

Exam:

Exam Form:

C2502

Response

1) Carlos and Lender's Mortgages**Alice's Initial Mortgage**

A mortgage is a device that is often used to purchase a house or make improvements on a house and attaches title to the mortgaged property in the event the mortgagor fails to make payments on the mortgage. Generally, mortgages must be satisfied at the sale of the house if it is sold prior to the mortgage being extinguished through timely repayments.

Here, Allison bought a house with proceeds from a mortgage loan by Lender which she intended to repay when she re-sold the house. However, prior to repayment, Allison agreed to sell the house to Barry at market price prior to her listing it for sale, at which point Lender's mortgage was unrecorded. Because the mortgage was not recorded, Allison's sale to Barry did not transfer to Barry.

Therefore, the mortgage did not pass to Barry because it was unrecorded prior to sale.

Race-Notice Jurisdiction

Under a race-notice recording jurisdiction, a deed or mortgage is valid when first recorded through the first in time, first in right theory. Race-notice jurisdictions hold that recording is sufficient notice and subsequent sellers and buyers are deemed to have sufficient notice when a deed or mortgage is recorded.

Here, although Barry and Carlos did not know of Lender's mortgage, it was recorded prior to contract sale. Barry extinguished his liability on the deed because he recorded his deed before Lender recorded their mortgage on the house. Under a race-notice jurisdiction, the first recorded deed or mortgage is superior and extinguishes the subsequent recording. Here, Barry recorded prior to Lender and thus Barry's liability on the mortgage extinguished.

Bona Fide Purchaser for Value (BFP)

A BFP is a purchaser for value that does not have notice of a mortgage or deed. Generally, BFP's are protected from claims against them, however in race-notice jurisdictions a BFP is liable for a mortgage on a property when it was recorded prior to contract formation because actual notice is satisfied.

Here, Carlos is a BFP because he is purchasing the house from Barry and does not have actual notice of any mortgages on the property. As mentioned above, Carlos is in a race-notice jurisdiction and here BFP's are not protected from recorded mortgages on a land when they are recorded prior to contract formation. Here, Carlos and Barry both were unaware of Lender's mortgage on the house, however Lender recorded this mortgage weeks prior to Barry and Carlos entering into the contract. Because Barry recorded his deed to the house in his sale with Allison prior to Lender's mortgage recording, the mortgage does not transfer to Barry. Further, Barry's sale to Carlos would likely not include the original mortgage since Barry's deed was recorded prior to the mortgage.

Therefore, Carlos took title to the house free and clear of Lender's mortgage.

Purchase Money Mortgage (PMM)

A PMM is a type of mortgage that always has seniority to other lenders and a PMM must be repaid prior to paying junior lender's fees.

Lender may argue that their mortgage reigns superior as a PMM on the property. However, there is no evidence the mortgage was recorded, and rather Barry's deed was recorded prior to Lender's recording of the mortgage. Additionally, the sale of the house to Barry occurred prior to Lender's recording. Lender's mortgage is not a PMM even though Alison intended to repay the mortgage prior to sale of the house.

Therefore, there is no applicable defense Lender may raise to make Carlos liable.

Overall, Carlos took title to the house free and clear of Lender's mortgage.

2) Carlos v. Barry

General Warranty Deed

A general warranty deed is one of six types of deeds and provides a buyer with the guarantee of marketable title that is free of encumbrances including mortgages that are unrecorded. Additionally, a general warranty deed provides a buyer with the most protection of any deed and makes the seller liable for a failure to deliver title with this deed.

Here, Barry and Carlos entered into a contract for the sale of the house and at the time, Barry and Carlos both did know of the Lender's mortgage. Under a general warranty deed, the buyer is protected from any encumbrances on the land. However, as mentioned above, the mortgage would not transfer to Carlos because it was not recorded.

However, Carlos may raise against Barry for his failure to provide a general warranty deed through the failure to provide marketable title regarding the removal of the air conditioning. This removal may allow Carlos to recover damages against Barry because there duty of general warranty was breached.

Therefore, Carlos may successfully raise the failure to provide general warranty deed and would be entitled to any damages that may result due to this land sale contra

3) Barry's liability to Carlos Regarding the Air Conditioning Unit

Warranty of Habitability

Under a general warranty deed, a seller is required to provide the warranty of habitability which provides that a house must be habitable for residency. Habitability requires that a house be temperature controlled through air conditioning in areas where there is natural heat and heating during the winter.

Here, the day before the sale of Barry's house to Carlos, Barry removed the air-conditioning unit that was originally installed by Allison. Allison installed the air conditioning unit to improve ventilation in the kitchen. Although the air conditioning unit was not mentioned in contract for land sale between Barry and Carlos, an implication of air conditioning and appropriate ventilation are required under the warranty of habitability. Barry's intentional removal of this fixture would likely be a violation of the warranty of habitability because Carlos may be able to successfully argue that the air conditioning provides requisite ventilation.

Therefore, Barry's removal of the air conditioner will likely be a violation of the warranty of habitability.

Thus, Barry may be liable to Carlos for the value of the air conditioning unit under this warranty.

Warranty of Assurances

Under the warranty of assurances, the seller is required to provide the buyer with the appropriate assurances that the house is marketable for sale. As a part of this warranty, a seller may not intentionally misrepresent the house for sale during contract formation and deed delivery by changing any of the items included in the sale even if they are not explicitly stated in the contract.

Here, Barry was able to sell the house to Carlos at a profit. Under their contract agreement, there was no clause mentioning the inclusion of the air conditioning unit. However, under this warranty, Barry as a seller has a duty to provide the warranty of assurances and ensure that the contract reflects the deed.

Therefore, Barry would likely be liable to Carlos for the air conditioning.

Assumption of Fixtures

Fixtures are items that are physically attached to the house at the time of contract formation. Generally, furniture is not categorized as a fixture because it is not physically attached to the house. However, additional items such as ventilation added throughout the house is deemed to be a fixture because they are attached to the house and are generally intended to stay attached and thus are included in the house at contract formation.

Here, the air conditioning attached by Allison when she initially purchased the house and the lot on which it sits to improve the ventilation. Allison installed the air conditioning and did not simply place a fan in the home. Contrasting the air conditioning with furniture such as a fan, illustrates that the air conditioning was intended to be a fixture as it was screwed into a bracket and attached to an exterior wall. Fixtures are included in the house as it is for sale. Here, the air conditioning is a fixture because it is physically attached to the house.

Therefore, Barry would likely be liable for the value of the air conditioning to Carlos.

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Allison bought a house and the lot on which it sits (the house) with the proceeds of a mortgage loan made by New Lending Corp. (Lender). Allison intended to repay the loan when she resold the house. To improve ventilation in the kitchen, Allison installed an air conditioning unit screwed to a bracket mounted through an exterior wall. Impressed with Allison's improvements, Barry offered to buy the house at market price before Allison listed it for sale. Allison and Barry agreed on the terms and quickly finalized the sale of the house. Due to this haste, however, Lender did not record its mortgage until after Barry had recorded his deed. As a result, Lender's mortgage was not satisfied from the proceeds of the sale as planned. Soon thereafter, Barry was able to sell the house at a profit to Carlos. Barry and Carlos did not actually know of Lender's mortgage when their sale of the house was finalized, although the mortgage had been recorded weeks earlier. Barry gave Carlos a general warranty deed. The day before Barry's sale of the house to Carlos was finalized, Barry removed the air conditioning unit. Nothing was said about the unit in the parties' contract of sale. Shortly after Carlos took possession of the house, Lender commenced an action against Carlos for repayment of the mortgage. The house is located in a jurisdiction that has a "race-notice" recording act and indexes title documents by parcel numbers assigned to each lot.