A businessman executed a promissory note for $200,000 to a bank, secured by a mortgage on commercial real estate owned by the businessman. The promissory note stated that the businessman was not personally liable for the mortgage debt.

One week later, a finance company obtained a judgment against the businessman for $50,000 and filed the judgment in the county where the real estate was located. At the time the judgment was filed, the finance company had no actual notice of the bank's mortgage.

Two weeks after that filing, the bank recorded its mortgage on the businessman's real estate.

The recording act of the jurisdiction provides: "Unless the same be recorded according to law, no conveyance or mortgage of real property shall be good against subsequent purchasers for value and without notice or against judgment creditors without notice."

The finance company sued to enforce its judgment lien against the businessman's real estate. The bank intervened in the action, contending that the judgment lien was a second lien on the real estate and that its mortgage was a first lien.

Is the bank's contention correct?

A. No, because the businessman was not personally liable for the mortgage debt, and the mortgage was therefore void.

B. No, because the judgment lien was recorded before the mortgage, and the finance company had no actual notice of the mortgage.

C. Yes, because a mortgage prior in time has priority over a subsequent judgment lien.

D. Yes, because the recording of a mortgage relates back to the date of execution of the mortgage note.

Explanation:

The **priority of mortgages** and other liens is generally determined by their **recording dates**—not by the order in which those interests were created **(Choices C & D)**. **Purchase-money mortgages** (PMMs), however, have **super priority** over all other liens—whether or not the PMM or those liens are recorded—because PMMs **secure the purchase price** of the mortgaged property.

Here, the businessman mortgaged commercial real estate he *already owned* to the bank (not a PMM). One week later, the finance company filed a judgment lien against the real estate in a jurisdiction whose recording act expressly protects judgment creditors who lack notice.* Since the judgment lien was recorded *before* the mortgage, the finance company lacked constructive (ie, record or inquiry) notice. Therefore, the judgment lien has first priority because the finance company also lacked actual notice of the bank's prior mortgage.

*Most recording acts protect only subsequent purchasers for value who lack notice of prior competing interests in the property—not judgment creditors since they do not pay value for an interest in the property.

(Choice A) A mortgage is enforceable even if no one is personally liable for payment of the mortgage debt.

Educational objective:

The priority of mortgages (and other liens) is generally determined by the order of recording unless the mortgage enjoys super priority as a purchase-money mortgage.

References

Restatement (Third) of Property: Mortgages § 7.1 cmt. a (Am. Law Inst. 1997) (noting that recording acts may alter the priority of mortgages differently than their chronological creation).

Lien priority on real property