

A vendor owned a tract of land in fee simple. The vendor entered into a valid written agreement with a purchaser under which the vendor agreed to sell and the purchaser agreed to buy the land by installment purchase. The contract stipulated that the vendor would deliver to the purchaser, upon the payment of the last installment due, "a warranty deed sufficient to convey fee simple." The contract contained no other provision that could be construed as referring to title.

The purchaser entered into possession of the land. After making 10 of the 300 installment payments obligated under the contract, the purchaser discovered that there was outstanding a valid and enforceable mortgage on the land, securing the payment of a debt in the amount of 25% of the purchase price the purchaser had agreed to pay. There was no evidence that the vendor had ever been late in payments due under the mortgage and there was no evidence of any danger of insolvency of the vendor. The value of the land now is four times the amount due on the debt secured by the mortgage.

The purchaser quit possession of the land and demanded that the vendor repay the amounts the purchaser had paid under the contract. After the vendor refused the demand, the purchaser brought an appropriate action against the vendor to recover damages for the vendor's alleged breach of the contract.

In such action, should damages be awarded to the purchaser?

- A. No, because the purchaser assumed the risk by taking possession.
- B. No, because the time for the vendor to deliver marketable title has not arrived.
- C. Yes, because in the absence of a contrary express agreement, an obligation to convey marketable title is implied.
- D. Yes, because the risk of loss assumed by the purchaser in taking possession relates only to physical loss.

Explanation:

"Red flags" for marketable title

Covenants

Easements

Leases

Liens

Gaps in chain of title

Boundary disputes

Existing zoning violations

Adverse possession

The warranty of **marketable title** is implied in all land-sale contracts unless otherwise stated. This guarantees that, **upon closing**, the seller will convey the buyer title that is reasonably free from doubt and under no threat of litigation, such that a reasonable person would accept and pay for it. In the case of an **installment land contract**—ie, one in which the buyer takes possession of the property and pays the purchase price over time—the seller need not deliver marketable title until the buyer makes the **final payment**.

Here, the purchaser made 10 of the 300 installment payments before discovering the outstanding mortgage on the land. Although an existing mortgage can render title unmarketable, the vendor does not need to deliver marketable title until the purchaser has made the final installment payment. Therefore, damages should not be awarded to the purchaser because the time for the vendor to deliver marketable title has not arrived **(Choice C)**.

(Choices A & D) Under the doctrine of [equitable conversion](#), the risk of loss is on the buyer during the period between contract formation and closing—regardless of whether the buyer takes possession. The risk of loss assumed by the buyer typically relates to physical loss (eg, from fire), but the doctrine may also apply to legal changes (eg, zoning changes). However, this has no relevance to the seller's obligation to deliver title as promised.

Educational objective:

Under an installment land contract, the time for the seller to deliver marketable title arrives when the buyer makes the final installment payment.

References

Restatement (Third) of Property: Mortgages § 3.4 (Am. Law Inst. 1997) (installment land contracts).

77 Am. Jur. 2d Vendor and Purchaser § 93 (2020) (marketable title).

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