A man owned land. He took out a loan that was secured by a mortgage on the land. The man had personal liability on the loan.

The man sold the land to a purchaser, who expressly assumed the mortgage debt. The purchaser failed to make two installment payments. To prevent default and foreclosure, the man paid the overdue installments. After making the payments, the man sued the purchaser for reimbursement.

Is the man likely to prevail?

A. No, because the man did not initiate foreclosure proceedings before seeking reimbursement.

B. No, because the man was personally liable on the loan.

C. Yes, because the law of suretyship permits the man to seek reimbursement.

D. Yes, because the man's transfer of the land discharged him from any personal liability on the loan.

Explanation:

Suretyship rights

(recourse for secondary obligor)

Specific performance	Court order requiring primarily obligor to specifically perform all or part of his/her contractual duties
Reimbursement	Repayment for secondary obligor fulfilling all or part of primary obligor's underlying contractual duties
Restitution	Repayment to secondary obligor to avoid unjust enrichment to primary obligor even when no duty exists
Subrogation	Secondary obligor given rights of primary obligor & is protected as though an assignment of rights occurred

A mortgagor (ie, borrower) is generally free to **transfer mortgaged property** to another (ie, transferee). After the sale, the mortgage remains attached to the property and the **mortgagor remains personally liable** for the mortgage debt in the absence of a release by the mortgagee (eg, bank). However, the transferee's obligations with respect to that debt depend on whether the transferee:

took **subject to** the mortgage – in which case, the **transferee** is ***not* personally liable** for the debt *or*

agreed to **assume the mortgage** – in which case, the **transferee** becomes **primarily liable** for the debt and the **mortgagor** becomes **secondarily liable** as a surety.

If a **transferee defaults** on an *assumed* mortgage and the **mortgagor then pays** that debt, the mortgagor can **seek reimbursement** from the transferee under the law of suretyship.

Here, the purchaser expressly *assumed* the man's mortgage debt, so the purchaser became primarily liable for the debt and the man became secondarily liable as a surety **(Choice D)**. The purchaser then defaulted by failing to make two installment payments. Since the man paid the overdue installments, the law of suretyship permits him to seek reimbursement from the purchaser. As a result, the man is likely to prevail.

(Choice A) A foreclosure proceeding can be initiated only by the mortgagee or the current holder of the mortgagee's security interest—not the mortgagor (eg, the man).

(Choice B) The right to seek reimbursement under the law of suretyship requires that the man be personally liable on the loan, which he was as a surety. Therefore, the man's personal liability provides a basis for him to *prevail*.

Educational objective:

When a mortgagor transfers mortgaged property to someone who assumes the mortgage, the transferee becomes primarily liable for the mortgage and the mortgagor becomes secondarily liable as a surety. So if the mortgagor pays the mortgage debt after the transferee defaults, the mortgagor can seek reimbursement.

References

Restatement (Third) of Property: Mortgages § 5.3 (Am. Law Inst. 1997) (assumption of a mortgage).

Restatement (Third) of Suretyship & Guaranty § 22 (Am. Law Inst. 1996) (surety's right to reimbursement).