23-P-884 Appeals Court

JOSEPH TRITES & another[1] vs. PETER CRICONES & another.[2]

No. 23-P-884.

Middlesex. October 8, 2024. – February 7, 2025.

Present: Neyman, Singh, & Toone, JJ.

Practice, Civil, Directed verdict. Nuisance. Real Property, Nuisance, Sale. Contract, Sale of real estate, Implied covenant of good faith and fair dealing. Consumer Protection Act, Unfair or deceptive act. Damages, Consumer protection case.

Civil action commenced in the Superior Court Department on October 12, 2018.

The case was tried before Christopher K. Barry-Smith, J.

Edward A. Prisby for the defendants.
John G. Mateus for the plaintiffs.

TOONE, J. The defendants, Peter Cricones and Reedy Meadow LLC (Reedy Meadow), appeal from a judgment entered in favor of

[1] Kim Trites.

[2] Reedy Meadow LLC.

the plaintiffs, Joseph and Kim Trites. After the Triteses purchased a home in the defendants' new development in the town of Pepperell, they discovered that their yard was contaminated by Japanese knotweed, an invasive and destructive plant, as well as large shards of glass and metal debris. Following a trial in the Superior Court, the jury found for the Triteses on their claims for private nuisance and breach of the implied covenant of good faith and fair dealing, and the judge ruled that the defendants also violated G. L. c. 93A, §§ 2 and 9, awarding the Triteses the same damages determined by the jury for the other claims (so that the over-all judgment did not increase), attorney's fees and costs, but not multiple damages. We conclude that even though the defendants' motion for a directed verdict should have been allowed on the nuisance and implied covenant claims, the evidence was sufficient to establish a violation of c. 93A. We also conclude that the evidence was sufficient to support the judge's award of damages. Accordingly, we affirm the judgment.

Background. Cricones owns and operates Reedy Meadow, a real estate development company. In 2015, the defendants bought a vacant, overgrown gravel pit in Pepperell, with the aim of turning it into a twenty-seven-lot housing development. After excavating the foundations for the lots, the defendants used loam, a combination of clay, sand, and silt, in the course of

developing the lots. Some loam used was hauled in from an outside source, some was obtained from excavating the roads of the development, and some was taken from a pile of loam left behind by the site's gravel operation. Japanese knotweed grew from the pile five feet high. Similar in appearance to bamboo, Japanese knotweed is an invasive species with an unusually deep root structure. Unless its rhizomes and root systems are removed from the soil, it spreads easily, displaces other plants, breaks through concrete and asphalt, and is difficult to eradicate. The defendants' excavation contractor testified that he saw the Japanese knotweed growing in the pile and warned Cricones not to contaminate the other loam with it, but Cricones decided to use loam from the pile, mix it with the trucked-in loam, and spread it throughout the development.

In April 2017, the Triteses executed a purchase and sale agreement to purchase a home in the development for $435,000 (property). When they first toured the property in the early months of 2017, there was snow on the ground. The Triteses arranged for an inspection in April, but the inspector did not conduct a soil analysis and could not inspect the lawn because it was covered by hydroseed. The Triteses closed on the home in May. A leafy weed soon appeared in the Triteses' lawn, which their neighbor informed them was Japanese knotweed. By fall, knotweed was growing throughout the yard, all around the house's

foundation and under the deck, and was starting to sprout through the walkway pavement. A restoration ecologist testified that approximately thirty-five percent of the property was infested. In addition, there was a copious amount of glass and metal debris in the soil, which caused children playing in the yard to cut their feet. At trial, the Triteses presented for the jury's view what the judge described as "two very large buckets and a crate, filled with glass shards and metal refuse, some pieces very small and some quite large," that the Triteses had pulled from their yard.

Between May and October 2017, Cricones made what the judge characterized as "half-hearted" efforts to combat the Japanese knotweed on the lot. He did not consult with landscape professionals knowledgeable about the problem. He sent a contractor to try to pull out the knotweed, but that did nothing to eradicate it. One of Cricones's workers tried to excavate the knotweed with a compact tractor, but that also failed. Cricones advised the Triteses to use a commercial weed killer to control the knotweed, but they did not want to expose their children to the toxicity of that product. The relationship between the Triteses and the defendants deteriorated. The Triteses posted signs on their property and vehicles stating, for example, "Japanese knotweed lives in our yard." Cricones

made threats and vulgar gestures, and engaged in other actions in an attempt to intimidate them.

The Triteses filed suit against the defendants in 2018. The judge reserved the G. L. c. 93A claims for his consideration, and the remaining claims were tried before a jury. Following a four-day trial, the jury responded to questions on a special verdict form. With respect to the Triteses' claims concerning the Japanese knotweed and other defects in their yard, the jury found for the defendants on the claim alleging breach of contract as to an express warranty, and for the Triteses on nuisance and violation of the implied covenant of good faith and fair dealing. The jury also found that the defendants were negligent as to the Japanese knotweed and yard defects, but that negligence did not cause the Triteses' injuries.[3] In total, the jury awarded the plaintiffs $186,000 in damages: $166,000 on the implied covenant claim, and $186,000 on the nuisance claim, with $166,000 of the latter amount duplicative of the former.

[3] At trial, the Triteses also presented evidence about a fire that spread from the defendants' property to their home. The jury found in favor of the defendants on the Triteses' negligence and nuisance claims as to that fire. The jury also found for the defendants on two claims of intentional infliction of emotional distress.

After hearing additional argument, the judge issued findings, rulings, and an amended order on the c. 93A claims, concluding that the defendants had engaged in unfair or deceptive acts or practices and caused damages of $186,000, the same amount determined by the jury. The judge also awarded the Triteses reasonable attorney's fees and costs under G. L. c. 93A, § 9, but, finding that the defendants' conduct was not willful or knowing, declined to award the Triteses multiple damages. On appeal, the defendants challenge the denial of their motion for a directed verdict on the Triteses' claims for nuisance and breach of the implied covenant, the judge's c. 93A decision, and the determination of damages.[4]

Discussion. 1. The defendants' motion for a directed verdict. A jury's verdict will be upheld "if it may be determined that '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 plaintiff'" that supports the claim (citation omitted). Sullivan v. Five Acres Realty Trust, 487 Mass. 64, 68 (2021).

[4] The defendants also challenge the jury's finding of negligence. However, because the jury also found that the defendants' negligence did not cause the Triteses' injuries, that claim is not a basis for the judgment entered against the defendants, and we do not address it here.

a. Nuisance. "A private nuisance action is the remedy for an invasion of a property right." Connerty v. Metropolitan Dist. Comm'n, 398 Mass. 140, 147 (1986). See Restatement (Second) of Torts § 821D (1979) (defining private nuisance as "a nontrespassory invasion of another's interest in the private use and enjoyment of land"). To proceed with a claim, the plaintiff must have an interest in the affected property, such as a fee interest, an easement, or a tenancy. Connerty, supra. In addition, the invasion must come from beyond, usually from a different parcel of property. See Doe v. New Bedford Hous. Auth., 417 Mass. 273, 288 (1994). Private nuisance actions have historically involved "conflicts between neighboring, contemporaneous land uses." Wellesley Hills Realty Trust v. Mobil Oil Corp., 747 F. Supp. 93, 98 (D. Mass. 1990), citing Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303, 314 n.9 (3d Cir.), cert. denied, 474 U.S. 980 (1985). See Morrissey v. New England Deaconess Ass'n -- Abundant Life Communities, Inc., 458 Mass. 580, 588 (2010), quoting Taygeta Corp. v. Varian Assocs., Inc., 436 Mass. 217, 231 (2002) ("A private nuisance is actionable when a property owner creates, permits, or maintains a condition or activity on [its] property that causes a substantial and unreasonable interference with the use and enjoyment of the property of another").

Accordingly, a buyer of land does not have a private nuisance action against a seller for contamination of a property prior to its sale. In Sheehy v. Lipton Indus., Inc., 24 Mass. App. Ct. 188, 190 (1987), the plaintiff purchased land that he later discovered was contaminated by hazardous material. The plaintiff sued the seller for private nuisance, and this court affirmed summary judgment for the seller. Id. at 191-192. We explained that even though a seller may be liable for a structure or condition that causes harm to "others outside of the land," even after the buyer has taken possession, that liability does not extend to an action by the buyer against the seller for nuisance. Id., quoting Restatement (Second) of Torts § 373 (1965). See Wellesley Hills Realty Trust, 747 F. Supp. at 98-99 (dismissing nuisance claim against defendant that contaminated property before selling it to plaintiff).

Although the Triteses argue that, because Japanese knotweed spreads rapidly, it could have migrated to their yard "from other infected properties," the record does not support such a finding. Rather, the evidence established that the Japanese knotweed arrived at the property as a result of the development process, during which the defendants used loam contaminated with knotweed rhizomes and spread it throughout the development. The Triteses saw knotweed sprouting in their yard shortly after they purchased their home. The other contaminants in their yard --

the glass and metal debris -- were obviously also there at the time of purchase. Because the evidence was insufficient to show an invasion of the Triteses' property, as opposed to a preexisting contamination, the defendants were entitled to a directed verdict in their favor on the nuisance claim. See Sullivan, 487 Mass. at 72-73.

b. Implied covenant of good faith and fair dealing. The Triteses' complaint included claims for breach of contract, breach of the warranty of habitability, and breach of the implied covenant of good faith and fair dealing. The breach of contract claim was based on an express one-year limited warranty in the purchase and sale agreement, which the Triteses contended obligated the defendants to provide a property free of defects.[5] The jury found for the defendants on this claim.

The implied warranty of habitability "attaches to the sale of new homes by builder-vendors," Sullivan, 487 Mass. at 71, in order "to protect a purchaser of a new home from latent defects

[5] "Acceptance of a deed ordinarily merges all obligations in the purchase and sale agreement, except for those specified in the deed itself." Albrecht v. Clifford, 436 Mass. 706, 716 (2002), citing McMahon v. M & D Bldrs., Inc., 360 Mass. 54, 59 (1971). However, there is an exception to this rule where "a purchaser from a builder-vendor [relied] on the contractor's possessing the skill to build a house which is habitable." Solomon v. Birger, 19 Mass. App. Ct. 634, 642 (1985). See Kelley v. Iantosca, 78 Mass. App. Ct. 147, 151-153 (2010) (merger no bar to action for breach of construction contract).

that create substantial questions of safety and habitability," id., quoting Albrecht v. Clifford, 436 Mass. 706, 711 (2002). This warranty "cannot be waived or disclaimed, because to permit the disclaimer of a warranty protecting a purchaser from the consequences of latent defects would defeat the very purpose of the warranty." Albrecht, supra. Although the parties addressed the implied warranty of habitability in their opening statements, that claim was not submitted to the jury for decision.[6]

[6] At the final trial conference, the judge questioned whether the implied warranty of habitability applies to latent defects in the yard like the soil contaminants at issue here. He stated that a recent decision "basically said habitability has to involve actual use of the residence," not a yard, but he was still inclined to present the claim to the jury if the evidence showed that the Japanese knotweed threatened the foundation of the Triteses' house. In Goreham v. Martins, 485 Mass. 54 (2020), the Supreme Judicial Court held that the implied warranty of habitability as it applies to residential leases is limited to "the physical facilities" of the property, see id. at 65, quoting Doe, 417 Mass. at 282; and that the warranty did not cover code violations that do not affect "the habitability of a tenant's 'dwelling unit'" such as, in that case, snow and ice on the driveway, Goreham, supra, quoting Doe, supra at 281. Goreham focused on the reasonableness of the burden imposed on landlords as the result of the strict liability standard for personal injury damages under the implied warranty. See Goreham, supra at 65-66. Different considerations may apply in determining the scope of the implied warranty of habitability as it applies to the sale of new homes. Cf. Berish v. Bornstein, 437 Mass. 252, 264-265 (2002) (implied warranty as it applies to sale of new residential condominium units by builder-vendors extends to latent defects in common areas that implicate habitability of individual units, so as to "ensure that there is a complete remedy for a breach of habitability in the sale of condominium units").

The jury did find for the Triteses on their claim for breach of the implied covenant of good faith and fair dealing. The defendants argue that the judge should have granted their motion for a directed verdict because the implied covenant may not be invoked "to create rights and duties not otherwise provided for in the existing contractual relationship." Uno Restaurants, Inc. v. Boston Kenmore Realty Corp., 441 Mass. 376, 385 (2004) (Uno). We agree.

The implied covenant provides that "neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (citation omitted). Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451, 471-472 (1991). It is not limited to the enforcement of a contract's express terms; the term "implied covenant" contemplates "an obligation that is not express in the contract." Classic Restaurants Concepts, LLC v. President & Fellows of Harvard College, 104 Mass. App. Ct. 323, 331 (2024). Nevertheless, the scope of the implied covenant is "only as broad as the contract that governs the particular relationship," Ayash v. Dana-Farber Cancer Inst., 443 Mass. 367, 385, cert. denied sub nom. Globe Newspaper Co. v. Ayash, 546 U.S. 927 (2005), and a violation of the implied covenant must involve the manner in which the contract is performed, see Ayash, supra; Uno, 441 Mass. at 385.

The purchase and sale agreement did not expressly require the defendants to disclose soil contaminants, and the Triteses do not contend that the implied covenant imposed any disclosure obligation beyond what the contract provided.[7] Rather, they argue that the implied covenant required the defendants "not to knowingly bring Japanese knotweed onto the property and not to use soil that was filled with glass, . . . hunks of metal, garbage, and other debris that rendered the lawn unusable by the Trites family." Similarly, in his G. L. c. 93A decision, the judge interpreted the jury's verdict as finding that "the defects in the yard were so significant that [the defendants] breached the implied covenant of good faith and fair dealing by not mitigating those defects, thereby depriving the Triteses, as buyers, [of] the benefits of their contract to purchase the new

[7] Nor did the Triteses claim that the defendants engaged in common-law fraud or misrepresentation. See Sullivan, 487 Mass. at 73-75 (distinguishing claims for fraud and misrepresentation from "bare nondisclosure" in real estate transactions [citation omitted]). Interestingly, the "effects of Japanese [k]notweed are so drastic" that the disclosure of its presence is now required on all sales of property in the United Kingdom. Rathore, The Super-Villain of the Plant Kingdom: Japanese Knotweed and Its Never-Ending Saga, 18 Rutgers J.L. & Pub. Pol'y 2, 5 (2020). No such requirement exists in Massachusetts. Because the depth of the plant's rhizomes makes its presence difficult to detect when dormant, prospective purchasers' only option in the winter and early spring may be to ask sellers to disclose whether they are aware of the plant's occupation of their property. See Kannavos v. Annino, 356 Mass. 42, 48-49 (1969) (discussing duty of seller to disclose all known material facts when buyer asks about conditions of property).

home." Yet these concerns, while certainly understandable in their own right, implicate the habitability of the property, not whether the defendants performed their obligations under the purchase and sale agreement in bad faith. See Sheehy, 24 Mass. App. Ct. at 194 n.6, citing Restatement (Second) of Contracts § 205 (1981) (affirming summary judgment on purchaser's implied covenant claim notwithstanding seller's alleged failure to disclose contamination of property because implied covenant pertains only "to bad faith in the performance of a contract"). We decline to import habitability standards into the implied covenant of good faith and fair dealing on the theory that buyers of property are entitled to "the fruits of the contract." Anthony's Pier Four, Inc., 411 Mass. at 471-472, and cases cited. Rather, for purchasers of new homes from builder-vendors, their protection from latent defects lies in any warranty or disclosure requirement set forth in the contract, the implied warranty of habitability, and, as discussed infra, chapter 93A.[8]

[8] Because the purchase and sale agreement provided that the Triteses accepted the condition of the property after having "an opportunity to conduct all inspections," the Triteses might have had a claim for breach of the implied covenant had the defendants interfered with their ability to discover the contaminants prior to purchase. The home inspection that the Triteses arranged for, however, did not include a soil analysis, and there is no evidence that the defendants placed hydroseed on the yard in order to hamper the Triteses' and their inspector's ability to examine the soil.

2. The judge's c. 93A decision and amended order. The defendants also challenge the judge's decision on the Triteses' parallel claims under G. L. c. 93A, §§ 2 and 9. See Klairmont v. Gainsboro Restaurant, Inc., 465 Mass. 165, 186 (2013).[9]

a. Liability. The defendants do not dispute that they acted "in the conduct of any trade or commerce" for purposes of c. 93A. See G. L. c. 93A, §§ 2, 11. Although the statute does not apply to "strictly private transactions such as the isolated sale of a private home," Begelfer v. Najarian, 381 Mass. 177, 190 (1980), citing Lantner v. Carson, 374 Mass. 606, 610-611 (1978), its remedies may be invoked against a construction company or real estate developer like the defendants, see Heller v. Silverbranch Constr. Corp., 376 Mass. 621, 622-627 (1978). Instead, the defendants argue that the judge's finding of unfair or deceptive conduct was erroneous because, like the jury's finding of a violation of the implied covenant, he effectively relied on contractual terms not set forth in the purchase and sale agreement. Whether particular conduct is unfair or deceptive for purposes of a claim under G. L. c. 93A is a question of fact that we review under the clearly erroneous standard, and whether such unfair or deceptive conduct

[9] The defendants do not challenge the amount of attorney's fees and costs awarded by the judge but, rather, the Triteses' eligibility for any relief under c. 93A.

constitutes a c. 93A violation is a question of law that we review de novo. See H1 Lincoln, Inc. v. South Washington St., LLC, 489 Mass. 1, 13-14 (2022), and cases cited.

We disagree with the defendants' argument that their liability under c. 93A was limited to the "terms and obligations" of the parties' contract. A cause of action under c. 93A is "not dependent on traditional tort or contract law concepts for its definition." Heller, 376 Mass. at 626. See H1 Lincoln, Inc, 489 Mass. at 24. In particular, a seller of property can violate c. 93A by failing to disclose a material fact even in the absence of a contractual duty to disclose. In Heller, supra at 624-627, the Supreme Judicial Court affirmed a construction company's liability under c. 93A for failing to disclose a drainage problem to the purchasers of a residential property. The court found "ample support" for the judge's ruling that the company's failure to disclose the known defect violated the Attorney General's consumer protection regulations. See Heller, supra at 626-627 & n.3. See also 940 Code Mass. Regs. § 3.16(2) (1993) (§ 3.16[2]) ("[A]n act or practice is a violation of [G. L.] c. 93A, § 2, if . . . [a]ny person or other legal entity subject to this act fails to disclose to a buyer or prospective buyer any fact[,] the disclosure of which may have influenced the buyer or prospective buyer not to enter into the transaction"). In Sheehy -- the same case that upheld judgment

for the seller on the plaintiff's nuisance and implied covenant claims, see supra -- the court reversed summary judgment for the seller on the plaintiff's c. 93A claim. See Sheehy, 24 Mass. App. Ct. at 194-196. Citing the same Attorney General regulation, we explained that liability extends to "cases of nondisclosure of a material fact." Id. at 195. To recover under this theory, the plaintiff must show that (1) "the defendants knew that the property was contaminated with hazardous material; (2) that the contamination was a material circumstance which would have led the plaintiff not to purchase the property; and (3) that [the defendants] failed to disclose the problem" (footnote omitted). Id.

The evidence supported the judge's finding of a c. 93A violation here. First, it is clear that the Triteses would not have purchased the property had they known about the contamination of its soil. Joseph Trites testified that he was distraught to learn that his yard was infested with a plant that spreads rapidly, destroys other plants, and is "next to impossible to get rid of." Further, the Triteses had to prohibit their son from playing in the yard, due to the glass and metal debris, even though that was the main reason they bought the property. Second, the evidence showed that the defendants "knew about the contamination but failed to disclose it." See Sheehy, 24 Mass. App. Ct. at 195. Although a

defendant cannot be held liable under c. 93A for "not disclosing what he does not know," id. at 196, the defendants' knowledge of the Japanese knotweed was established by the excavator's testimony that, after he warned Cricones not to use the contaminated pile of loam, Cricones "decided not to worry about it." Contrast Nei v. Burley, 388 Mass. 307, 316-317 (1983) (no violation of § 3.16 [2] where evidence supported finding that broker did not know lot would require additional fill in order to construct house and septic system). The judge also found that the defendants were aware of the glass and metal debris based on "the sheer quantity" that the Triteses found in their yard, and the defendants do not challenge that finding on appeal.[10] Finally, while a defendant may avoid liability under c. 93A for a nondisclosure "if it is shown that the plaintiff knew about the contamination," Sheehy, supra, the record does

[10] Instead, the defendants argue that the judge's finding of their knowledge conflicted with his conclusion that they did not engage in a knowing or willful violation that would warrant an award of multiple damages under c. 93A. See H1 Lincoln, Inc., 489 Mass. at 17-18. We disagree. Chapter 93A distinguishes "between violations that consist of unfair or deceptive acts or practices, simpliciter, and those that are knowing or wilful or actuated by bad faith. The former are sanctioned by compensatory single damages. Damages for the latter more serious violations are avowedly punitive" (quotations and citation omitted). Gore v. Arbella Mut. Ins. Co., 77 Mass. App. Ct. 518, 536 n.21 (2010). The judge reasonably concluded that even though the defendants knew about the contaminants in the soil, they did not know that their failure to disclose them to the Triteses amounted to unfair and deceptive conduct.

not demonstrate such knowledge by the Triteses. They bought the house before the knotweed growing season began, and snow and hydroseed prevented them and their inspector from detecting contaminants in the soil before purchase.[11]

b. Damages. In his c. 93A decision, the judge concluded that the defendants caused "damages of $186,000, the same amount of damages determined by the jury in its verdict due to nuisance and breach of contract."[12] A claimant under G. L. c. 93A, § 9, may recover actual or nominal damages, whichever is greater, see G. L. c. 93A, § 9 (3), and actual damages include recovery "for

---

[11] The defendants do not contend that the "as is" clause in the purchase and sale shielded them from liability under c. 93A. As this court recognized in Sheehy, "Massachusetts case law rejects the assertion of 'as is' and like clauses as an automatic defense to allegations of fraud or deceit." Sheehy, 24 Mass. App. Ct. at 193. It also observed that there may be "important questions of law with respect to liability under c. 93A for pure nondisclosure" in a case involving an "as is" agreement and "sophisticated businessmen." Sheehy, supra at 196, citing V.S.H. Realty, Inc. v. Texaco, Inc., 757 F.2d 411, 420-422 (1st Cir. 1985) (Breyer, J., concurring in part and dissenting in part). This case, which involves an agreement between an experienced developer and relatively unsophisticated purchasers, does not implicate those questions. The judge did consider the defendants' reliance on the "as is" clause in the purchase and sale agreement as a factor in determining that they did not engage in a knowing or willful violation of c. 93A, and we discern no error in that analysis.

[12] The judge was not required to adopt the jury's finding of damages. See Wyler v. Bonnell Motors, Inc., 35 Mass. App. Ct. 563, 567 (1993) ("a judge may make independent and, therefore, different findings on the c. 93A aspect of a case that arises out of the same facts which gave rise to parallel common law claims").

all losses which were the foreseeable consequences of the defendant's unfair or deceptive act or practice," DiMarzo v. American Mut. Ins. Co., 389 Mass. 85, 101 (1983).

The defendants argue that the evidence was insufficient to support the award of damages. In assessing such evidence, we apply a "highly deferential" standard and will overturn such an award only if it is "clearly excessive in relation to what the plaintiff's evidence ha[d] demonstrated damages to be." Spinosa v. Tufts, 98 Mass. App. Ct. 1, 10 (2020), quoting Ayash, 443 Mass. at 404. At trial, the Triteses called a restoration ecologist, who testified about the difficulty involved in remediating a property infected with Japanese knotweed, and a real estate appraiser who, based on her research, estimated that the cost of remediating the knotweed as of 2022 resulted in a diminution in the value of the property between $65,000 and $166,000. The Triteses also testified about their own efforts to remove glass and metal debris from their yard. The defendants cross-examined these witnesses about various remediation options, but did not present any evidence on damages themselves. Considered in its totality, and with regard for the deferential standard of review, we conclude that the evidence was sufficient to allow the judge "to arrive at a reasonably approximate estimate of damages." Brewster Wallcovering Co.

v. Blue Mountain Wallcoverings, Inc., 68 Mass. App. Ct. 582, 609 (2007).

Conclusion. For the foregoing reasons, we conclude that the defendants' motion for a directed verdict should have been allowed on the claims of nuisance and breach of the implied covenant of good faith and fair dealing. The judgement is otherwise affirmed.

So ordered.