

A landowner in fee simple mortgaged the land to an investor to secure repayment of the loan she made to him. The loan was due at the end of the growing season of the year in which it was made. The landowner maintained and operated an orchard on the land, which was his sole source of income. Halfway through the growing season, the landowner experienced severe health and personal problems and, as a result, left the state; his whereabouts were unknown. The investor learned that no one was responsible for the cultivation and care of the orchard on the land. She undertook to provide, through employees, the care of the orchard and the harvest for the remainder of the growing season. The net profits were applied to the debt secured by the mortgage on the land.

During the course of the harvest, the landowner's friend, a business invitee, was injured by reason of a fault in the equipment used. Under applicable tort case law, the owner of the premises would be liable for the friend's injuries. The friend brought an appropriate action against the investor to recover damages for the injuries suffered, relying on this aspect of tort law.

In such lawsuit, for whom should the court render judgment?

- A. The friend, because the investor was a mortgagee in possession.
- B. The friend, but only if the state is a title theory state, because in other jurisdictions a mortgagee has no title interest but only a lien.
- C. The investor, because she acted as agent of the landowner only to preserve her security interest.
- D. The investor, but only if the mortgage expressly provided for her taking possession in the event of danger to her security interest.

Explanation:

Mortgage theories

Lien theory (majority rule)	Lender receives security interest in property. Mortgagor retains title & possession unless lender forecloses.
Title theory	Lender receives legal title & mortgagor retains right of possession. Title reverts to mortgagor once debt is paid.
Intermediate theory	Mortgagor retains title & possession until default, then full title passes to lender without foreclosure.

A **mortgage** is a lien against real property given to secure a debt. Under the lien theory of mortgages (adhered to by a majority of jurisdictions), a mortgage creates a security interest only and confers no right to possession of the mortgaged property. Regardless of the applicable mortgage theory, however, the **mortgagee is entitled to take possession if the mortgagor abandons** the mortgaged property (**Choice B**). A mortgagee who does so incurs **liability** as if he/she were the owner (eg, tort liability to anyone injured on the property).

Here, the landowner mortgaged land to the investor. When the landowner abandoned the property due to severe health and personal problems, the investor rightfully took possession—regardless of whether the mortgage expressly permitted her to do so (**Choice D**). And since the facts stipulate that the owner of the premises would be liable for the friend's injuries, the investor is liable. The court should therefore render judgment for the friend.

(**Choice C**) In lieu of taking possession, most mortgagees attempt to preserve their security interest by getting a court-appointed receiver (ie, agent) to manage the property. This shields the mortgagee from the liability risks of being a mortgagee in possession. But no receivership was created on these facts.

Educational objective:

The mortgagee can take possession of the mortgaged property if the mortgagor abandons it. Once in possession, the mortgagee incurs liability as if he/she were the owner.

References

55 Am. Jur. 2d Mortgages § 153 (2019) (specifying rights and liabilities of mortgagee in possession).

Essex Cleaning Contractors, Inc. v. Amato, 317 A.2d 411, 412 (N.J. Super. 1974) (discussing tort liability of mortgagees in possession).

Restatement (Third) of Property: Mortgages § 4.1(c) (Am. Law Inst. 1997) (identifying mortgagee rights to take possession).

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