Michigan Law Review

Volume 58 | Issue 1

1959

Real Property - Mortgages - Liability of Mortgagee of Lessee's Term for Rent

Michael B. Lewiston S.Ed.
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr

 Part of the Housing Law Commons, Property Law and Real Estate Commons, and the Torts Commons

Recommended Citation

Michael B. Lewiston S.Ed., *Real Property - Mortgages - Liability of Mortgagee of Lessee's Term for Rent*, 58 MICH. L. REV. 140 (1959).
Available at: https://repository.law.umich.edu/mlr/vol58/iss1/18

This Recent Important Decisions is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

REAL PROPERTY—MORTGAGES—LIABILITY OF MORTGAGEE OF LESSEE'S TERM FOR RENT—Respondent leased a building to South Texas Kitchens, Inc., for a term of five years. The lessee became indebted to petitioner and, being unable to meet this obligation, transferred its business assets and lease to petitioner as security.[1] Petitioner was authorized to manage the business and to apply all proceeds to discharge the indebtedness, the transfer to terminate when the debt was fully paid. Petitioner went into possession of the premises and operated the business for about six months, paying the rent during that period. It then vacated the property and ceased making rental payments. Respondent sued petitioner and the lessee in an action for rent and recovered a judgment against both. On appeal by petitioner only, *held,* reversed. A mortgage is only a security device and does not vest all of the mortgagor's title and estate in the mortgagee. A mortgagee in possession[2] of the mortgaged premises is not an assignee of the lease and thus is not liable on the covenant of rent. *Amco Trust, Inc. v. Naylor,* (Tex. 1958) 317 S.W. (2d) 47.

An assignee of a lease is liable on covenants running with the lease[3] while a sub-lessee is not. The execution of the lease places the lessee in privity of estate with the lessor.[4] A transfer by the lessee of his entire interest in the lease terminates his privity of estate and creates privity of estate between the lessor and the transferee,[5] the latter becoming an assignee. On the other hand, where the transfer leaves the lessee with a reversion,[6] or in some jurisdictions with a right of re-entry,[7] the transferee is a sub-lessee rather than an assignee

1 The court assumed that this was a mortgage.

2 See note 12 infra.

3 As a general rule, for a covenant to run there must be privity of estate between covenantor and covenantee, and the benefit and the burden of the covenant must "touch and concern" the respective estates of the covenantor and the covenantee. Spencer's Case, 5 Coke 16, 77 Eng. Rep. 72 (1583).

4 See TIFFANY, REAL PROPERTY, 3d ed., §121 (1939).

5 Washington Natural Gas Co. v. Johnson, 123 Pa. 576, 16 A. 799 (1889). See TIFFANY, REAL PROPERTY, 3d ed., §121 (1939).

6 Sexton v. Chicago Storage Co., 129 Ill. 318, 21 N.E. 920 (1889).

7 Davis v. Vidal, 105 Tex. 444, 151 S.W. 290 (1912). The great weight of authority is to the contrary. See Sexton v. Chicago Storage Co., note 6 supra; TIFFANY, REAL PROPERTY, 3d ed., §123 (1939).

There are two basic theories as to the nature of a mortgage; the title theory and the lien theory. In the former, the mortgage is an absolute conveyance and the mortgagor has no right to possession unless the mortgage, or quite commonly a statute, provides for retention of possession. In lien states, a mortgage is merely a security device, legal title being retained by the mortgagor until foreclosure and sale. Where the title theory is followed the mortgagee of the term is an assignee whether or not he enters into possession, as long as he has the right to do so.[8] Though it has been argued that since the mortgagor has a right to a reconveyance upon discharge of the debt he retains an interest in the transferred lease,[9] this has been rejected on the ground that the mortgage, where no right of possession has been reserved, or the mortgage plus default where such a right has been reserved, is a conveyance of the lessee's entire interest and creates privity of estate.[10] On the other hand, among the states which follow the lien theory of mortgages and have litigated the issue, there is a split of authority. One view, originating in New York,[11] is that a mortgagee of the term who enters into possession of the mortgaged premises[12] thereby acquires the entire interest of the mortgagor and becomes an assignee.[13] The reasoning is that once the mortgagee has taken possession he is entitled to all the benefits of the lease and should therefore be subjected to all the burdens. The other view, originating in California,[14] is that the mere acquisition of possession by the mortgagee does not vest him with the entire interest of the mortgagor and that therefore he is not liable for rent under the lease.[15] In the principal case, the court rejected a prior Texas

8 Williams v. Bosanquet, 1 Brod. & B. 238, 129 Eng. Rep. 714 (1819), rejecting Eaton v. Jacques, 2 Doug. 455, 99 Eng. Rep. 290 (1780); Williams v. Safe Deposit & Trust Co., 167 Md. 499, 175 A. 331 (1934).

9 See note 7 supra. A court using the title theory but adhering to this view would logically have to reach the result of the principal case, since there would be no privity of estate. See principal case at 51.

10 Williams v. Bosanquet, note 8 supra. Cf. Williams v. Safe Deposit & Trust Co., note 8 supra.

11 Astor v. Hoyt, 5 Wend. (N.Y.) 603 (1830).

12 It is not at all clear from the cases when a mortgagee will be considered as being in possession. Clearly, physical possession is sufficient and the giving of a lease by the mortgagee seems to be enough. See Studebaker Corp. v. Aetna Savings & Trust Co., (7th Cir. 1927) 21 F. (2d) 385. Cf. Johnson v. Sherman, 15 Cal. 287 (1860). Although there are no cases in point, it appears that the mere right to enter into possession is not sufficient. It might be otherwise where possession had actually been taken and then abandoned, the right to re-enter being retained. See Walton v. Cronly's Administrator, 14 Wend. (N.Y.) 63 (1835).

13 Astor v. Hoyt, note 11 supra; Olcese v. Val Blatz Brewing Co., 114 Ill. App. 597 (1908). But see David Bradley & Co. v. Peabody Coal Co., 99 Ill. App. 427 (1902); Studebaker Corp. v. Aetna Savings & Trust Co., note 12 supra. Cf. McKee v. Angelrodt, 16 Mo. 283 (1852); Walton v. Cronly's Administrator, note 12 supra.

14 Johnson v. Sherman, note 12 supra.

15 Johnson v. Sherman, note 12 supra; Slane v. Polar Oil Co., 48 Wyo. 28, 41 P. (2d) 490 (1935). Cf. Detroit Trust Co. v. Mortensen, 273 Mich. 407, 263 N.W. 409 (1935); Johnson v. Commercial State Bank, 142 Neb. 752, 7 N.W. (2d) 654 (1943). Se also 2 AMERICAN LAW OF PROPERTY, §9.6, 361 (1952) (adopting the California view).

decision[16] which had followed the New York view, and instead adopted the reasoning of California. It would seem difficult to support the New York view since it is clear that the mortgagee, even though in possession, lacks legal title.[17] Furthermore, the view that privity of estate, a rather technical doctrine, depends on such principles as equating burdens with benefits finds no support elsewhere. In addition, it is even doubtful that equitable principles require that a mortgage, coupled with possession of the premises in the mortgagee, be considered an assignment of the mortgagor's entire interest. The lessor has relied on the credit of the lessee and has an action against him for the rent.[18] The position of the mortgagee in possession is not analogous to that of an assignee. An assignee has the same rights as to retention of profits as were enjoyed by the lessee, while the mortgagee must apply all the proceeds of the business to the discharge of the debt and does not therefore enjoy the independent status of an assignee.[19] Moreover, when operation of the business proves fruitless and is abandoned, it seems especially harsh to burden the mortgagee further with the rent obligation. Thus whether the question is determined on the basis of traditional legal logic or the balancing of equities the California view appears to be the better solution.[20] The mortgagee should be recognized for what he really is, a security holder who does not in any real sense take the place of the lessee.

Michael B. Lewiston, S.Ed.

16 Cockrell v. Houston Packing Co., 105 Tex. 283, 147 S.W. 1145 (1912).

17 Slaughter v. Bernads, 97 Wis. 184, 72 N.W. 977 (1897). Cf. Trimm v. Marsh, 54 N.Y. 599 (1874); Hewen Co. v. Thibaut Realty Co., 154 Misc. 687, 277 N.Y. S. 860 (1935).

18 This is true even where there has been an assignment. Wall v. Hinds, 4 Gray (Mass.) 256 (1855).

19 Cf. Cargill v. Thompson, 57 Minn. 534, 59 N.W. 638 (1894).

20 The California view has recently been adopted by several other jurisdictions considering the question for the first time. Slane v. Polar Oil Co., note 15 supra. Cf. Detroit Trust Co. v. Mortensen, note 15 supra; Johnson v. Commercial State Bank, note 15 supra; Hausman & Sons, Inc. v. Central Home Trust Co., 118 N.J.L. 104, 191 A. 301 (1937).