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18-P-968

Appeals Court

LEO J. MOTSYS, trustee,<sup>1</sup> vs. MING'S SUPERMARKET, INC.

No. 18-P-968.

Suffolk. July 12, 2019. - November 5, 2019.

Present: Henry, Sacks, & Ditkoff, JJ.

Contract, Lease of real estate, Performance and breach, Implied covenant of good faith and fair dealing, Damages, Specific performance. Consumer Protection Act, Lease, Unfair act or practice, Attorney's fees. Real Property, Lease, Specific performance. Damages, Breach of contract, Loss of profits, Consumer protection case, Attorney's fees.

Civil action commenced in the Superior Court Department on August 25, 2015.

Summary Process. Complaint filed in the Superior Court Department on November 22, 2016.

After consolidation, the case was tried before Paul D. Wilson, J., and a motion for a new trial was considered by him.

Dana Alan Curhan for the plaintiff.  
Richard E. Gentilli for the defendant.

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<sup>1</sup> Of the 140-148 East Berkeley Realty Trust.

SACKS, J. This case presents the question whether a lessor's material breach of a commercial lease permits the lessee both to recover lost profits due to lost use of the premises and to obtain an order for specific performance of the lease provision requiring the lessor to make structural repairs. After a Superior Court jury trial and the judge's resolution of the parties' G. L. c. 93A claims, a judgment awarding both forms of relief entered for the lessee, the defendant and plaintiff in counterclaim, Ming's Supermarket, Inc. (Ming's), against the lessor, the plaintiff and defendant in counterclaim, Leo J. Motsis, as trustee of a realty trust (Motsis). We conclude that, in the circumstances of this case, such relief was proper. We also reject Motsis's challenge to the judge's findings in favor of Ming's under G. L. c. 93A, and we see no merit in Motsis's various claims of trial error. We thus affirm the judgment.

Background. 1. The lease. The jury could have found that Motsis owned the premises in question, a four-story warehouse on East Berkeley Street in Boston. Ming's operated a specialty supermarket, selling Asian food, on Washington Street in Boston; the rear portion of the supermarket building connected directly to the warehouse. In 1999, the parties signed a lease of the premises to Ming's for a term of ten years and five months,

effective January 1, 2000, with two extension options of ten years each.

The lease provided, with exceptions not relevant here, that Motsis was "responsible for making all structural repairs and replacements to the foundation, walls and roof of the building on the leased premises. The cost of such structural repairs and replacements will be charged to [Ming's] as additional rent if they are necessitated by the fault or negligence of [Ming's] . . . ." Other repairs and maintenance were Ming's responsibility. The lease also provided that if a "casualty . . . renders the leased premises substantially unsuitable for their intended use, a just and proportionate abatement of rent shall be made, and [Ming's] may elect to terminate this lease" if certain conditions were met. The lease required that in any situation where Motsis's consent was required, Motsis could not unreasonably withhold or delay it. Finally, the lease gave Ming's a right of first refusal if Motsis received any offers to purchase the premises.

The premises had previously been used to store and repair motor vehicles, and the city had issued a permit for that purpose. Ming's intended to use the space to store food and grocery items. That use was not allowed under the existing permit and, because of zoning regulations, required what the parties refer to as a conditional use permit from the city's

zoning board of appeals.<sup>2</sup> Precisely when Ming's became aware that it needed such a permit was an issue at trial.

Nevertheless, even without that permit, Ming's used the premises for food and grocery storage into 2010 and, under a lease extension, until early 2015.

2. The dispute. In February 2015, a sprinkler pipe froze and burst which, among other things, led the city's inspectional services division (ISD) to pay a visit. ISD issued citations for numerous building code violations, including unsafe structural conditions such as a fractured fourth-floor ceiling with delaminating concrete, a fracturing concrete beam, and fractures in the staircases.<sup>3</sup> ISD also found violations concerning the mechanical systems, elevators, and sprinklers. Finally, ISD issued a citation for failure to have a permit to use the premises for food storage. ISD told the administrative manager of Ming's that Ming's could not use the building because of its structural problems and the lack of a proper permit.

Ming's moved its stored food and grocery supplies out of the premises but continued to pay rent through April 2015.

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<sup>2</sup> At trial, the permit was also referred to on occasion as a "use and occupancy permit." For clarity, we use the term "conditional use permit" throughout this opinion.

<sup>3</sup> There was evidence at trial that the structural damage was primarily caused by long-standing roof leaks, which Ming's had asked Mosis to repair, to no avail, on several occasions between 2010 and 2015.

Ming's made some of the internal repairs, but took the position that the elevator repairs could not be completed until the premises were made structurally sound. Ming's and Motsis both understood that Ming's could not apply for the conditional use permit until the structural repairs, or at least the plans for such repairs, were complete. Ming's needed Motsis's cooperation in the permit application process. Ming's asked Motsis to make the structural repairs (their cost was later estimated at approximately \$500,000), but Motsis did not do so, asserting that at least some of them were the responsibility of Ming's.

Ming's stopped paying rent in May 2015,<sup>4</sup> because it could not use the premises, Motsis was not making the structural repairs, and Ming's could not yet seek the conditional use permit. In August 2015, Ming's agreed to undertake the permit application process if the parties could cooperate to resolve the repair issues. Ming's stated, "If on the other hand the owner wants [Ming's] out and will attempt to terminate the lease at all costs, then we might as well know that now." Motsis replied that he would not allow Ming's back on the premises until Ming's paid for the structural damage it allegedly had

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<sup>4</sup> The monthly rent under the lease (which provided for annual adjustments) appears to have been \$20,415.75 as of May 2015 and increased to \$21,436.50 shortly thereafter.

caused, obtained the permit, and paid all back rent. Motsis then commenced this action in the Superior Court.

3. The litigation. Motsis's complaint<sup>5</sup> asserted material violations of the lease, breach of contract, and a variety of other claims; Motsis requested damages and declaratory relief. Motsis's theory, stated briefly, was that Ming's had stopped paying rent in order to pressure Motsis either to sell the premises to Ming's at below-market value or to buy out the lease. Motsis sought a declaration that the violations by Ming's rendered the lease of no further effect.

Ming's counterclaimed for breach of the lease, breach of the implied covenant of good faith and fair dealing, and violations of G. L. c. 93A. As relief, Ming's sought damages (including lost profits from decreased sales), a declaration that it had been constructively evicted and thus had no duty to pay rent, and an order for specific performance of the lease provisions requiring Motsis to make structural repairs and to cooperate with Ming's in obtaining a conditional use permit.<sup>6</sup> In

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<sup>5</sup> We refer here to the second amended complaint, which was the operative complaint at the time of trial.

<sup>6</sup> Ming's asserted that Motsis's cooperation was required by the lease provision barring the lessor from unreasonably withholding or delaying its consent in any situation where such consent was required. Motsis had admitted, in his answer to the amended counterclaim, that Ming's "cannot obtain a conditional use permit without [Motsis's] assent," and there was trial testimony to the same effect.

essence, Ming's proceeded on the theory that, because the rent specified in the lease was substantially below market value, Motsis was attempting to force Ming's to abandon the premises and forgo its rights under the lease, leaving Motsis free to sell the premises unencumbered by the lease.

Motsis later filed a separate summary process action. On a motion by Ming's, the cases were consolidated. In August of 2017, most of the claims were tried to a jury. The parties submitted proposed special questions for the jury; based on those submissions, and after extensive discussions with the parties during the trial, the judge developed a special verdict slip. The G. L. c. 93A claims, Motsis's summary process claim, and the request by Ming's for specific performance were tried to the judge.

In response to questions on the verdict slip, the jury found, as to Motsis's claims, that Ming's had materially breached the lease by failing to pay rent. The jury found, however, that the breach was excused -- either because Ming's had been constructively evicted or because a casualty had rendered the premises substantially unsuitable for their intended use, entitling Ming's to a rent abatement.<sup>7</sup> Similarly, the jury found that Ming's had breached the lease by using the

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<sup>7</sup> The verdict slip did not require the jury to specify which of these two conditions applied.

premises without a proper permit and by failing to make certain repairs, but that Motsis either had waived these claims or was estopped to assert them.<sup>8</sup>

On the counterclaims that Ming's asserted, the jury found that Motsis had committed a breach of the lease by failing to make structural repairs, causing Ming's damages in the amount of \$795,000, plus \$2,250 for each future month.<sup>9</sup> The jury also found that Motsis had violated the implied covenant of good faith and fair dealing, both by failing to make the structural repairs and by failing to cooperate with Ming's in the permit application process. But the jury found that those breaches had not caused Ming's any additional damages beyond the amounts already awarded for Motsis's breach of the lease.

As for the claims tried to the judge, the transcript indicates that the parties agreed to waive formal findings of fact and rulings of law and instead to have the judge indicate his rulings in the "short form of a jury verdict slip[-]like

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<sup>8</sup> The jury also found that the use by Ming's of the warehouse for food storage without a proper permit violated the implied covenant of good faith and fair dealing, but that this caused Motsis no damage.

<sup>9</sup> The judge had instructed the jury that such future damages could be awarded to compensate Ming's for the loss of use of the premises until such time (if any) as Ming's resumed using them.

document."<sup>10</sup> Using such a form, the judge found against Motsis on his G. L. c. 93A and summary process claims. On the G. L. c. 93A counterclaim brought by Ming's, the judge found that Motsis had violated the statute, that the damages to Ming's were the same \$795,000 already awarded by the jury, that the violation was willful or knowing, and that the damages should therefore be doubled.<sup>11</sup> The judge ruled that Ming's was entitled to specific performance of the lease provisions requiring Motsis to make structural repairs and to cooperate with Ming's in seeking the conditional use permit. Finally, the judge ruled that damages of \$2,250 per month would continue to accrue until Motsis completed the structural repairs.

Judgment entered in accordance with the jury verdicts and the judge's rulings, and Motsis now appeals.<sup>12</sup>

Discussion. 1. Propriety of relief awarded. Motsis argues that, based on the jury's finding of a constructive

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<sup>10</sup> The transcript further reflects that the parties were to attempt to agree on the questions to be included on the form, but it leaves unclear whether the form ultimately used by the judge was agreed upon by both parties.

<sup>11</sup> The judge also awarded Ming's its attorney's fees and costs under G. L. c. 93A, later determined to be \$251,944.60.

<sup>12</sup> Motsis also moved for a new trial; the judge denied the motion, and Motsis appealed from that ruling. On appeal, however, Motsis makes no separate argument as to how the judge abused his discretion or otherwise erred in denying the motion, and thus we do not discuss it further.

eviction, the relief available to Ming's was limited to a termination of the lease and the recovery of any relocation costs. Motsis argues that it was error to award damages for lost profits and to order specific performance of the violated lease provisions.<sup>13</sup> This argument misses two essential points.

First, the jury found, in response to a compound question on the special verdict slip, either that Ming's had been constructively evicted or that a casualty had rendered the premises substantially unsuitable for their intended use, entitling Ming's to a rent abatement. Second, the jury's finding was not that either (or both) of these conditions entitled Ming's to affirmative relief, but only that they gave Ming's a defense to Motsis's claim that Ming's had committed a breach of the lease by failing to pay rent.<sup>14</sup> The affirmative relief awarded to Ming's by both the jury and the judge was based instead on the counterclaims that Ming's asserted for breach of the lease, breach of the implied covenant of good faith and fair dealing, and violation of G. L. c. 93A. In short, Motsis's argument about what relief is properly available

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<sup>13</sup> For this proposition, Motsis relies on Wesson v. Leone Enters., Inc., 437 Mass. 708 (2002), but in that case the court held that no constructive eviction had occurred. Id. at 715.

<sup>14</sup> More precisely, the jury found that either a constructive eviction or a casualty excused the failure by Ming's to pay rent.

based on a finding of constructive eviction overlooks that (1) the jury did not clearly find Ming's to have been constructively evicted and (2) in any event the relief awarded to Ming's was not based solely (if at all) on a constructive eviction theory.

Motsis argues in particular that there was not "any legal basis for awarding damages for lost profits." But numerous decisions have upheld such awards for a commercial lessor's breach of a lease. See Charles E. Burt, Inc. v. Seven Grand Corp., 340 Mass. 124, 126, 130-131 (1959);<sup>15</sup> Visnick v. Hawley, 69 Mass. App. Ct. 901, 902 (2007); Kobayashi v. Orion Ventures, Inc., 42 Mass. App. Ct. 492, 499-500 (1997). Cf. Parker v. Levin, 285 Mass. 125, 128 (1934) (evidence of lessee's lost profits admissible in determining damages for lessor's breach of lease, measured by difference in value between leasehold with covenant unbroken and leasehold with covenant broken). See also Restatement (Second) of Property, Damages § 10.2(5) & comment f, at 338-339, 344 (1977) (upon landlord's breach of lease, tenant may recover for loss of anticipated business profits, proven to

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<sup>15</sup> In Charles E. Burt, Inc., 340 Mass. at 127-128, the lessor's violation of the covenant of quiet enjoyment (by failing to furnish heat, light, power, and elevator service) was sufficiently serious to allow the lessee not only to recover damages but also to abandon the premises and treat the lessor's conduct as a constructive eviction. But nothing in the decision treated the lessee's right to damages as contingent on the existence of a constructive eviction. Id. at 127, 130.

reasonable degree of certainty, which resulted from landlord's default, and which landlord at time lease was made could reasonably have foreseen would be caused by default).

Motsis also argues that, although real property may be unique, a court may not order specific performance of a lease provision, as opposed to specific performance of an agreement to convey land.<sup>16</sup> But Motsis cites no authority for this proposition, and he overlooks authority to the contrary. See Jones v. Parker, 163 Mass. 564, 566 (1895) (court could order specific performance of covenant requiring lessor to furnish premises with sufficient heating and lighting apparatus). Cf. Rigs v. Sokol, 318 Mass. 337, 342 (1945) ("[T]he plaintiff among other things is seeking specific performance of a covenant to give a lease. That such covenants may be specifically enforced is well settled"); Baseball Publ. Co. v. Bruton, 302 Mass. 54, 55, 58 (1938) (affirming order for specific performance of contract for easement in gross allowing plaintiff to place advertising sign on defendant's building for one year, with privilege of annual renewal for four years); Wescott v. Luttazi,

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<sup>16</sup> At least for some purposes, the court has adopted the modern view that "a commercial lease is a contract rather than a conveyance of property." 275 Washington St. Corp. v. Hudson River Int'l, LLC, 465 Mass. 16, 27 (2013). But see id. at 28 (holding that "benefit of the bargain" principle for determining contract damages did not apply to termination of commercial lease following breach).

296 Mass. 541, 543-544 (1937) (holding lessee entitled to specific performance of option agreement for lease extension).<sup>17</sup>

Finally, as for Motsis's argument that a party cannot obtain both contract damages and specific performance, we are unpersuaded. In Perroncello v. Donahue, 448 Mass. 199, 205-206 & nn.10, 11 (2007), involving a breach of a contract for the sale of land, the court affirmed an award of damages to the seller (in the form of carrying costs) where, even after the judge ordered specific performance of the contract, the buyer had delayed in closing. The court explained that the damages award was "not inconsistent with specific performance. . . . 'A party who seeks specific performance or an injunction may . . . be entitled to damages to compensate him for delay in

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<sup>17</sup> Motsis also asserts in passing that specific performance was inappropriate because "[t]here is nothing unique about the subject premises, and nothing prevented Ming's from moving its warehouse to another location." The judge here could have found, however, that the premises were uniquely suited to the purposes for which Ming's sought them because they were located directly adjacent to the supermarket that Ming's owned. "A judge generally has considerable discretion with respect to granting specific performance, but it is usually granted in disputes involving the conveyance of land." McCarthy v. Tobin, 429 Mass. 84, 89 (1999). "It is well-settled law in this Commonwealth that real property is unique and that money damages will often be inadequate to redress a deprivation of an interest in land." Id., quoting Greenfield Country Estates Tenants Ass'n, Inc. v. Deep, 423 Mass. 81, 88 (1996). Even if a commercial lease is not considered a conveyance of property, see note 16 supra, we see no abuse of discretion in the judge's implicit determination that the subject matter of the lease -- the right to use the warehouse -- warranted specific performance.

performance.'"<sup>18</sup> Id. at 205-206, quoting Restatement (Second) of Contracts, § 378 comment d, at 230 (1981). Cf. Pierce v. Clark, 66 Mass. App. Ct. 912, 913-914 (2006) (affirming judgment for specific performance of contract for sale of land, but denying damages for delayed performance because evidence of damages was too speculative). And in Baseball Publ. Co., 302 Mass. at 58, the court affirmed a decree for specific performance and further recognized that an assessment of damages should be made as of the date of the final decree after rescript.<sup>19</sup> See generally G. L. c. 214, § 1A (existence of damages remedy does not bar action for specific performance if court finds that damages are not in fact equivalent to performance promised). The judge here could reasonably have concluded that Motsis should be required both to perform the relevant obligations of the lease in the future and to pay damages caused by his previous failure to do so and for any period of delay in completing specific performance.

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<sup>18</sup> See also Restatement (Second) of Contracts § 358(3), at 166 (1981) ("In addition to specific performance . . . damages and other relief may be awarded in the same proceeding"); id. at comment c, at 167 ("Since an order [for specific performance] seldom results in performance within the time the contract requires, damages for the delay will usually be appropriate").

<sup>19</sup> The damages appear to have been based on the defendant's breach, from February 1937 until and even after the trial judge first ordered specific performance in November 1937, of the contract allowing the plaintiff to post advertising signs on the defendant's property. Id. at 55.

2. Chapter 93A claim. Motsis argues that there was insufficient evidence to support the judge's finding that he violated G. L. c. 93A. We first address what standard of review should apply.

As mentioned supra, the parties agreed to waive formal findings of fact and rulings of law and instead to have the judge indicate his rulings in summary form on a document resembling a jury verdict slip. Regrettably, however, it appears that no document was filed to memorialize the terms of the parties' agreement, as should be routine in these circumstances to avoid later disputes.<sup>20</sup> At oral argument,

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<sup>20</sup> Although Ming's informed us at argument that the case was tried under Rule 20 of the Rules of the Superior Court (2017), neither Ming's nor Motsis could cite anything in the record so stating. Rule 20(2)(h) authorizes parties, among other things, to try a case to a judge under a "waiver of detailed written findings of fact and rulings of law." Rule 20 still requires the judge to "answer special questions on the elements of each claim, at a level of detail comparable to a special jury verdict form." Rule 20(8)(a). "The parties [in such cases] waive all arguments in the trial court or on appeal that require or depend upon the existence of detailed written findings of fact. Any appellate review of the court's decision and of the judgment entered shall be according to the standard of review that would apply to a verdict by a jury in a case tried to a jury and to the judgment entered thereon." Rule 20(8)(b). Cf. Rule 14 of the Rules of the Land Court (2017) (similar). Such a standard would appear to be that applicable to appellate review of a jury's answers to special questions, which is essentially the same as the standard governing appellate review of rulings on motions for a directed verdict or for judgment notwithstanding the verdict, as discussed infra. See, e.g., Brewster Wallcovering Co. v. Blue Mountain Wallcoverings, Inc., 68 Mass. App. Ct. 582, 594-595 (2007). We apply that standard here,

Motsis essentially acknowledged, and Ming's agreed, that the standard of review we should apply is the same as that applicable to the review of a ruling on a motion for a directed verdict or for judgment notwithstanding the verdict: whether "anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the [nonmoving party]" (quotation omitted). Dobos v. Driscoll, 404 Mass. 634, 656, cert. denied, 493 U.S. 850 (1989).

Applying that standard, we have no difficulty affirming the judge's conclusion that Motsis violated G. L. c. 93A. No doubt "the mere breach of a contract, without more, does not amount to a c. 93A violation." Madan v. Royal Indem. Co., 26 Mass. App. Ct. 756, 762 (1989), citing Whitinsville Plaza, Inc. v. Kotseas, 378 Mass. 85, 100-101 (1979). But "conduct in disregard of known contractual arrangements and intended to secure benefits for the breaching party constitutes an unfair act or practice for c. 93A purposes" (quotation and citation omitted). Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451, 474 (1991). The judge here could reasonably have found that Motsis's conduct was of that nature.

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without determining whether this case is governed by the cited portions of rule 20.

Specifically, Motsis acknowledged that it would have taken him two years to recoup, via rental payments, the approximately \$500,000 cost of the repairs, and although Motsis denied that this was any part of his motive for not wanting to perform them, the judge could have disbelieved that testimony. There was evidence that the lease rent was considerably below market value, that the lease was in effect until 2020 at which time Ming's had an option to renew it for another ten years, that Motsis wished to sell the premises, and that he "wanted both parties to just walk away from the lease," which would allow the premises to be sold unencumbered. There was evidence that Motsis not only failed to make the structural repairs, but dragged his feet when asked about his plans to do so, and then asserted, without reasonable basis, that Ming's had caused the structural problems and was responsible for repairing them.

In short, the judge could reasonably have found that Motsis hoped and attempted to induce Ming's either to abandon the lease or to commit a breach of it (by failing to pay rent) in a manner that would justify Motsis in terminating it. That would have allowed Motsis both to save the considerable cost of the structural repairs and to sell the property unencumbered by a below-market-value lease potentially in effect until the year 2030. This would constitute not an ordinary breach by Motsis, but "conduct in disregard of [the lease] and intended to secure

benefits" for Motsis (quotation and citation omitted).<sup>21</sup>

Anthony's Pier Four, Inc., 411 Mass. at 474. We therefore decline to disturb the judge's conclusion that Motsis violated G. L. c. 93A.<sup>22</sup> See Exhibit Source, Inc. v. Wells Ave. Business Ctr., LLC, 94 Mass. App. Ct. 497, 501 (2018).

3. Other issues. Motsis argues that a variety of evidentiary and other errors entitle him to a new trial. We find none of these arguments persuasive.

a. ISD inspectors' testimony. Motsis argues that the judge abused his discretion in precluding ISD inspectors from testifying about the meaning of the violation notices they had issued. Motsis asserts -- without record support -- that the inspectors would have testified that Ming's was required to vacate the premises not because of any structural defects but rather because of the lack of a conditional use permit. The judge ruled that Motsis had not raised this theory until the

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<sup>21</sup> It bears noting that the jury found that Motsis not only committed a breach of the lease but also violated the implied covenant of good faith and fair dealing. Cf. Anthony's Pier Four, Inc., 411 Mass. at 474 (on record before Supreme Judicial Court, trial judge's ruling that party had violated implied covenant could not be squared with judge's ruling that party had not violated G. L. c. 93A; latter ruling was erroneous).

<sup>22</sup> Motsis makes no separate challenge to the judge's further finding that Motsis's violation of G. L. c. 93A was willful or knowing. In any case, the evidence supported the finding.

first day of trial, causing unfair surprise to Ming's, and that the violation notices spoke for themselves.

To preserve the issue for appeal, Motsis was required to make an offer of proof as to the inspectors' testimony, unless the substance of that testimony was clear from the context. See Commonwealth v. Chase, 26 Mass. App. Ct. 578, 581 (1988); Mass. G. Evid. § 103 (a) (2) (2019). Here, Motsis did not make an offer of proof or even argue, nor did the context indicate, that the inspectors would testify that the lack of a proper permit, rather than structural defects, was what required Ming's to vacate. The issue is therefore waived.<sup>23</sup>

b. Expert testimony. Motsis argues that the judge abused his discretion in allowing an attorney working with Ming's to offer an expert opinion that the process for obtaining a conditional use permit in Boston took four to six months. What Motsis ignores is that the judge initially precluded the attorney from offering such an opinion because Ming's had not

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<sup>23</sup> In any event, we see no abuse of discretion in the judge's ruling. The judge asked Motsis's trial counsel to identify any document in which Motsis had previously raised his theory about the reason ISD required Ming's to vacate, and counsel was unable to do so. On appeal, Motsis points for the first time to a memorandum of law he filed before trial arguing that Ming's was required to vacate because of the lack of a use permit. But the same memorandum also says Ming's was required to vacate because the building was not structurally sound.

shown that he was qualified to do so,<sup>24</sup> but then Motsis himself, in cross-examining the attorney, elicited extensive information about the attorney's knowledge of the area. On redirect, Ming's again asked the attorney about the average time required to obtain a conditional use permit, and the judge ruled that Motsis had effectively opened the door to such testimony. Motsis has not shown any abuse of discretion in the judge's ruling.<sup>25</sup>

c. Evidence of lost profits. Motsis argues that there was insufficient evidence to support whatever portion of the jury's damages verdict represented lost profits. But "[i]t is an established rule that an appellate court cannot review the sufficiency of the evidence in the absence of an effective motion for a directed verdict" (quotation omitted).

International Fid. Ins. Co. v. Wilson, 387 Mass. 841, 846

(1983). Motsis's motion for a directed verdict did not argue

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<sup>24</sup> On appeal, Motsis also argues that allowing the attorney to offer expert testimony constituted unfair surprise. Because Motsis never made such an objection at trial, this argument is waived.

<sup>25</sup> Motsis also argues on appeal that the attorney should not have been allowed to testify as to whether Ming's would receive the permit if it applied. But it was Motsis himself who obtained the judge's permission to ask the attorney that very question. Motsis then never asked it. The most the attorney said on the issue was that Ming's satisfied the criteria for obtaining the permit.

that there was insufficient evidence of lost profits. The issue is therefore waived.<sup>26</sup>

d. Verdict slip. Motsis argues that the special verdict slip, although it asked the jury whether the breaches by Ming's were excused by Motsis's breaches, unfairly failed to ask the jury the mirror-image question whether Motsis's breaches were excused by those of Ming's. But Motsis did not ask that such a question be put to the jury either in his proposed special verdict slip, or on any of the four separate occasions during trial when the parties and the judge discussed the verdict slip. Motsis made the request only on the last day of trial, a few minutes before closing arguments and the judge's final charge. At that point the judge observed that the request was untimely

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<sup>26</sup> In any event, the testimony of Ming's controller and two managers could support a finding that, beginning in January 2016, and allowing for what Ming's saved by not paying rent, Ming's lost over \$1.6 million in profits, because of its inability to use the premises. There was also evidence to support a finding that, but for Motsis's conduct, Ming's would have obtained a conditional use permit by January 2016, leaving Motsis's failure to make structural repairs as the cause of the lost profits. Had Motsis moved for a directed verdict on the issue of lost profits, the motion could properly have been denied. Motsis's further argument that Ming's failed to mitigate its damages was not raised below, and Motsis's argument that the lost profits component of damages was unduly speculative is doomed by, among other things, the judge's careful instructions on that issue, to which Motsis did not object.

and that Motsis had not raised an affirmative defense to performance based on claimed breaches by Ming's.<sup>27</sup>

Any objection to the form of a verdict slip must be timely raised. See Hawco v. Massachusetts Bay Transp. Auth., 398 Mass. 1006, 1006 (1986); Fecteau Benefits Group, Inc. v. Knox, 72 Mass. App. Ct. 204, 208 n.12 (2008). Here, Motsis failed to demonstrate to the judge, at a time when the judge could take appropriate action, that he was entitled to add the question to the verdict slip. It was within the judge's discretion to deny Motsis's request as untimely.<sup>28</sup>

e. Estoppel certificate. Motsis argues that the judge erred in drafting the verdict slip and instructing the jury on an issue related to whether estoppel barred Motsis's claims of breach against Ming's. In 2009, Motsis had executed an estoppel certificate confirming to Ming's that it was not in default of any lease obligation and that Motsis was unaware of any facts or circumstances that if left uncured would give rise to such a

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<sup>27</sup> On appeal, Motsis belatedly points out that he did assert such a defense, one of sixteen affirmative defenses in his answer to the amended counterclaims that Ming's advanced. Motsis failed to alert the judge to this fact.

<sup>28</sup> Ming's also argues that the omission of the question sought by Motsis was rendered moot by the jury's findings (in response to other questions) that waiver or estoppel barred Motsis's claims of breach by Ming's. Motsis does not explain how, despite being barred from asserting these claims, he could still rely on them to excuse his own breaches. We need not resolve this issue.

default. Motsis now argues that the verdict slip and jury instructions permitted the jury to find that the 2009 estoppel certificate alone barred Motsis from asserting that Ming's was in breach of the lease in 2015, by reason of its failure to have the required conditional use permit or otherwise. The short answer to this argument is that Motsis made no such objection to the judge and on appeal points to no language in the verdict slip or jury instructions that mentions the certificate, let alone gives it conclusive weight.

4. Appellate attorney's fees and costs. Ming's requests an award of reasonable appellate attorney's fees and costs pursuant to G. L. c. 93A, § 11. See Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co., 445 Mass. 411, 432-433 (2005). We agree that Ming's is entitled to such an award. Ming's is invited to file a verified and itemized application for such fees and costs within fourteen days of the date of this decision, and Motsis will have fourteen days thereafter in which to file any opposition to the amounts requested. See Fabre v. Walton, 441 Mass. 9, 10-11 (2004).

Judgment affirmed.

Order denying motion for  
a new trial affirmed.