A seller contracted to sell a vacant lot to a purchaser. The written contract required the seller to provide evidence of marketable title of record, specified a closing date, stated that "time is of the essence," and provided that at closing, the seller would convey by warranty deed. The purchaser paid the seller $7,000 earnest money toward the $140,000 purchase price.

The title evidence showed that an undivided one-eighth interest in the lot was owned by a third party. The purchaser immediately objected to title and said she would not close on the seller's title. The seller responded, accurately, that the third party was his daughter who would be out of the country until two weeks after the specified closing date. He said that she would gladly deed her interest upon her return, and that meanwhile his deed warranting title to all of the lot would fully protect the purchaser. The seller duly tendered his deed on the specified closing date but the purchaser refused to close.

The purchaser brought an appropriate action to recover the $7,000 earnest money promptly after the specified closing date. The seller counterclaimed for specific performance, tendering a deed from himself and his daughter, who had by then returned.

Which party will likely prevail?

A. The purchaser, because the seller's title was not marketable and time was of the essence.

B. The purchaser, because under the circumstances the earnest money amount was excessive.

C. The seller, because his warranty deed would have given the purchaser adequate interim protection.

D. The seller, because the daughter's deed completing the transfer was given within a reasonable time.

Explanation:

A **real estate contract** is executed when the seller promises to deliver marketable title and the buyer promises to pay the purchase price. However, these promises need not be **performed** until **closing or a reasonable time** thereafter—**unless** the parties set a **strict closing deadline**. The closing date will be strictly enforced when the contract includes express language that makes **time of the essence** or the circumstances strongly suggest that the parties intended it to be.

Here, the contract stated that "time is of the essence," so the seller was required to deliver marketable title at the time of closing—no later. Title is marketable if it is reasonably free from doubt and under no threat of litigation such that a reasonable person would accept and pay for it. Since 1/8 of the seller's title was held by his daughter who could not deed her interest to him until two weeks *after* closing, the seller could not timely deliver marketable title with a warranty deed. Therefore, the seller breached the contract **(Choices C & D)**.

When a seller has breached, the buyer's remedies include rescission and restitution. This allows the buyer to cancel the contract and receive the return of any paid deposits and other restitution. As a result, the purchaser will likely prevail in her action to recover the $7,000 earnest-money deposit.

(Choice B) A seller may retain the buyer's earnest-money deposit as liquidated damages so long as the deposit is not so excessive that it constitutes a penalty. An amount exceeding 15% of the purchase price is likely excessive, so the buyer's $7,000 deposit (5% of the purchase price) was not excessive.

Educational objective:

Performance is *strictly* due at the time of closing when the real estate contract includes express language that makes time of the essence or when the circumstances strongly suggest that the parties intended it to be.