

**EXHIBIT E**

LEXSEE 1978 OHIO APP LEXIS 10229

**Scioto Savings Association, Plaintiff-Appellee, v. James A. Porter, and Anna M. Porter, Defendants-Appellees, John R. Sampson Company, Defendant-Appellant**

No. 77AP-788

Court of Appeals of Ohio, Tenth Appellate District, Franklin County

*1978 Ohio App. LEXIS 10229*

March 2, 1978

**NOTICE:** PURSUANT TO RULE 2(G) OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS, UNPUBLISHED OPINIONS MAY BE CITED SUBJECT TO CERTAIN RESTRAINTS, LIMITATIONS, AND EXCEPTIONS.

**DISPOSITION:** [\*1]*Judgment Affirmed***CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant, a loan's original debtor, appealed from a judgment of the trial court (Ohio), which granted plaintiff creditor's motion for summary judgment in the creditor's action on a mortgage that had been assumed by defendant transferees.

**OVERVIEW:** The debtor took out a mortgage that was ultimately assumed by the transferees. However, pursuant to the assumption, the creditor refused to release the debtor from personal liability for the mortgage. In response to the creditor's suit, the debtor argued that the assumption by the transferees constituted a novation that released the debtor from his obligation on the note. On review, the court affirmed the trial court's order granting the creditor's motion for summary judgment. In reaching its conclusion, the court held that the parties did not intend to extinguish the original debt. Additionally, while the terms of the note were modified, they changed only as to the transferees. Thus, there was no novation. In the absence of a novation, under both the law and contract the court held that the debtor was still liable for the

mortgage.

**OUTCOME:** The court affirmed the judgment in favor of the creditor in the action on the note.

**LexisNexis(R) Headnotes*****Contracts Law > Performance > Novation***

[HN1] A novation may be defined as the substitution of a new obligation for an old one, which is thereby extinguished. Not only must there be an obligation that is extinguished but that, the parties at the time the novation took place intended a novation and both parties consented thereto.

***Real Property Law > Financing > Mortgages & Other Security Instruments > Transfers > General Overview***

[HN2] In the absence of a novation, when one party assumes a mortgage, the original mortgagor is still liable to the mortgagee.

**COUNSEL:**

Welch, Danner & Innis Co., LPA, Mr. James W. Wheeler, of Counsel, for Plaintiff-Appellee

Mr. John E. Palcich, for Defendant-Appellant

**JUDGES:**

STRAUSBAUGH, J., WHITESIDE and McCORMAC, JJ., concur.

**OPINION BY:**

STRAUSBAUGH

**OPINION:**

DECISION

STRAUSBAUGH, J.

This is an appeal by defendant from an order of the Common Pleas Court granting summary judgment to the plaintiff.

The facts indicate that on January 20, 1966, defendant executed a promissory note secured by a mortgage on real estate in favor of the plaintiff. The loan was later transferred to and assumed by Pride Properties, and still later transferred to and assumed by James A. Porter and Anna M. Porter. Each time the note was assumed, the transfer agreement contained the following language:

"In consideration of approval of said transfer by Scioto Savings Association the undersigned expressly agrees that the rate of interest on said note and mortgage shall be increased to (eight (8%) percent on the first transfer, nine (9%) percent on the second transfer), effective from October 1, 1974, irrespective of any provisions of the note and mortgage to the contrary. All other terms and conditions remain the [\*2] same."

Also in each transfer agreement was the following statement:

"\* \* \* Scioto Savings Association hereby consents to the transfer and assumption of the above loan as requested, without, however, releasing from personal liability anyone already liable for payment thereof."

Appellant's single assignment of error is:

"The trial court committed prejudicial error in rendering summary judgment in favor of the Plaintiff, Scioto Savings Association and against the Defendant, John R. Sampson Company on the original obligation and said judgment is contrary to law."

The basic issue raised by this appeal is whether the assumptions of the loan by Pride Properties and the Porters constituted a novation thus releasing the original obligor, the defendant herein, from liability on the note.

In *Baker v. All States Life Ins. Co.* (1950), 58 *Ohio Law Abs.* 366, this court held at page 374:

[HN1] "A novation may be defined as the substitution of a new obligation for an old one, which is thereby extinguished."

This court further observed that not only must there be an obligation that is extinguished but that, "\* \* \* the parties at the time the novation took place intended a novation [\*3] and both parties consented thereto."

An examination of the transfer agreement indicates that Scioto Savings did not intend to extinguish the original debt. The transfer states: "Scioto Savings hereby consents to the transfer and an assumption of the above loan as requested, without, however, releasing from personal liability anyone already liable for payment thereof." The language is clear, Scioto Savings did not intend to extinguish the original debt but intended to render both the original obligor and the transferee liable on the note.

Defendant contends that the change in the amount of interest due on the note upon each transfer, constituted a modification of the agreement, therefore a novation ensued. This is contrary to law and the facts. The agreement was modified, but only for the transferees. The defendant's agreement was unchanged, and was not extinguished. The trial court properly found defendant liable for the interest rate set out in the initial agreement.

Intent being the issue, the evidence shows the parties did not intend to extinguish the original debt, therefore, the parties did not intend to effect a novation. [HN2] In the absence of a novation, when one party [\*4] assumes a mortgage, the original mortgagor is still liable to the mortgagee. *Harris v. DePaulina* (1931), 40 *Ohio App.* 57.

For the foregoing reasons, the judgment of the trial court is affirmed.