A woman borrowed $100,000 from a bank and executed a promissory note to the bank in that amount. As security for repayment of the loan, the woman's brother gave the bank a mortgage on a tract of land solely owned by him. The brother did not sign the promissory note.

The woman subsequently defaulted on the loan, and after acceleration, the bank instituted foreclosure proceedings on the brother's land. The brother filed a timely objection to the foreclosure.

Will the bank succeed in foreclosing on the tract of land?

A. No, because a mortgage from the brother is invalid without a mortgage debt owed by him.

B. No, because the bank has an equitable mortgage rather than a legal mortgage.

C. Yes, because the bank has a valid mortgage.

D. Yes, because the bank is a surety for the brother's mortgage.

Explanation:

Mortgage documents

Mortgage deed	A writing that conveys an interest in collateral to secure a debt
Promissory note	A formal "IOU" in which the borrower promises to repay the debt according to the listed terms

A **mortgage** is a lien against real property given to secure repayment of a debt. If the **debt** (evidenced by a promissory note) **belongs** to **someone other than the mortgagor**, then the mortgagor is not personally liable for repaying that debt.* However, the **mortgagee can foreclose** on the mortgaged property if the debtor defaults.

Here, the woman received a $100,000 loan from the bank, which was evidenced by a promissory note. The brother did not sign the promissory note, so he is not personally liable for the debt. But since he used his tract of land to secure repayment of the woman's debt, the bank has a valid mortgage on that land. Therefore, the bank will succeed in foreclosing on the brother's land after the woman defaulted on the loan.

*The mortgagor would be personally liable for the debt if the mortgage itself contained language to that effect.

(Choice A) The fact that the mortgage debt is owed by someone else does not render the mortgage from the brother invalid. It merely means that the brother is not personally liable for repaying the mortgage debt.

(Choice B) An equitable mortgage is a mortgage alternative that arises when a party takes possession of the original deed to property with the intent that the property serve as security for a debt (not seen here).

(Choice D) A surety is a party who guarantees to pay another's debt in the event that person fails to do so. Here, the bank has not agreed to pay the debt for the woman if she defaults, so the bank is not a surety.

Educational objective:

A mortgage can be given to secure repayment of a debt owed by someone other than the mortgagor, and the mortgagee can foreclose on the mortgaged property if the debtor defaults.

References

Restatement (Third) of Property: Mortgages § 1.3 (Am. Law Inst. 1997) (mortgages securing obligations of nonmortgagors).