A man obtained a bank loan secured by a mortgage on an office building that he owned. After several years, the man conveyed the office building to a woman, who took title subject to the mortgage. The deed to the woman was not recorded. The woman took immediate possession of the building and made the mortgage payments for several years.

Subsequently, the woman stopped making payments on the mortgage loan, and the bank eventually commenced foreclosure proceedings in which the man and the woman were both named parties. At the foreclosure sale, a third party purchased the building for less than the outstanding balance on the mortgage loan. The bank then sought to collect the deficiency from the woman.

Is the bank entitled to collect the deficiency from the woman?

A. No, because the woman did not record the deed from the man.

B. No, because the woman is not personally liable on the loan.

C. Yes, because the woman took immediate possession of the building when she bought it from the man.

D. Yes, because the woman was a party to the foreclosure proceeding.

Explanation:

A **mortgage** is an interest in real property given to a lender (ie, mortgagee) to secure a debt. The debtor (ie, mortgagor) can freely **transfer the mortgaged property** to a grantee unless the mortgage states otherwise. After the conveyance, the mortgage remains attached to the property and the **debtor remains personally liable** for the debt secured by the mortgage. 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 agrees to pay and becomes **primarily** liable for the debt, and the debtor becomes secondarily liable as a surety.

Therefore, if a lender forecloses and the sale results in a **deficiency**—ie, the proceeds are insufficient to satisfy the debt—the lender **cannot collect** that deficiency from a grantee who took the property **subject to the mortgage**.

Here, the man (debtor) mortgaged his office building to a bank (lender). He then conveyed the office building to a woman, who took title *subject to* the man's mortgage. As a result, the woman did not assume personal liability for the man's mortgage debt. This means that the bank cannot collect the deficiency from the foreclosure sale from the woman—regardless of whether she took possession of the property or was a party to the foreclosure proceeding **(Choices C & D)**.

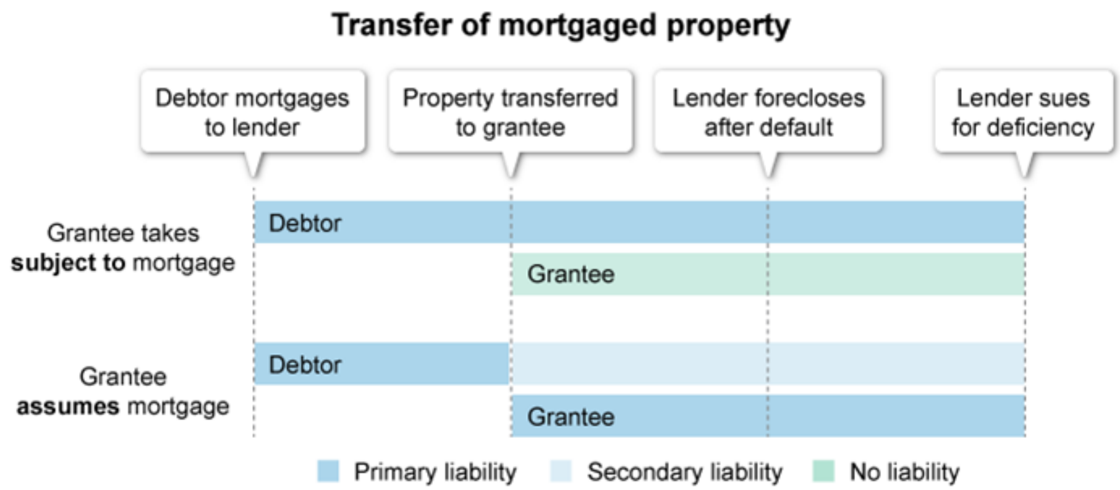
(Choice A) Recording a deed in the land records puts others on record notice of a person's interest in the land. But it has no impact on a lender's right to foreclosure or ability to collect a deficiency.

Educational objective:

A grantee who acquires property *subject to* a mortgage is not personally liable for the mortgage debt and therefore is not liable for any deficiency following a foreclosure sale.

References

Restatement (Third) of Property: Mortgages § 5.2 (Am. Law Inst. 1997) (receipt of property subject to mortgage).


Transfer of mortgaged property
Debtor mortgages to lender
Property transferred to grantee
Lender forecloses after default
Lender sues for deficiency
Grantee takes subject to mortgage
Debtor
Grantee
Grantee assumes mortgage
Debtor
Grantee
Primary liability
Secondary liability
No liability