20-P-387 Appeals Court

468 CONSULTING GROUP, LLC vs. AGRITECH, INC., & others.[1]

No. 20-P-387.

Middlesex. March 10, 2021. - June 17, 2021.

Present: Milkey, Kinder, & Sacks, JJ.

Contract, Performance and breach, Joint venture, Damages. Consumer Protection Act, Trade or commerce, Unfair or deceptive act, Businessman's claim. Attorney at Law, Transaction with client, Compensation. Damages, Consumer protection case, Breach of contract, Remittitur. Evidence, Joint venturer. Practice, Civil, Damages, Findings by judge, Fraud, Consumer protection case, Instructions to jury, New trial, Argument by counsel. Joint Enterprise.

Civil action commenced in the Superior Court Department on May 27, 2016.

The case was tried before Susan E. Sullivan, J., and a motion for judgment notwithstanding the verdict or for a new trial or remittitur was considered by her.

Joshua A. McGuire for the defendants.
Michael J. Heineman for the plaintiff.

[1] Patrick J. Hannon and RHR, LLC.

KINDER, J. This dispute arises from a business arrangement in which Patrick J. Hannon and his company, Agritech, Inc. (Agritech), agreed to pay 468 Consulting Group, LLC (468 Group), a percentage of the revenue received from a soil reclamation project. 468 Group was formed by Hannon's longtime attorney, Paul Dee, for the purpose of this arrangement. After the relationship between Hannon and Dee soured, 468 Group brought this action against the defendants -- Hannon, Agritech, and RHR, LLC (RHR), an entity formed by Hannon's son (PJ[2]) -- to enforce the terms of the parties' agreement. A jury found that the defendants were engaged in a joint venture, committed breaches of contract, defrauded 468 Group, and transferred property fraudulently. The jury awarded $276,000 in damages. Separately, the judge found that the defendants engaged in unfair or deceptive acts or practices in violation of G. L. c. 93A and awarded double damages, costs, and attorney's fees, resulting in a total judgment of $774,084.[3] The judge denied the defendants' motion for judgment notwithstanding the verdict, a new trial, or remittitur.

---

[2] Hannon's son is also named Patrick. For simplicity, we refer to him as PJ.

[3] The total judgment included $116,475 in attorney's fees and $98,976.36 in prejudgment interest.

On appeal, the defendants claim error in the jury instructions on breach of contract because (1) the judge declined to instruct that Dee, as Hannon's attorney, had to prove that the transaction was fairly and equitably conducted, and (2) the instructions permitted the jury to hold RHR liable for breach of contract as a joint venturer. The defendants also argue that they are not liable, as a matter of law, on the remaining claims and that, alternatively, the amount of damages should be reduced. Finally, the defendants argue that they were prejudiced by improprieties in 468 Group's closing argument. We affirm the amended judgment as to liability on the breach of contract, fraudulent transfer, and G. L. c. 93A claims, and we reverse the amended judgment as to liability on the fraud claims. In addition, we reverse the order on the defendants' motion for judgment notwithstanding the verdict, a new trial, or remittitur insofar as the order denied the request for a remittitur or a new trial on damages.

Background. The jury could have found the following facts. In or around 2013, Hannon devised a business plan to operate a soil reclamation project called Rolling Hills. The plan was for Rolling Hills to receive soil from large urban construction sites and to use that soil to fill an old quarry, so that the quarry could later be used for another purpose. To that end, Hannon formed Agritech on August 27, 2013, to engage in

"mineral, environmental and waste activities" and began negotiating with Immanuel Corporation (Immanuel) to purchase a quarry in Uxbridge. Around the same time, on November 7, 2013, Hannon offered Dee five percent of Rolling Hills's revenue. Hannon made this offer in recognition of an outstanding debt owed to Dee and to reward Dee for his loyalty.[4] Dee accepted Hannon's offer and, the next day, formed 468 Group for purposes of this business arrangement.

A problem soon developed with the sale of the quarry. Agritech was required to obtain environmental insurance as a condition of the purchase, but Agritech could not secure insurance to protect against the possibility that it would contaminate its own property. On November 27, 2013, Hannon proposed restructuring the deal so that (1) Immanuel would sell its stock to another entity, to be named by Hannon, and (2) Agritech would operate Rolling Hills as a contractor, which would allow Agritech to obtain the insurance. On December 20, 2013, Immanuel asked Hannon to provide the name of the other entity, and Hannon responded that the other entity was RHR. PJ formed RHR three days later.

---

[4] Dee was owed approximately $275,000 for legal services he performed for Hannon, as evidenced by information filed in connection with Hannon's 2012 bankruptcy petition. Hannon's bankruptcy was not allowed, and his debt to Dee was not discharged.

On May 5, 2014, RHR and Immanuel entered into a written licensing agreement (licensing agreement), which permitted RHR to "[d]eposit [a]cceptable [m]aterials at the [p]remises" and also granted RHR the option to purchase Immanuel's stock.[5] RHR, in turn, hired Agritech "to essentially run the day-to-day operations of the site," although there was no written agreement between Agritech and RHR. Regardless, Agritech was supposed to bill customers for dumping soil, and those customers were supposed to remit their payments directly to Immanuel. Immanuel was then supposed to pay RHR, which would in turn pay Agritech.

On April 17, 2014, two weeks before the licensing agreement was signed, Hannon and Dee memorialized their November 7, 2013, oral agreement by signing a written consulting agreement between Agritech and 468 Group (consulting agreement). Hannon executed the consulting agreement as president of Agritech and personally guaranteed Agritech's obligations. The consulting agreement specifically stated as follows:

> "The overriding purpose and intent of this [a]greement is that [468 Group] be paid five percent (5%) of the total [r]evenues received in connection with the reclamation, or any other permissible usage, of the real property situated . . . [in] Uxbridge . . . until the [p]roject thereon has been legally and properly completed, regardless of which entity or entities (and their nominees, designees, agents, successors, transferees, or assignees) bills and/or collects such revenues, and regardless of which entity or

[5] The licensing agreement provided that RHR could exercise this stock option after paying Immanuel one million dollars.

> entities comes into actual or constructive possession of monies paid which are related to the development."

To accomplish the stated intent of the consulting agreement, Hannon and Agritech agreed that if they "acquire[d] either a [l]icensing [a]greement to operate the [p]roperty, or acquire[d] title to the [p]roperty itself, . . . [they would] pay to [468 Group], from and after the date of commencement of the [p]roject, an amount equal to five percent (5%) of the [g]ross [m]onthly [r]evenues."[6] The consulting agreement defined gross monthly revenues, in pertinent part, as "the total amount of revenues received by [Hannon or Agritech], or any of its agents, designees, nominees, assignees, transferees or successors." While 468 Group agreed, in exchange, to provide legal advice and consulting services, 468 Group was entitled "to full payment . . . regardless of whether it render[ed] any . . .

---

[6] Section 7 of the consulting agreement further provided as follows:

> "The parties reasonably contemplate that, should [Hannon and Agritech] acquire either a [l]icense to operate the [p]roperty, or the [p]roperty itself, the name of the present corporate client may be changed; and, ownership of the corporation which presently holds title to the [p]roperty may also be changed. It is the intention of the parties that the newly-named corporate client(s) will become a party (or, parties) to this [a]greement, prospectively, thereby assuming all of the duties and obligations which are presently placed on Agritech . . . by virtue of this [a]greement."

advice or services." 468 Group was also entitled to accountings.

The consulting agreement was the product of multiple drafts exchanged between Hannon and Dee. Dee created the first draft, which referred to RHR as a named party to the agreement. However, at some point during Hannon's review of Dee's first draft, the references to RHR as a named party were removed. As Hannon explained to Dee, "it wasn't necessary" to name RHR as a party, but RHR was "understood" to be a party. In response, Dee inserted the paragraph about the overriding purpose and intent of the consulting agreement, the definition of gross monthly revenues, and section 7, see note 6, supra.

Rolling Hills was in operation from around 2015 to 2017. RHR did not maintain corporate books, but $5,537,283.11 passed into Agritech's bank accounts during the operation of the project. Agritech paid 468 Group $53,805 between April and August of 2015 but made no payments to 468 Group after August 22, 2015. While Dee made requests for payments and accountings, Hannon testified that he stopped paying Dee because "the more money that [Hannon] gave to . . . Dee the pushier he got." At trial, Hannon and Agritech took the position that they did not owe anything under the consulting agreement because Dee did not

provide any consulting services.[7] RHR argued that it did not owe anything under the consulting agreement because RHR "had nothing to do with [the consulting agreement]."

Discussion. 1. Breach of contract. a. Business transaction with an attorney. The defendants argue that the judge erred in declining to instruct the jury, consistent with Pollock v. Marshall, 391 Mass. 543, 556-557 (1984), that in a business transaction between a lawyer and a client, "the burden is upon the attorney to prove that any influence over the client which might be presumed to have arisen out of the relationship was neutralized by independent advice given to the client or by some other means so that there was no overreaching of the client and no abuse of confidence" (citation omitted).[8] The defendants contend that this instruction was necessary because Dee was Hannon's longtime attorney.

---

[7] Hannon attempted to explain the consulting agreement by stating that it was, essentially, a fiction, an entity created solely because Dee needed a document showing he had a steady stream of income for purposes of unrelated legal proceedings.

[8] The defendants' proposed instructions initially included a request that the judge instruct the jury on the text of Mass. R. Prof. C. 1.8, as appearing in 471 Mass. 1349 (2015), which governs a lawyer's ethical responsibilities in business transactions with clients. The defendants withdrew that request at the charge conference. The defendants' argument that Mass. R. Prof. C. 1.8 should have been included in the jury instructions is therefore waived. See, e.g., Toney v. Zarynoff's, Inc., 52 Mass. App. Ct. 554, 563-564 (2001).

"We review objections to jury instructions to determine if there was any error, and, if so, whether the error affected the substantial rights of the objecting party" (citation omitted). Beverly v. Bass River Golf Mgt., Inc., 92 Mass. App. Ct. 595, 603 (2018). We will not set aside a verdict due to an error in the jury instructions "unless the error was prejudicial -- that is, unless the result might have differed absent the error" (citation omitted). Id.

As to whether there was error, a "judge need not instruct the jury on every spin that a party can put on the facts." Boothby v. Texon, Inc., 414 Mass. 468, 484 (1993). "But if an instruction bears on a material issue, it is error for a judge to refuse to give the substance of the requested instruction." Antoniadis v. Basnight, 99 Mass. App. Ct. 172, 178-179 (2021). Here, one of the main grounds of defense was that Dee was Hannon's longtime attorney. At the same time, there was little evidentiary support for the defendants' argument that Dee exerted undue influence over Hannon. It was undisputed that Hannon had the expertise in the soil reclamation business, not Dee. See Rubin v. Murray, 79 Mass. App. Ct. 64, 70 (2011) (considering client's "knowledge and sophistication"). And it was Hannon, not Dee, who proposed the consulting agreement. Although Dee drafted the written agreement memorializing his verbal agreement with Hannon, Dee testified that it was edited

several times after it was reviewed by PJ, a practicing attorney who Dee understood to be providing legal advice to Hannon. Thus, even assuming that Dee had some degree of influence over Hannon, there was evidence that Hannon received independent legal advice before executing the agreement. See Pollock, 391 Mass. 556-557 (considering whether client received independent advice). However, we need not decide whether, on this evidence, the judge erred in declining to provide the instruction, as we conclude that there was no prejudice.

Dee was vigorously cross-examined at trial regarding his ethical obligations and admitted that he did not encourage Hannon to seek independent review of the contract. The defendants argued in closing that Dee committed a breach of his ethical obligations to Hannon and that the jury would have to decide whether the consulting agreement was fair and reasonable to Hannon. 468 Group responded, in its closing, that "[t]his agreement was fair [and] reasonable . . . [and] Mr. Hannon had the benefit of his son the lawyer's advice." Thus, the issue was presented to the jury and they were well positioned to determine whether the consulting agreement was unfair to Hannon. For these reasons, we are confident that the jury would not have reached a different result had a Pollock instruction been given.

b. Joint venture. 468 Group's theory was that RHR, although not a signatory to the consulting agreement, was

engaged in a joint venture with Hannon and Agritech to operate Rolling Hills and that "to the extent [the consulting agreement] binds . . . one to pay 468 [Group] five percent, it binds them both." On appeal, RHR contends that the jury instructions and special verdict form erroneously allowed the jury to hold RHR liable for breach of contract on this joint venture theory. RHR argues that it may be held liable as a joint venturer only for "accidents" caused in the carrying out of the joint venture, not for breaches of contract. We are not persuaded.

"[A] joint [venture] is a partnership of a sort," Cardullo v. Landau, 329 Mass. 5, 8 (1952), whereby each joint venturer "is the agent or servant of the others, and . . . the act of any one within the scope of the enterprise is to be charged vicariously against the rest" (citation omitted), Bell v. Mazza, 394 Mass. 176, 184 (1985). It has generally been recognized that, if joint venturers have authority to bind each other, one joint venturer "may be held liable in contract . . . to third persons for all acts . . . carried out by [another joint venturer] within the scope of the joint venture." H.J. Alperin, Summary of Basic Law § 1:10 (5th ed. 2014). See 48A C.J.S. Joint Ventures § 63, at 390 (2014) ("The fact that one joint venturer did not sign the contract will not relieve him or her of liability under such contract when a fellow member of the venture had the authority to bind him or her"). And even if

joint venturers do not have authority to bind each other, "when third parties deal with a [joint venturer] in good faith and without knowledge of any limitation upon his authority, the law presumes that the power exists to bind the [joint venturers] by contracts that are reasonably necessary to carry on the business in which the joint venture is engaged." 12 R.A. Lord, Williston on Contracts § 35:75 (4th ed. 2012).

Here, RHR does not dispute that it was engaged in a joint venture with Hannon and Agritech to operate Rolling Hills. Nor does RHR argue that the consulting agreement was outside the scope of the defendants' joint venture or that Hannon and Agritech lacked authority to bind RHR.[9,10] Rather, RHR argues that it may not be held liable for breach of contract because 468 Group "did not have a contract with RHR, and . . . had not negotiated with RHR." In the circumstances here, however, we disagree. While it is true that joint venture liability is more

---

[9] Even if RHR had raised these arguments, there was ample evidence that (1) Hannon and PJ formed Agritech and RHR, respectively, for purposes of jointly operating Rolling Hills and (2) the consulting agreement, which required Dee to provide legal advice and consulting services in connection with Rolling Hills, was within the scope of the defendants' joint venture.

[10] The judge did not instruct on the ability of Hannon and Agritech to bind RHR or on whether Dee was a third party dealing in good faith. However, RHR did not request those instructions and does not claim error in the failure to give them. This issue is therefore waived. See, e.g., Toney v. Zarynoff's, Inc., 52 Mass. App. Ct. 554, 563-564 (2001).

often applied in tort actions, see Stock v. Fife, 13 Mass. App. Ct. 75, 78 n.5 (1982), a party can be liable for breach of contract where its authorized agent -- that is, its joint venturer -- has made agreements in furtherance of the joint venture. Indeed, other States have applied joint venture liability in similar circumstances. See, e.g., Deicher v. Corkery, 205 Cal. App. 2d 654, 662-663 (1962); Baker Farmers Co. v. ASF Corp., 28 Ill. App. 3d 393, 395-396 (1975); Nesbitt v. Flaccus, 149 W. Va. 65, 73-74 (1964). In light of the undisputed evidence that RHR participated in a joint venture with Hannon and Agritech to operate Rolling Hills, and that the consulting agreement was within the scope of that joint venture, we discern no error in the judge's joint venture instruction or in the special jury question regarding RHR's joint venture liability for breach of contract.

2. Fraud. The defendants argue that 468 Group did not satisfy its burden of proof on the fraud claims. We agree. To prove fraud, 468 Group had to prove the defendants (1) made a false representation, (2) of a matter of material fact, (3) with knowledge of its falsity, (4) for the purpose of inducing action thereon by 468 Group, and (5) that 468 Group justifiably relied on the representation as true and acted upon it to 468 Group's detriment. See Sullivan v. Five Acres Realty Trust, 487 Mass. 64, 73 (2021). "Deception need not be direct to come within

reach of the law. Declarations and conduct calculated to mislead and which in fact do mislead one who is acting reasonably are enough to constitute fraud" (citation omitted). Id. In determining whether the jury verdict on the fraud claims may be sustained, we ask whether "anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be made in favor of [468 Group]" (citation omitted). O'Brien v. Pearson, 449 Mass. 377, 383 (2007).

468 Group's fraud theory shifted over the course of the case. The complaint alleged that the defendants "used the corporate form in effort to commit a fraud" against 468 Group. In its opening statement, 468 Group vaguely suggested that the circumstances surrounding RHR's creation were fraudulent. In response to the defendants' motions for a directed verdict, 468 Group argued that the jury could find fraud based on Hannon's representation that RHR did not need to be named in the consulting agreement. In closing argument, 468 Group urged the jury to find fraud on the following facts: (1) references to RHR were removed from the consulting agreement, (2) RHR, rather than Agritech, signed the licensing agreement, and (3) money from Rolling Hills was spent on real estate for Hannon's family. The judge did not identify the alleged false representation or conduct in the jury instructions, and the special jury verdict

form asked only whether Hannon committed "a fraud upon the plaintiff."[11]

Nothing about RHR's involvement, in and of itself, defrauded 468 Group. Hannon proposed the idea of RHR to solve an insurance problem, and 468 Group knew of RHR's involvement prior to entering into the consulting agreement. The only alleged false representation was Hannon's statement that "it wasn't necessary" to name RHR as a party to the consulting agreement, because RHR was "understood" to be a party. The exact meaning of Hannon's representation was unclear, but we assume for purposes of our review that Hannon intended to convey that RHR would not later dispute being a party.[12] See McEvoy Travel Bur., Inc. v. Norton Co., 408 Mass. 704, 709 (1990) (statements misrepresenting "present intention as to future conduct may be the basis for a fraud action"). We also assume that Hannon's representation was a statement of material fact

---

[11] On appeal, 468 Group also argues that Hannon's promise to pay Dee five percent of the revenues supports 468 Group's fraud claims because that promise was knowingly false when made. This argument was raised for the first time on appeal, however, and we decline to address it. See Boston Water & Sewer Comm'n v. Commonwealth, 64 Mass. App. Ct. 611, 618 (2005).

[12] Or perhaps Hannon intended to convey that the consulting agreement bound RHR, regardless of whether RHR was named as a party. Assuming such a representation would have been one of fact rather than opinion, it would have been an accurate representation based on RHR's role as a joint venturer.

rather than one of opinion, and that Hannon knew the statement was false when he made it. Even assuming these facts, there was insufficient evidence that Dee relied on the statement to his detriment.

The evidence regarding Hannon's representation that it was not necessary to name RHR in the consulting agreement was straightforward. Dee testified that Hannon made the representation and that Dee then revised the consulting agreement to include other language in an attempt to protect 468 Group. From this evidence, it is apparent that Dee, a practicing attorney, understood the importance of the terms of a written contract and did not rely on Hannon's representation that it was "understood" that RHR would be a party to the consulting agreement. Significantly, Dee did not testify that Hannon's representation factored into his decision to have 468 Group enter into the consulting agreement.[13] Simply put, the evidence did not support a reasonable inference that Dee and 468 Group relied on Hannon's alleged false statement to their

[13] Indeed, in these circumstances, Dee's reliance on Hannon's lay opinion regarding what was necessary to bind RHR under the consulting agreement would have been unreasonable.

detriment.[14,15] Accordingly, the defendants' motions for a directed verdict on the fraud claims should have been allowed.

3. General Laws c. 93A. The defendants argue that their conduct did not rise to the level of G. L. c. 93A (c. 93A) violations.[16] Chapter 93A, § 2 (a), declares unlawful "unfair or deceptive acts or practices in the conduct of any trade or commerce."[17] "While a breach of contract alone does not qualify, we have said that '[t]o be held unfair or deceptive under

---

[14] In light of our conclusion, we need not reach RHR's separate argument that it could not have been found liable for fraud as a joint venturer.

[15] RHR's argument regarding the fraudulent transfer claim is made in cursory fashion and without citation to legal authority. It is therefore waived. See Halstrom v. Dube, 481 Mass. 480, 483 n.8 (2019). Even were we to reach the issue, the damages awarded by the jury were tied directly to the breach of contract claim, see infra, and RHR does not identify additional damages awarded based on the fraudulent transfers. Thus, there was no prejudice from the finding of liability on the fraudulent transfer claim.

[16] 468 Group's c. 93A claims were reserved for the judge, who concluded that the defendants committed willful or knowing violations of the statute and awarded double damages in accordance with c. 93A, § 11. The defendants do not raise any separate arguments with respect to the judge's conclusion that the violations were willful or knowing.

[17] The defendants argue that this was a private transaction to which c. 93A does not apply. The defendants rely on a line of cases limiting the reach of c. 93A to exclude disputes arising from private transactions, such as the private sale of one's home, or from intra-enterprise transactions. See Milliken & Co. v. Duro Textiles, LLC, 451 Mass. 547, 563-564 (2008). Contrary to the defendants' arguments, this was not a private or intra-enterprise transaction; this was a commercial transaction between two separate businesses.

c. 93A, practices involving even worldly-wise business people do not have to attain the antiheroic proportions of immoral, unethical, oppressive, or unscrupulous conduct, but need only be within any recognized or established common law or statutory concept of unfairness.'" Exhibit Source, Inc. v. Wells Ave. Business Ctr., LLC, 94 Mass. App. Ct. 497, 501 (2018), quoting VMark Software, Inc. v. EMC Corp., 37 Mass. App. Ct. 610, 620 (1994). In reviewing the judge's conclusion that the defendants' conduct was unfair or deceptive, we "review the judge's subsidiary findings of fact under the clearly erroneous standard, while reviewing de novo [her] ultimate conclusion of law." Zabin v. Picciotto, 73 Mass. App. Ct. 141, 170 (2008).

Here, there was more than a simple breach of contract. Leading up to the breaches of contract, the defendants kept Dee and 468 Group "on a string" for close to two years by (1) offering Dee five percent of the revenue from Rolling Hills as a means of repaying Dee,[18] (2) representing that RHR did not need to be named as a party in the consulting agreement, (3) agreeing to alternative language that was intended to address RHR's

[18] As found by the judge, Dee agreed to enter into the consulting agreement "in lieu of taking other action to collect [the] fees owed to him." The defendants argue that this finding was clearly erroneous. We disagree; Dee testified that after entering into the consulting agreement, he no longer viewed Hannon as having a debt for the hundreds of thousands of dollars in unpaid legal fees.

involvement, and (4) making some initial payments to 468 Group. See Greenstein v. Flatley, 19 Mass. App. Ct. 351, 356 (1985) (c. 93A claim supported where, in part, defendant kept plaintiff "on a string"). See also Lambert v. Fleet Nat'l Bank, 449 Mass. 119, 127 (2007) ("'stringing along' that induces detrimental reliance can, in some cases, constitute a G. L. c. 93A violation"). Deceptively strung along in this way, Dee, as the judge found, "did not undertake steps to collect the fees owed to him." Then, after Dee forwent bringing a lawsuit against Hannon, and just as Rolling Hills began to generate significant revenue, the defendants manufactured excuses to stop paying 468 Group. Instead, the defendants spent the money on real estate for other family members. This was not a good faith dispute over contract terms. See Exhibit Source, Inc., 94 Mass. App. Ct. at 501 (c. 93A claim supported where, in part, defendant manufactured reasons for not returning deposit). We discern no error in the judge's conclusion that the defendants' conduct rose to the level of unfair or deceptive acts or practices, even if that conduct was not fraudulent. See Heller v. Silverbranch Constr. Corp., 376 Mass. 621, 626 (1978) (act may be unfair or deceptive even if not fraudulent).

4. Damages. Next, the defendants argue that the damages awarded were excessive. "We will affirm . . . an award [of damages] unless the court below committed an abuse of discretion

. . . amounting to an error of law" (quotation and citation omitted). DaPrato v. Massachusetts Water Resources Auth., 482 Mass. 375, 393 (2019). It is an error of law for a court to allow an award of damages that "is clearly excessive in relation to what the plaintiff's evidence has demonstrated damages to be" (citation omitted). Id.

468 Group urged the jury to award $223,059.15, which represented five percent of the $5,537,283.11 that passed into Agritech's bank accounts minus the $53,805 that Agritech had already paid 468 Group.[19] The jury, however, awarded $276,000, which represented approximately five percent of the $5,537,283.11 that passed into Agritech's bank accounts, without any reduction for the $53,805 that Agritech had already paid 468 Group. This award was clearly excessive in relation to what 468

[19] The defendants argue that some of the money that passed through Agritech's bank accounts was not attributable to Rolling Hills and that the amount of damages was also excessive for this reason. We disagree. Where Agritech was formed for the purpose of operating Rollings Hills, and there was no evidence that Agritech received money from any other business pursuits, the jury reasonably could have inferred that all of the money that passed through Agritech's bank accounts was attributable to Rolling Hills. There was no evidence supporting 468 Group's related statement that Agritech was taking payments on the side, and that argument should not have been made. However, we are confident that this isolated comment did not make a difference in the jury's verdict, especially in light of the judge's clear instructions that the jury were to decide the case based only on the evidence and not based on arguments of counsel. See Fyffe v. Massachusetts Bay Transp. Auth., 86 Mass. App. Ct. 457, 472 (2014).

Group's evidence demonstrated the damages to be.[20] The defendants' motion for remittitur should have been allowed, and 468 Group should have been permitted to elect a new trial on damages or to accept the jury's damages award reduced by the $53,805 that 468 Group was paid. On remand, 468 Group may make this election. Should 468 Group accept the remitted damages, the judge's separate award of multiple damages for the c. 93A violation should be recomputed based on that amount.

5. Closing argument. 468 Group argued to the jury that, as part of the consulting agreement, Dee relinquished his right to sue Hannon for Hannon's unpaid legal fees. The defendants claim that this argument was improper because it was not supported by the evidence, and that the defendants were prejudiced because they had taken the position that the consulting agreement was not supported by consideration. See Mass. G. Evid. § 1113(b)(3)(A) (2021). We agree that the consulting agreement did not contain an express waiver of Dee's right to sue Hannon for his legal fees, but Dee testified that

[20] The judge's findings of fact on the c. 93A claim included the following finding: "[p]ursuant to the [consulting agreement] . . . [468 Group] was entitled to $276,864.15 from the money that passed through the Agritech account less the $53,805.00 previously paid for a total of $223,059.15." Yet the judge ordered that judgment be entered in favor of 468 Group on its c. 93A claims in the amount of $276,000, together with reasonable costs and attorney's fees. The judge was not required to follow the jury's damages award. See Exhibit Source, Inc., 94 Mass. App. Ct. at 500.

after entering into the consulting agreement, he no longer viewed Hannon as having a debt for the unpaid legal fees. In any event, we discern no prejudice where, regardless of whether the consulting agreement contained such a waiver, the purpose of the consulting agreement was for Hannon to repay Dee and there was other evidence of consideration. The consulting agreement obligated Dee to provide consulting services and legal advice. In these circumstances, 468 Group's closing argument on this point, even if improper, could not have made a difference in the jury's conclusion. See Fyffe v. Massachusetts Bay Transp. Auth., 86 Mass. App. Ct. 457, 472 (2014).[21]

Conclusion. For these reasons, so much of the amended judgment as imposes liability on the fraud claims is vacated, and so much of the amended judgment as imposes liability on the breach of contract, fraudulent transfer, and c. 93A claims is affirmed. In addition, the order denying the defendants' motion for judgment notwithstanding the verdict, a new trial, or

[21] The defendants also argue that 468 Group improperly shifted the burden of proof by commenting on the absence of documentary evidence showing that (1) RHR sought financing from a third party before the defendants and Immanuel settled on the deal set forth in the licensing agreement and (2) Hannon's girlfriend attempted to obtain a traditional mortgage to purchase the home in Uxbridge. Even assuming these comments were improper, they were related to tangential issues, and we are confident that they did not affect the jury verdict on the breach of contract or fraudulent transfer claims or the judge's finding on the c. 93A claims.

remittitur is reversed insofar as the order denied the request for a remittitur or a new trial on damages. On remand, 468 Group may elect a new trial on damages or accept the remitted damages. Should 468 Group accept the remitted damages, the judge's separate award of multiple damages for the c. 93A violation should be recomputed based on that amount.

So ordered.