COMMONWEALTH OF MASSACHUSETTS
APPELLATE DIVISION OF THE DISTRICT COURT DEPARTMENT
SOUTHERN DISTRICT

HEBREW SENIOR LIFE, INC.[1]

V.

SANDY NOVACK

NO. 20-ADSP-03SO

In the BROOKLINE DIVISION:

Justice: White, J.
Docket No. 1609SU0018
Date of Decision Appealed: August 15, 2019
Date of Entry in the Appellate Division: January 6, 2020

In the APPELLATE DIVISION:

Justices: Finigan, Pino & Campbell, JJ.
Date of Hearing: July 24, 2020
Date Opinion Certified: June 30, 2021

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OPINION

FINIGAN, J. This appeal is the latest chapter in a long running summary process action brought by the plaintiff-appellee, Hebrew Senior Life, Inc. ("HSL"), against the defendant-appellant, Sandy

[1] As officer of or agent for H.R.C.A. Housing for the Elderly, Inc.

Novack ("Novack"), in February, 2016 for failure to pay rent. Novack was formerly a tenant in a building operated by HSL at 1550 Beacon Street in Brookline, Massachusetts. Novack counterclaimed against HSL on a variety of grounds, including violations of the consumer protection statute, G.L. c. 93A ("c. 93A"). The case was tried to a jury in late July of 2016, with the trial judge reserving the c. 93A claim for himself. At trial, both the jury and the court found for HSL and against Novack. Following the verdict, Novack appealed, citing a variety of errors at the trial stage. This Appellate Division affirmed the judgment of the trial court, with one exception: it vacated the trial judge's entry of judgment on Novack's c. 93A claim because the judge did not make findings or rulings as required by Mass. R. Civ. P. 52(c). See *Hebrew Senior Life, Inc. v. Novack*, 2018 Mass. App. Div. 185, 199. ("*Hebrew Senior Life I*").

After vacating the judgment on the c. 93A claim, this Appellate Division returned the matter to the trial court for a new trial on that claim only. Some three years had passed since the original filing of the action, and the trial judge had by then retired. In the months following the return of the action to the trial court, Novack filed a motion seeking leave to take the deposition of an expert on indoor air quality (some of her claims involved her sensitivity to airborne irritants), and HSL filed a motion for summary judgment, arguing that it was not subject to a c. 93A claim because it was a nonprofit entity not engaged in trade or commerce. A second judge denied the motion to take the deposition and allowed the motion for summary judgment, and this appeal followed. For the reasons set forth below, we affirm.

Timeliness of summary judgment motion. As a preliminary matter, Novack argues HSL's motion for summary judgment was untimely, having never been raised until the matter was returned to the trial court on the c. 93A claim following *Hebrew Senior Life I*. Rule 56 of the Massachusetts Rules of Civil Procedure, however, does not place a time limit on either side for purposes of a summary judgment motion. The rule merely states, "A party against whom a claim, counterclaim, or cross-claim is asserted . . . may, *at any time*, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof" (emphasis added). Mass. R. Civ. P. 56(b). By the time the matter returned to the trial court, Novack had long since vacated her apartment, and we see no prejudice to her in

the court's consideration of HSL's summary judgment motion at that time.

Allowance of summary judgment motion. Summary judgment is appropriate where there is no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. See Mass. R. Civ. P. 56(c); *Kourouvacilis v. General Motors Corp*., 410 Mass. 706, 716 (1991). A complete failure of proof concerning an essential element of the nonmoving party's case renders all other facts immaterial. *Kourouvacilis*, *supra* at 711, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). An appellate court's review of a grant of summary judgment is de novo. *DeWolfe v. Hingham Ctr., Ltd*., 464 Mass. 795, 799 (2013). For HSL to prevail in its motion for summary judgment on the c. 93A claim, it was not necessary HSL establish that no material facts were in dispute, as it could satisfy its burden by establishing that Novack has no reasonable expectation of proving an essential element of the case. *Sullivan v. Liberty Mut. Ins. Co*., 444 Mass. 34, 39 (2005). In its motion, HSL focused on its status as a nonprofit entity. As discussed further below, the determining factor is whether as a nonprofit entity, HSL was engaged in "trade or commerce" for purposes of c. 93A, § 2, when it leased the apartment to Novack. We agree with the motion judge that HSL was not.

The original summary process action was brought because of the failure of Novack to pay rent beginning in 2015, a fact not in dispute. What was in dispute was Novack's justification for withholding rent -- her allegations of HSL's violation of the laws regarding handling of her security deposit, breach of implied warranties of habitability and quiet enjoyment, retaliatory eviction, disability discrimination, and violation of c. 93A. *Hebrew Senior Life I*, *supra* at 185. Presumably, the factual disputes concerning claims apart from c. 93A were resolved in HSL's favor, given the jury verdict. While the trial court docket makes reference to a "special verdict form," the record before us does not include any special jury questions that may have been submitted to the jury under appropriate instructions from the judge. Even if they were, the trial judge would not have been bound by them for purposes of deciding the c. 93A claim. It is possible and feasible for a judge deciding a c. 93A claim to make findings of fact contrary to those made by a jury on a parallel common law claim. See *Poly v. Moylan*, 423 Mass. 141, 151 (1996); *Walsh*

v. Chestnut Hill Bank & Trust Co., 414 Mass. 283, 287-288 (1993). It does seem, however, the judge likewise resolved the factual disputes in HSL's favor because he also found for HSL on the c. 93A claim. Novack did make a timely request for findings and rulings, though, and was therefore entitled to them pursuant to Mass. R. Civ. P. 52(c). Because of the retirement of the original judge, the only way to resolve the disputed facts for purposes of the c. 93A claim would be a retrial of the underlying action. See *Hebrew Senior Life I*, *supra* at 199.

In an effort by the Legislature to encourage more equitable behavior in the commercial marketplace, c. 93A provides consumers in Massachusetts protection from and recourse for unfair and deceptive acts on the part of persons conducting trade or commercial activities. *Poznik v. Massachusetts Med. Professional Ins. Ass'n*, 417 Mass. 48, 53 (1994). General Laws c. 93A, § 2(a) makes unlawful "[u]nfair methods of competition and unfair or deceptive acts or practices *in the conduct of any trade or commerce*" (emphasis added). The statute does not specifically define the phrase "in the conduct of any trade or commerce." The Supreme Judicial Court has stated that c. 93A is typically not applicable to charitable organizations while undertaking activities in furtherance of their core mission, since they are not engaged in "trade or commerce." *Linkage Corp. v. Trustees of Boston Univ*., 425 Mass. 1, 26 (1997). An entity's status as a charitable corporation is not dispositive of the issue of whether c. 93A applies. *Planned Parenthood Fed'n of Am., Inc. v. Problem Pregnancy of Worcester, Inc*., 398 Mass. 480, 492-493 (1986). Instead, the inquiry is whether the acts complained of were committed within a "business context." *Id*.

Novack contends that an examination of the articles of organization of HSL and its affiliate, H.R.C.A. Housing for the Elderly, Inc. ("H.R.C.A."), establishes that the core charitable function of the two is other than apartment rentals, neither of which specifically refer to leasing Brookline apartments.[2] The language of the articles of organization is not of particular significance, however; the focus is on the

[2] The record does not establish which entity actually owns the property where Novack's apartment was located; it is clear all parties considered HSL the landlord under the lease.

true nature of the transaction between HSL and Novack. *Begelfer v. Najarian*, 381 Mass. 177, 190-191 (1980) (whether transaction occurs in "business context" for purposes of c. 93A must be determined from circumstances of each case). In any event, the articles of each entity establish that their mission is one of charity and service, as opposed to a profit motive. The articles for HSL describe its mission in part as providing "a home for aged and ill men and women of Boston and vicinity"; the articles of H.R.C.A. state that "[t]he purpose of the Corporation is charitable." In contrast to the language of the articles of organization, Chapter 93A was designed to "encourage more equitable behavior in the marketplace . . . [and impose] liability on persons seeking to profit from unfair practices." *Poznik*, *supra* at 53, citing *Manning v. Zuckerman*, 388 Mass. 8, 12 (1983).

Nothing in the record suggests HSL made a profit when it leased an apartment to Novack or other tenants. See *Lanter v. Carson*, 374 Mass. 606, 611 (1978) ("[T]he proscription in § 2 [of c. 93A] of 'unfair or deceptive acts or practices in the conduct of any trade or commerce' must be read to apply to those acts or practices which are perpetrated in a business context."). In ruling in HSL's favor, the judge had the benefit of an affidavit signed by Sophia Smith, the director of property management for certain of HSL's properties, including Novack's building (the "Smith affidavit"). The Smith affidavit, which was not challenged by Novack by an opposing affidavit or otherwise, established that HSL is registered with the Internal Revenue Service as a 501(c)(3) charitable organization, is required to set aside a certain percentage of apartments for lower income residents, and does not earn a profit. Further, according to the Smith affidavit, at all relevant times Novack lived in a subsidized unit. Because it is not in dispute that her lease was subsidized, below market rate, and that HSL was not making a profit from the "transaction," we conclude that HSL's conduct did not take place in a business context. See *All Seasons Servs., Inc. v. Commissioner of Health and Hosps. of Boston*, 416 Mass. 269, 271 (1993). For that reason, HSL was not engaging in "trade or commerce" in its dealings with Novack and was consequently not subject to a c. 93A claim.

Denial of motion to take expert's deposition. After the matter was returned to the trial court on the

c. 93A claim, Novack sought leave to take the deposition of an expert on indoor air quality, which the judge denied. The original trial judge had precluded the same expert from testifying at the first trial, because his identity had been disclosed a mere nine days prior to the start of the trial. That ruling was ultimately upheld by this Division. See *Hebrew Senior Life I*, *supra* at 194-195. While we note that the scope of discovery is normally within the discretion of the trial judge, see *Solimene v. B. Grauel & Co., KG*, 399 Mass. 790, 799 (1987), we do not reach the issue in light of our ruling on the grant of summary judgment.[3]

Attorney's fees. The plaintiff characterizes Novack's appeal as frivolous and seeks attorney's fees and costs pursuant to Dist./Mun. Cts. R. A. D. A. 25. While this summary process action has dragged on far past what is contemplated by the Uniform Summary Process Rules, we do not view the appeal as frivolous. The retirement of the trial judge foreclosed what might have been a more expedient end to the matter, and in theory a second judge might have reached a different result on the c. 93A claim after a new trial. As a result, we decline to award attorney's fees and costs pursuant to Rule 25.

Summary judgment for the plaintiff on the defendant's c. 93A counterclaim is affirmed. Appeal dismissed.

HON. THOMAS L. FINIGAN, Justice
HON. PAUL G. PINO, Justice
HON. CATHLEEN E. CAMPBELL, Justice

This certifies that this is the Opinion of the Appellate Division in this case. A True Copy, Attest:

/s/ Brien M. Cooper

Brien M. Cooper, Clerk

[3] The record does not contain a transcript of the hearing regarding Novack's motion for leave to take the deposition. We note that it appears Novack was seeking to depose her *own* expert in advance of trial; normally leave of the court is sought when a party seeks to take the deposition of the opposing party's expert. See Mass. R. Civ. P. 26(b)(4)(A)(ii).