appeal or appealing solely to cause delay. An appeal is frivolous 'only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.]' [Citation.] The first standard is tested subjectively. The focus is on the good faith of appellant and counsel. The second is tested objectively. [Citation.] 'While each of the above standards provides *independent* authority for a sanctions award, in practice the two standards usually are used together "with one providing evidence of the other. Thus, the total lack of merit of an appeal is viewed as evidence that appellant must have intended it only for delay." [Citations.]' [Citation.]" (*In re Marriage of Gong and Kwong* (2008) 163 Cal.App.4th 510, 516.)

Ordinarily, a court will not impose sanctions because an appeal is based on a creative argument with little hope of success. "[C]ounsel must have the freedom to file appeals on their clients' behalf without the fear that an appellate court will second-guess their reasonable decisions." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 648.)

Here, while we agree that the trial court properly found in favor of the Dedmores, we reject the argument that the appeal is frivolous. The instant appeal involves complicated legal issues, prompting extensive briefing by both sides. Moreover, there is no indication the appeal was brought for purposes of harassment or delay. Accordingly, we deny the request by the Dedmores for imposition of sanctions on appeal. (Cal. Rules of Court, rule 8.276.)

III. DISPOSITION

The judgment is affirmed.[8] The Dedmores as the prevailing parties on appeal are entitled to recover their costs on appeal. (Cal. Rules of Court, rule 8.278.)

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[8] By reason of this holding, there is no need to address LTIC's claim that the Dedmores were not entitled to attorney fees and costs.

REARDON, J.

We concur:

RUVOLO, P. J.

HUMES, J.*

* Presiding Justice of the Court of Appeal, First Appellate District, Division One, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.