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1. Will Beverly be able to rescind the contract with Austin on the basis of misrepresentation and/or non disclosure?

The facts state that the parties entered into a valid written agreement for the purchase of the warehouse. To be a valid contract, the requirements are Offer/Consideration/ Mutuality / Capacity / not illegal. Because it was a written contract for the sale of property, the Statute of Frauds would apply, and because the facts state that the contract was valid, it is assumed that the elements have been met. The UCC does not apply to this transaction.

Rescission is a remedy offered by the courts in contract matters, which essentially undoes the contract and both parties are put back into place as if the contract had not occurred. Rescission may be used when there is a mistake of fact to the forming of the contract.

Here, although Beverly knew she was buying a warehouse "as is with not warranties as to the condition of the structure." She specifically asked about the condition of the roof, and Austin with knowledge that the roof would soon develop leaks, skirted the issue by saying "I've never had a problem with it." Even in a as-is contract, disclosure of information known by the seller is required, and that fact that Beverly specifically asked, and Austin skirted the question, shows that Austin intended not to make the disclosure to Beverly.

Austin may try to argue that extrinsic evidence to the conversation prior to should not be allowed in as violation of the Parole Evidence Rule, because the contract itself states that the property is being sold "as is" and that evidence outside the four corners of the document should not be allowed. (The facts are silent as to whether or not there is a merger clause in the contract.) Because of Austin's misrepresentation/non disclosure, the Court will disregard this type of argument likely allow in evidence to prove the matter.

Conclusion

As such, the court will likely allow Beverly to rescind the contract with Austin based on his non-disclosure / Misrepresentation of the fact.

2. What, if any ethical violations has Lou Committed? Discuss. Answer according to California and ABA authorities.

False Testimony of a Witness

Lou has a duty to not encourage a witness to testify falsely. Here, there does not appear to be any facts that Lou encouraged the Expert not to tell the truth. Lou did know from prior testimony that Dr. Crest's previous assertion was that a TT roof always lasts at least 5 years, and that they were climate dependent. Based on that knowledge, and the facts, it seems unlikely that Lou did not ask the expert to change his opinion prior to the witness taking the stand..

Lou also has a duty if a witness is testifying, not to promote the falsehoods. Here, it appears that the false information came out during Cross-Examination by the other attorney. Lou was not the one asking the questions of Dr. Crest at the time the false information was revealed. But Lou should not have used the information in any way in his closing argument.

Under ABA and CA rules, if an attorney knows that a witness is planning on testifying falsely, in a civil matter such as this, the attorney has the right not to put the witness on the stand. (If it's the defendant, the Defendant has the right to take the stand, but the attorney may then only question in them in a way not to draw out the false information or to allow the Defendant to testify in a more narrative format.) Further, the Attorney has the duty to correct the falsehoods with the tribunal and/or with draw from the matter. Further, in CA the Attorney has a duty not to mislead the Court. Lou by taking the false information from the expert and spinning it again to the court is misleading and intentional.

The facts do not state that Lou knew that Dr. Crest was planning to testify contrary to his prior opinion, and thus would not had a reason not to have his witness testify. Again, the information came out on Cross Examination, but should have never been used by Lou.

Candor

Lou has a duty of Candor to the court. Here it is likely that Lou breached that duty in his closing arguments. Not only did Lou not call out the false and misleading information, but Lou used the false information as a credible argument in his closing statement, and backed the statements up by saying he inspected the roof and his inspection confirmed Dr. Crest's testimony. Lou, in his "testifying" closing statement (see below) advanced the false theories to the court, by knowingly stating and repeating false information.

Under both, Lou breached his duty of Candor to the Court. Further under CA rules, Lou has a duty not to mislead the court, or allow testimony which misleads the court, which he, himself did in his closing.

Attorney at Witness

An attorney may not act as a witness in the case in which they are counsel for except as stated below under the distinctions. Lou's statement regarding his confirmation of Dr. Crest's findings, although not made on the stand as a witness would testify from, may be considered that Lou is acting as a witness for Plaintiff and testifying.

Here , Lou is claiming that he did an inspection and his findings agree with the Expert. Further, unless the findings would be something a lay person could testify to as for opinion, it may also cross the line as subject matter requiring an expert opinion to introduce the testimony. Lou is a lawyer, not a roofing expert and a lay person would not likely know if Climate was a factor to that particular type of roof failing, or the life expectancy of that type of roof. Further the facts do not state if Lou ever actually inspected the roof himself.

Had Dr. Crest's statements been true, Lou could have reminded the jury of the opinions of the witness during the closing, but Lou's using his own inspection to underscore the truth of the testimony, crosses the line.

ABA/CA: In the ABA an attorney may testify to uncontested matters. In California, an attorney may testify with the informed written consent of the client, however Lou's testimony was not in an uncontested matter, further even if the client was OK with Lou testifying, the testimony and opinions given by Lou were not appropriate, and further caused a fraud on the court. Nothing in the facts state that the Client agreed in writing to Lou acting as a witness.

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