

A woman borrowed \$500,000 from a bank. She signed a note to the bank and secured repayment of the loan with a mortgage on a commercial tract that she owned. The note and mortgage did not contain a due-on-sale clause. Several months later, the woman conveyed the commercial tract to her business partner "subject to a mortgage to the bank, which the grantee assumes and agrees to pay." The business partner then conveyed the tract to a buyer "subject to an existing mortgage to the bank." Each grantee received a copy of the note and the mortgage.

After the buyer made several timely payments, no further payments were made by any party. The bank initiated a foreclosure action, naming the woman, the business partner, and the buyer as defendants. The foreclosure sale resulted in a deficiency.

There are no applicable statutes.

Against whom is the bank entitled to collect a deficiency judgment?

- A. The business partner and the buyer.
- B. The woman.
- C. The woman and the business partner.
- D. The woman, the business partner, and the buyer.

Explanation:

A debtor is free to **sell mortgaged property** unless the mortgage agreement states otherwise. After the sale, the mortgage remains attached to the property and the debtor remains **personally liable** for the debt secured by the mortgage. But the **buyer's obligations** with respect to the mortgage depend on whether he/she:

took the property **subject to the mortgage** – in which case the buyer does *not* agree to pay, and is **not personally liable** for the debt (even if the buyer makes payments on the loan)
or

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

Therefore, if a creditor forecloses on mortgaged property and the sale results in a **deficiency**—ie, the proceeds are insufficient to satisfy the debt—the creditor can obtain a deficiency judgment against the *original debtor* and/or any party who has *assumed* the mortgage.

Here, the woman mortgaged the commercial tract to a bank and then conveyed the tract to her business partner, who *assumed* the mortgage. The business partner then conveyed the tract to the buyer, who took it *subject to* the mortgage. Although the buyer made payments on the loan, this did not constitute an assumption of liability for the debt. As a result, the bank is entitled to collect a deficiency judgment only against the woman and the business partner **(Choices A, B & D)**.

Educational objective:

When a foreclosure sale results in a deficiency, the creditor can obtain a deficiency judgment against (1) the original debtor and/or (2) any party who has assumed the mortgage.

References

55 Am. Jur. 2d Mortgages § 967 (2019) (deficiency judgments).

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

