

By a valid written contract executed in March, a seller agreed to sell land to a buyer. The contract stated, "The parties agree that closing will occur on May 1 at 10 a.m." There was no other reference to closing. The contract was silent as to quality of title.

On April 27, the seller notified the buyer that she had discovered that the land was subject to a long-standing easement in favor of a corporation for a towpath for a canal, should the corporation ever want to build a canal.

The buyer thought it so unlikely that a canal would ever be built that the closing should occur notwithstanding this easement. Therefore, the buyer notified the seller on April 28 that he would expect to close on May 1.

When the seller later refused to close, the buyer sued for specific performance.

Will the buyer be likely to prevail?

- A. No, because rights of third parties are unresolved.
- B. No, because the easement renders the seller's title unmarketable.
- C. Yes, because the decision to terminate the contract for title not being marketable belongs only to the buyer.
- D. Yes, because the seller did not give notice of the easement a reasonable time before the closing date.

Explanation:

"Red flags" for marketable title

Covenants

Easements

Leases

Liens

Gaps in chain of title

Boundary disputes

Existing zoning violations

Adverse possession

All contracts for the sale of land have an **implied warranty** that the seller will convey **marketable title** to the buyer **upon closing** unless otherwise stated. To be marketable, title must be reasonably free from doubt and under no threat of litigation such that a reasonable person would accept and pay for it. If the seller cannot convey marketable title at the time of closing, only the *buyer* can rescind (ie, terminate) the sales contract and refuse to close.

Title can be **rendered unmarketable** by **encumbrances** (eg, easements, mortgages, other liens). However, **buyers can waive** encumbrances—as the buyer did here when he notified the seller that he expected to close notwithstanding the corporation's easement. Because the buyer chose to accept the land with the easement instead of terminating the contract, the buyer will be likely to prevail in an action for specific performance (**Choice B**).

(Choice A) The fact that rights of third parties are unresolved (eg, whether the corporation's easement is valid) is irrelevant to the buyer's suit against the seller for specific performance of the sales contract.

(Choice D) The seller was obligated to disclose the easement to the buyer promptly after learning of it, which she did. The buyer then chose to go through with the deal rather than terminate the contract, so the seller is obligated to complete the sale.

Educational objective:

An easement is an encumbrance that can render title unmarketable. However, the buyer can choose to waive the encumbrance and insist that the sale be completed.

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