COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1670

RICK YATSENICK & another[1]

vs.

OLD WHARF VILLAGE LLC & another.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiffs, Rick Yatsenick and Joal Yatsenick, appeal from a judgment, after a Superior Court jury trial, for the defendants, Old Wharf Village LLC (developer) and Charles Edgar, the manager of Old Wharf Village LLC. They also appeal from the judge's order denying their motion for a new trial. Concluding that the trial judge properly instructed the jury on quitclaim covenants, that the plaintiffs did not preserve any claim that the instruction on the exculpatory clause was confusing or foreclosed their theory of the case, and that the judge acted within his discretion in excluding marginal testimony from other unit owners, we affirm.

[1] Joal Yatsenick.

[2] Charles Edgar.

1. Jury instructions. a. Standard of review. "The trial judge has wide discretion in framing the language used in jury instructions." Kiely v. Teradyne, Inc., 85 Mass. App. Ct. 431, 441 (2014). "An appellate court considers the adequacy of the instructions as a whole, not by fragments." Selmark Assocs., Inc. v. Ehrlich, 467 Mass. 525, 547 (2014). "An error in jury instructions is not grounds for setting aside a verdict unless the error was prejudicial -- that is, unless the result might have differed absent the error." Patriot Power, LLC v. New Rounder, LLC, 91 Mass. App. Ct. 175, 181 (2017), quoting Blackstone v. Cashman, 448 Mass. 255, 270 (2007). The burden is on the plaintiffs to make a "plausible showing that the trier of fact might have reached a different result," absent any erroneous instruction. Campbell v. Cape & Islands Healthcare Servs., Inc. 81 Mass. App. Ct. 252, 258 (2012), quoting Grant v. Lewis/Boyle, Inc., 408 Mass. 269, 275 (1990).

b. Breach of contract theory. "Quitclaim covenants . . . guarantee that the grantor is conveying whatever title he has and that he has done nothing to impair or encumber that title," Dalessio v. Baggia, 57 Mass. App. Ct. 468, 470 n.4 (2003), other than those encumbrances referenced in the deed. See Snyder v. Sperry & Hutchinson Co., 368 Mass. 433, 443 (1975) ("Although the lease is an encumbrance . . . , the deed makes the conveyance subject to the lease 'with Amendments' so that the

[quitclaim] warranty is subject to that qualification"). Accord Titcomb v. Carroll, 287 Mass. 131, 133 (1934) (quitclaim deed recited conveyance "subject to 'several tenancies and leases'"); Maksymiuk v. Puceta, 279 Mass. 346, 351 (1932) (quitclaim deed recited conveyance subject to three mortgages); Everett v. Gately, 183 Mass. 503, 505 (1903) ("The deed under which the plaintiff took was a quitclaim deed. It recited that the premises were subject to an [e]ncumbrance . . . . The plaintiff had, therefore, full notice, if that is material, of the [e]ncumbrance which he now seeks to avoid"). Here, the deed repeatedly referenced the condominium master deed and the condominium bylaws. The deed, however, stated that the unit was "intended . . . only for year round single family residences . . . as set forth in the aforesaid Master Deed," but the master deed limited the unit to motel use.[3]

At trial, the judge instructed the jury on the law applicable to quitclaim covenants. The judge stated, "[E]very condominium unit deed must . . . contain a statement of the use

[3] The encumbrance in the master deed was not created by the town, as the developer suggests, but rather was created by the developer. The language in the master deed restricting the permissible use of the property was drafted and executed by the developer. Regardless of the town's use restriction on the property, the developer affirmatively created an encumbrance by limiting the permissible uses of the property in the master deed.

for which the unit is intended and the restrictions, if any, on its use. . . . A deed with quitclaim covenants conveys land from the seller to the buyer with covenants, or promises, on the part of the seller that at the time of the delivery of such deed the premises are free from all encumbrances made by the seller, and that the seller will never challenge the buyer's right to the property." As the judge properly instructed the jury on the existence and legal import of the quitclaim covenants, the plaintiffs received the instructions necessary to argue that the developer breached these covenants. See Beverly v. Bass River Golf Mgt., Inc., 92 Mass. App. Ct. 595, 603 (2018), quoting Hopkins v. Medeiros, 48 Mass. App. Ct. 600, 611 (2000) ("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").

Contrary to the plaintiffs' assertion, at no point did the trial judge instruct that the breach of contract claim was limited to the purchase and sale agreement. The judge simply declined to give the instruction as requested, which explicitly set out the basis of the plaintiffs' contract claim. "Every possible correct statement of law need not . . . be included in the jury instructions if the instructions as given are correct and touch on the fundamental elements of the claim." Hopkins, 48 Mass. App. Ct. at 611, quoting Kobayashi v. Orion Ventures,

Inc., 42 Mass. App. Ct. 492, 503 (1997). The judge provided the jury with all of the legal concepts necessary to evaluate the plaintiffs' claims, leaving the plaintiffs free to argue that the developer was liable for breach of contract by breaching the quitclaim covenants in the deed.

c. Exculpatory clause. To the extent that the plaintiffs argue that the jury instruction regarding the exculpatory clause in the purchase and sale agreement[4] confused the jury into thinking that the breach of contract claim could not be based on the deed, this argument was not preserved in the trial court. "An issue not raised or argued below may not be argued for the first time on appeal." Carey v. New England Organ Bank, 446 Mass. 270, 285 (2006), quoting Century Fire & Marine Ins. Corp. v. Bank of New England-Bristol County, N.A., 405 Mass. 420, 421

[4] The relevant jury instruction stated, "[T]he written purchase and sale agreement . . . included the following clause at paragraph 25: 'The buyers acknowledge that they have not been influenced to enter into this transaction, nor have they relied upon any warranties or representations not set forth or incorporated into this agreement or previously made in writing. This provision may permit the buyers to rely on prior written representations not set forth or incorporated in the written purchase and sale agreement.' The plaintiffs maintain they relied upon the Multiple Listing Sheet, or MLS listing sheet . . . . They claim this listing sheet constituted a written representation to them. . . . It is for the jury to decide if the MLS listing sheet constitutes a written representation previously made in writing . . . . If the jury finds that the MLS listing sheet does not constitute a written representation previously made in writing by the defendant to the plaintiffs, [the developer] is entitled to rely upon [the exculpatory clause] as a defense to the breach of contract claim."

n.2 (1989). The plaintiffs assert that they preserved this issue in the written motion to reform the jury instructions and at several points throughout the trial, but at no point did they object to the exculpatory clause instruction as being confusing in relation to the breach of contract claim, or request that the judge omit the exculpatory clause instruction altogether.[5] In fact, the plaintiffs requested a jury instruction on the exculpatory clause concerning their claim of misrepresentation. Similarly, after the charge, there was no objection with respect to this issue. Accordingly, this claim is waived.

2. Excluded testimony. It is "within the judge's discretion to decide whether the probative value of the evidence outweighs the possibility that it would mislead or prejudice the jury." Carrel v. National Cord & Braid Corp., 447 Mass. 431, 446 (2006), quoting Kobico, Inc. v. Pipe, 44 Mass. App. Ct. 103, 109 (1997). "We will not reverse such decisions unless there is palpable error." Carrel, supra.

We cannot say that the trial judge's refusal to admit the testimony of the other unit holders who were allegedly deceived

[5] The letter sent by the plaintiffs pursuant to Mass. R. A. P. 22 (c), as appearing in 481 Mass. 1652 (2019), as requested during oral argument, provided merely a citation to where the plaintiffs objected to the judge's refusal to describe the basis of the breach of contract claim. At no point in that discussion did the plaintiffs discuss the exculpatory clause instruction, much less suggest that it would confuse the jury about the basis of the breach of contract claim.

as to the "motel" use restriction on the condominiums constituted an abuse of discretion. The plaintiffs wanted to call the other unit holders to demonstrate Edgar's "method of marketing," and the "capacity of [the] marketing program to deceive."[6] The judge declined to admit this testimony, stating that "the only effect that matters is the effect on your client."

Although this testimony may have been relevant to support the proposition that the developer's actions had the capacity to deceive under the plaintiffs' G. L. c. 93A claim, the real issue, as pointed out by the judge, was whether the plaintiffs were in fact deceived. "To be successful, a plaintiff bringing a claim under [G. L. c. 93A, § 11,] must establish (1) that the defendant engaged in an unfair method of competition or committed an unfair or deceptive act or practice . . . ; (2) a loss of money or property suffered as a result; and (3) a causal connection between the loss suffered and the defendant's unfair

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[6] Further, the plaintiffs assert that the unit holders could have testified to the value of the units. "To be sure, '[a] nonexpert owner of property may testify to its value upon the basis of "his familiarity with the characteristics of the property, his knowledge or acquaintance with its uses, and his experience in dealing with it."'" Canepari v. Pascale, 78 Mass. App. Ct. 840, 847 (2011), quoting Epstein v. Board of Appeal of Boston, 77 Mass. App. Ct. 752, 759 (2010). This testimony is subject to the judge's discretion. See Canepari, supra. For the reasons discussed infra, the judge did not abuse his discretion in concluding that evidence about the value of other units was not sufficiently probative to justify its admission.

or deceptive method, act or practice." Auto Flat Car Crushers, Inc. v. Hanover Ins. Co., 469 Mass. 813, 820 (2014).

Edgar testified that he did not tell the plaintiffs, or other prospective buyers for that matter, that the units were not for residential use because he did not believe it was his place to do so. As he did not admit that this practice had the capacity to deceive, this statement was not conclusive.[7] Nonetheless, the plaintiffs testified that they were deceived. Although the unit holder testimony may have supported the proposition that Edgar's business practices had the capacity to deceive, the plaintiffs were permitted to show that his business practices did in fact deceive them, and that this deception caused their alleged loss. See Auto Flat Car Crushers, Inc., 469 Mass. at 820.[8] "It is not at all clear to us that the judge

[7] The plaintiffs provide no legal authority to support their claim in their reply brief that the developer's statement in its brief that the "failure to disclose [that the units were limited to motel use] had the capacity to deceive" permits this court to consider the G. L. c. 93A claim de novo. Rather, had the plaintiffs filed a motion for a directed verdict or for judgment notwithstanding the verdict, we would review to determine "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 [other party].'" Selmark Assocs., Inc., 467 Mass. at 539, quoting Bank v. Thermo Elemental Inc., 451 Mass. 638, 651 (2008).

[8] If allowed, the testimony of the other unit holders had the potential to consume a great deal of time, wildly disproportionate to its limited probative value. See Zabin v. Picciotto, 73 Mass. App. Ct. 141, 152 (2008).

abused his discretion in excluding the evidence in the circumstances." Zabin v. Picciotto, 73 Mass. App. Ct. 141, 152 (2008). Accordingly, we affirm.[9]

Judgment affirmed.

Order denying motion for new trial affirmed.

By the Court (Green, C.J., Ditkoff & Hand, JJ.[10]),

Joseph F. Stanton

Clerk

Entered: November 20, 2020.

[9] As we affirm the trial judge's decision for the above reasons, we need not consider whether the plaintiffs waived Edgar's personal liability on appeal.

[10] The panelists are listed in order of seniority.