

A seller owned a lot improved with an aging four-story warehouse. The warehouse was built to the lot lines on all four sides. On the street side, recessed loading docks permitted semi-trailers to be backed in. After the tractors were unhooked, the trailers extended into the street and occupied most of one lane of the street. Over the years, as the trailers became larger, the blocking of the street became more severe. The municipality advised the seller that the loading docks could not continue to be used because the trailers blocked the street; it gave the seller 90 days to cease and desist.

During the 90 days, the seller sold and conveyed the lot by warranty deed for a substantial consideration to a buyer. The problem of the loading docks was not discussed in the negotiations.

Upon expiration of the 90 days, the municipality required the buyer to stop using the loading docks. This action substantially reduced the value of the lot.

If the buyer seeks cancellation of the deed and return of all monies paid, which claim should the buyer bring against the seller?

- A. Breach of the covenant of warranty.
- B. Failure of consideration.
- C. Misrepresentation.
- D. Mutual mistake.

Explanation:

When disclosure is required to avoid misrepresentation

Previous assertion	Disclosure would prevent previous assertion from being a misrepresentation <i>or</i> fraudulent or material
Mistake about basic assumption	Disclosure would correct other party's mistake about basic assumption of contract AND Failure to disclose would constitute lack of good faith & fair dealing
Fiduciary relationship	Other party is entitled to know fact because of confidential/fiduciary relationship
Mistake about writing	Disclosure would correct other party's mistake about contents or effect of writing that embodies agreement

A **misrepresentation** is an **untrue assertion of fact** that makes a contract **voidable** by the adversely affected party when:

the misrepresentation is fraudulent OR material

the misrepresentation induced assent to the contract *and*

the adversely affected party justifiably relied on the misrepresentation.

Nondisclosure of a known fact is tantamount to an assertion that it does not exist if, among other things, the party not disclosing the fact knows that:

disclosure would **correct** the other party's **mistake about a basic assumption** of the contract *and*

the **failure to disclose** would **violate** the **duty of good faith and fair dealing**.

Here, the seller misrepresented that the loading docks could continue to be used (basic assumption of the contract) by failing to disclose to the buyer that this was untrue (lack of good faith and fair dealing). As a result of this misrepresentation, the buyer purchased the lot. And because the misrepresentation was not obviously false or known by the buyer to be false, the buyer **justifiably relied** on it. Therefore, misrepresentation is the claim the buyer should bring against the seller.

(Choice A) A **covenant of warranty** is the seller's promise to protect the buyer against claims of superior title brought by another party (not seen here).

(Choice B) The buyer should not claim failure of consideration because the buyer's agreement with the seller *was* supported by consideration (ie, conveyance of the lot in exchange for the purchase price).

(Choice D) There was no mutual mistake that would make the contract voidable here because only one party, the buyer, was mistaken about the use of loading docks.

Educational objective:

Nondisclosure of a known fact is tantamount to an assertion that it does not exist if the party not disclosing the fact knows that (1) disclosure would correct the other party's mistake about a basic assumption of the contract and (2) the failure to disclose would violate the duty of good faith and fair dealing.

References

Restatement (Second) of Contracts § 161 (Am. Law Inst. 1981) (when nondisclosure is a misrepresentation).

Restatement (Second) of Contracts § 164 (Am. Law Inst. 1981) (when misrepresentation makes a contract voidable).

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