

A man borrowed money from a lender and mortgaged land that he owned to secure repayment of the loan. Before he had completely repaid the loan, the man conveyed the land to an investor, who expressly assumed the loan. The note and mortgage did not contain a due-on-sale clause.

After the investor had made several payments on the loan, she defaulted on two payments. The lender notified the man and the investor of its intention to accelerate the loan pursuant to the terms of the note and mortgage unless the default was cured within 60 days. When neither the man nor the investor made the required payment, the lender accelerated the loan and initiated foreclosure proceedings, naming both the man and the investor as party defendants. The foreclosure sale resulted in a deficiency. The lender has sought a deficiency judgment against only the man, because the investor has become insolvent in the meantime.

Will the court likely find the man liable for the deficiency?

- A. No, because the investor's express assumption of the loan released the man from liability.
- B. No, because the lender must first seek to obtain a deficiency judgment against the investor.
- C. Yes, because even after the assumption, the man remains liable as a surety of the investor in the absence of a release from the lender.
- D. Yes, because the note and mortgage did not contain a due-on-sale clause.

Explanation:

A mortgage is an interest in real property given to a lender (mortgagee) to secure a debt. The debtor (mortgagor) can freely **transfer mortgaged property** to a grantee unless the mortgage states otherwise. After the transfer, the mortgage remains attached to the property and the **debtor remains personally liable** for the mortgage debt. But the grantee will become liable for the debt only if the grantee *expressly* agrees to assume the mortgage.

Assumption of a mortgage makes the **grantee primarily liable** for the debt and the **debtor secondarily liable** as a surety in the absence of a release from the lender **(Choice A)**. This means a lender can sue the grantee, the debtor, or both for any deficiency resulting from a foreclosure sale **(Choice B)**. If the debtor pays any amount of the deficiency, the debtor can seek reimbursement from the grantee.

(Choice D) A due-on-sale clause allows a lender to demand full payment of the remaining mortgage debt if the debtor sells the mortgaged property without the lender's permission. However, this type of clause (or the absence thereof) does not affect the debtor's liability to the lender for a deficiency judgment after a foreclosure sale.

Educational objective:

A grantee who *assumes* a mortgage is primarily responsible for a deficiency from a foreclosure sale, and the debtor is secondarily liable as a surety in the absence of a release from the lender. The lender can sue the grantee, the debtor, or both to recover the deficiency amount, and the debtor can seek reimbursement from the grantee.

References

Restatement (Third) of Property: Mortgages § 5.1 (Am. Law Inst. 1997) (assumption of a mortgage).

55 Am. Jur. 2d Mortgages § 967 (2019) (deficiency judgments).

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Transfer of mortgaged property

