

A man borrowed money from a bank and executed a promissory note for the amount secured by a mortgage on an office building that he owned. Several years later, the man sold the building. As specified in the contract of sale, the deed to the buyer provided that the buyer agreed "to assume the existing mortgage debt" on the building.

Subsequently, the buyer defaulted on the mortgage loan to the bank, and appropriate foreclosure proceedings were initiated. The foreclosure sale resulted in a deficiency.

There is no applicable statute.

Is the buyer liable for the deficiency?

- A. No, because even if the buyer assumed the mortgage, the man is solely responsible for any deficiency.
- B. No, because the buyer did not sign a promissory note to the bank and therefore has no personal liability.
- C. Yes, because the buyer assumed the mortgage and therefore became personally liable for the mortgage loan and any deficiency.
- D. Yes, because the transfer of the mortgage debt to the buyer resulted in a novation of the original mortgage and loan and rendered the buyer solely responsible for any deficiency.

Explanation:

Mortgage documents are used to convey a lender (ie, mortgagee) an interest in real property to secure a debt. The debtor (ie, mortgagor) can freely **transfer mortgaged property** unless the parties agree otherwise. After the transfer, the mortgage remains attached to the property and the debtor remains personally liable for the mortgage debt. But the **grantee's obligations** depend on whether the grantee:

took **subject to the mortgage** – in which case, the grantee does not agree to pay and is **not personally liable** for the debt *or*

assumed the mortgage – in which case, the grantee *expressly* agrees to pay and becomes **personally liable** for the debt, while the **debtor** becomes **secondarily liable** as a surety.

When a grantee *assumes* the mortgage (as seen here) and defaults on the mortgage loan, the grantee is primarily liable for any deficiency from the foreclosure sale **(Choice**

B). Therefore, the buyer (grantee) is primarily liable for the deficiency here **(Choice A)**.

(Choice D) A novation is a separate agreement between a lender and debtor in which (1) the lender agrees to substitute a new party for the debtor and (2) the debtor is excused from liability for the debt. Therefore, merely transferring the mortgage debt to another does not create a novation.

Educational objective:

A party who assumes a mortgage expressly agrees to become personally liable for the mortgage debt. That means the party assuming the mortgage is primarily liable for paying any deficiency resulting from a foreclosure sale and the debtor is secondarily liable as a surety.

References

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

Copyright © 2014 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.

Transfer of mortgaged property

