

A landowner borrowed \$100,000 from a lender and executed a valid mortgage on a commercial tract of land to secure the debt. The lender promptly recorded the mortgage.

A year later, the landowner conveyed the same tract to a developer by a deed that expressly stated that the conveyance was subject to the mortgage to the lender and that the grantee expressly assumed and agreed to pay the mortgage obligation as part of the consideration for the purchase. The mortgage was properly described in the deed, and the deed was properly executed by the landowner; however, because there was no provision or place in the deed for the developer to sign, he did not do so. The developer promptly recorded the deed.

The developer made the monthly mortgage payments of principal and interest for six payments but then stopped payments and defaulted on the mortgage obligation. The lender properly instituted foreclosure procedures in accordance with the governing law. After the foreclosure sale, there was a \$10,000 deficiency due to the lender. Both the landowner and the developer had sufficient assets to pay the deficiency.

There is no applicable statute in the jurisdiction other than the statute relating to foreclosure proceedings.

At the appropriate stage of the foreclosure action, which party will the court decide is responsible for payment of the deficiency?

- A. The developer, because he accepted delivery of the deed from the landowner and in so doing accepted the terms and conditions of the deed.
- B. The developer, because he is estopped by his having made six monthly payments to the lender.
- C. The landowner, because he was the maker of the note and the mortgage, and at most the developer is liable only as a guarantor of the landowner's obligation.
- D. The landowner, because the developer was not a signatory to the deed.

Explanation:

Transfer of mortgaged property

	Effect on buyer/transferee	Effect on seller
Subject to mortgage	Does not agree to pay loan & is not liable for debt	Remains solely liable for debt
Assumption of mortgage	Agrees to pay loan & is primarily liable for debt	Becomes secondarily liable as surety

A **mortgage** is an interest in real property given to secure a debt. The debtor may freely transfer mortgaged property (unless otherwise agreed), but the mortgage will remain attached to that property even after it is transferred to another. The grantee's (eg, buyer's) obligations with respect to that mortgage depend on whether he/she either:

took **subject to** the mortgage – did **not agree to pay** and is **not personally liable** for the debt *or*

assumed the mortgage – expressly **agreed to pay** and becomes **primarily liable** for the debt, while the **original debtor** becomes **secondarily liable** as a surety.

Here, the landowner's deed to the developer stated that the developer expressly *assumed* and *agreed* to pay the mortgage. And though the developer did not sign the deed, he assumed the mortgage by accepting delivery of that deed (**Choice D**). Therefore, the developer is primarily liable for the lender's \$10,000 deficiency. And since the developer has sufficient assets to pay the deficiency judgment, the landowner need not pay anything.

(Choice B) Because the developer assumed the mortgage once he accepted the landowner's transfer of the deed, he is liable for the deficiency judgment regardless of whether, or for how long, he had paid the mortgage.

(Choice C) Although the landowner was the maker of the [note and mortgage](#), the landowner (not the developer) became secondarily liable as a guarantor (ie, surety) when the developer assumed primary liability for that mortgage.

Educational objective:

A grantee assumes a mortgage when he/she expressly agrees to pay the debt. The grantee then becomes primarily liable for that debt, while the original debtor becomes secondarily liable as a surety.

References

Restatement (Third) of Prop.: Mortgages § 5.1 (assumption of mortgage).

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