

Docketed 07/29/2025

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT DEPARTMENT

Civil Action No. 2182CV01044

MARINA BAY RESIDENCES, LLC,

Plaintiff,

v.

CUBE 3 STUDIO, LLC, Defendant, and, CALLAHAN, INC., Defendant/Third-Party Plaintiff,

v.

SHAWNLEE CONSTRUCTION LLC, WELLESLEY ROOFING, INC., d/b/a BOSTON ROOFING, OPTILINE ENTERPRISES, LLC, and BASF CORPORATION,

Third-Party Defendants,

and

EXTERIOR DESIGNS, INC.,

Third-Party Defendant/Fourth-Party Plaintiff,

v.

COPPOLA CONSTRUCTION & REMODELING CORP., FASADDEX DESIGNS, LLC, IMPERIAL HAMMER CONTRACTING, LLC, PROFESSIONAL WATERPROOFING & CAULKING, LLC, TIM CAREY, HARVEY INDUSTRIES, INC., PLYCEM USA LLC, RIVERSIDE CONSTRUCTION, EMPIRE REMODELING, INC., WHITE CAP SUPPLY HOLDINGS, LLC, successor-in-interest to and/or f/k/a KENSEAL CONSTRUCTION PRODUCTS CORPORATION, and FRY REGLET CORPORATION,

Fourth-Party Defendants,

HARVEY INDUSTRIES, INC.

Fifth-Party Plaintiff,

v.

ELEMENTIA USA, INC.; and ALLURA USA,

Fifth-Party Defendants.

MARINA BAY RESIDENCES' OMNIBUS OPPOSITION TO:

- **Motion to Intervene on Behalf of Minor K.F. by his Mother and Legal Guardian Sandra Fernandez;**
- **Motion for Protective Order and Request to Seal Identifying Information (by Fernandez);**

- **Federal Preservation Notice on Behalf of Minor K.F. (by Fernandez);**
- **Notice of Insurance Disclosure and Demand for Compliance by Legal Guardian of Minor K.F. (by Fernandez);**
- **Ex Parte Emergency Motion for Temporary Restraining Order and Protective Intervention, With Request for Insurance Disclosure and Enforcement of Minor Rights (by Fernandez);**
- **Emergency Motion to Intervene and For Disclosure of Insurance Policies (by Fernandez);**
- **Emergency Ex Parte Motion for Temporary Restraining Order (by Fernandez);**
- **Motion to Intervene (by Dany Abouelkhier); and,**
- **Emergency Ex Parte Motion for Temporary Restraining Order and Preliminary Injunction (by Dany Abouelkhier).**

This Opposition is joined by Callahan, Inc, Coppola Construction & Remodeling Corp., Empire Remodeling, Inc., Tim Carey, Professional Waterproofing & Caulking LLC, BASF Corporation, Exterior Designs, Inc., Shawnlee Construction, LLC, Fry Reglet Corporation, White Cap Supply Holdings, LLC, Harvey Industries, Inc., Plycem USA, LLC and Elementia USA, Inc., Wellesley Roofing, Inc. d/b/a Boston Roofing, and Riverside Construction, Inc.

Marina Bay Residences, LLC submits this omnibus opposition to the series of motions filed by Sandra Fernandez as the mother and legal guardian of minor “K.F.” and in her personal capacity, and by her husband Dany Abouelkhier, improperly seeking to intervene in this action, for a temporary restraining order of unclear conduct, for a protective order as to K.F.’s identity, for some kind of acknowledgment that rights are being “preserved,” and for discovery of insurance policies.

Fernandez, her minor child, and her husband Abouelkhier are by now well familiar to this Court. Abouelkhier was the original class representative in an action filed against Marina Bay Residences in this Court putatively on behalf of all present and former tenants at the Meriel Marina Bay in Quincy. That action, civil action number 2382CV00389, sought damages allegedly incurred by tenants related to water infiltration of the property’s building envelopes

and associated microbial growth, and disruptions caused by construction to remediate the conditions that gave rise to the water infiltration. When Abouelkhier had a falling out with his counsel at Keches Law, the law firm moved to amend the complaint to substitute the class representative and to sever Abouelkhier's personal claims from the putative class action. This Court granted those motions and created a new docket for the severed case, 2582CV00364.

This Court's actions triggered an avalanche of motions and "notices" from Abouelkhier, Fernandez, and the minor child in both the class action and the severed case, over 80 to date served (including more than 10 on this past Saturday alone), not all of which have been filed, but all of which essentially ask this Court to reconsider its ruling on substituting the class representative and severing Abouelkhier's claims. This Court has denied motions filed by Fernandez in her personal capacity and on behalf of "K.F." to intervene in the class action. Fernandez has not sought to join her husband in his severed case, which they both have asked this Court to stay.

Filing motions to intervene in this case by Marina Bay Residences against the architect and general contractor of the Meriel Marina Bay is a new front in Fernandez's and Abouelkhier's vexatious campaign to improperly pursue their claims in every action except the one this Court expressly created for them, civil action number 2582CV00364. While this action in which Marina Bay Residences is the plaintiff is superficially related to the tenant class action and Abouelkhier's severed case in that each involves the same underlying conditions in the building, the claims, defenses, and relevant evidence differ markedly. In this one, the case examines the causes of water infiltration issues and involves many layers of contractors, designers, subcontractors, suppliers, and other vendors. In the others, the cases examine allegations of disruptions in residential tenancies. The evidence and expert analyses in the two cases are

different. No efficiencies would be achieved, and much confusion would be created, by trying all issues in the same case, particularly since the present construction case has been going on for four years now, extensive discovery has been completed, the parties are in the process of preparing expert reports, and the parties are actively engaged in settlement negotiations with the involvement of a mediator.

Even more importantly, the motions to intervene fail to establish common questions of law or fact necessary for intervention, are not timely, do not include appropriate representation of the minor child, and would be futile. Fernandez's and Abouelkhier's motions, and related filings, on behalf of the minor child and on their own behalf, should be denied. The associated filings similarly should be denied.

A. Fernandez and Abouelkhier fail to comply with procedure and to meet the standard for intervention.

Massachusetts Rule of Civil Procedure 24(b) provides that “[u]pon timely application anyone may be permitted to intervene in an action ... (2) when an applicant's claim or defense and the main action have a question of law or fact in common.” Rule 24(c) directs that “[t]he motion shall state the grounds therefor and shall be *accompanied by a pleading* setting forth the claim or defense for which intervention is sought.” (emphasis added)

Permissive intervention, when the procedure has otherwise been followed, lies entirely within the discretion of the trial court and may be reversed only upon a clear showing of abuse of that discretion. *See Com. v. One Hundred Twenty-five Thousand One Hundred Ninety-one Dollars*, 76 Mass. App. Ct. 279, 283 (2010) (explaining that permissive intervention is subject to the trial court's broad discretion and appellate review is limited to clear abuse). *See also Cruz Management Co., Inc. v. Thomas*, 417 Mass. 782, 785 (1994) (“A judge has broad discretion in deciding whether to permit intervention.”). Rule 24(b) further directs that, “In exercising its

discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” Courts also generally consider other factors while exercising discretion, including prejudice to the respective parties if a motion to intervene is or is not allowed, the adequacy of representation of the intervening party’s interests, and whether the claims of the intervenor are futile. See, e.g., *Com. v. Fremont Inv. & Loan*, 459 Mass. 209, 219 (2011); *R&G Mtge. Corp. v. Federal Home Loan Mtge. Corp.*, 584 F.3d 1, 7 (1st Cir. 2009). All these factors militate against the motions to intervene.

1. *The intervenors fail to comply with the procedure for intervention under Rule 24(c).*

The motions to intervene do not comply with Rule 24(c)’s requirement that it be accompanied by “a pleading setting forth the claim or defense for which intervention is sought.” This requirement is necessary to evaluate a claim of common question of law or fact, a precondition for intervention. The intervenors’ failure to comply with this rule alone is ground for denying the motions.

2. *The intervenors cannot demonstrate common questions of law or fact, and would not be prejudiced by a denial of the motion.*

With the motions failing to articulate the alleged substantive claims, and being unaccompanied by the required pleading under Rule 24(c), one is left to guess as to what claims the intervenors wants to assert, but presumably they relate to alleged injuries of some nature that Fernandez blames on the building. The present case is limited to construction-related issues, and the named parties are businesses involved in the design, construction, or development of the property. Years of discovery and expert analyses have focused on design and construction issues. While there may be a common background fact of water infiltration in the building, this case does not involve claims by individual current or former residents, and such claims would require entirely different proof than the claims Marina Bay Residences asserts in its complaint or the

various third-party claims and cross-claims that the defendants assert against one another in this action. Thus, the material questions of fact and law are not common between this case and the likely claims of the intervenors.

Further, there is no prejudice if the motions are denied. There are existing forums in which tenant issues are being adjudicated in both civil action numbers 2382CV00389 and 2582CV00364, or Fernandez and her minor child could file their own action. There is no need for the intervenors to adjudicate any claims they may have in this already complex construction litigation.

3. *The motions are untimely and granting them would prejudice the existing parties.*

An overriding consideration in motions to intervene is their timeliness. *See Holland Brands SB, LLC v. Bd. of Appeal of Boston*, 103 Mass. App. Ct. 740, 745 (2024) (holding delay in seeking intervention after knowledge of potential harm is the “most important factor” in timeliness analysis), quoting *Galbi v. Cellco Partnership*, 101 Mass. App. Ct. 260, 264 (2022) (holding that a motion to intervene filed more than a year after the complaint was untimely under Mass. R. Civ. P. 24(a)(2)).

This case has been pending since 2021. The intervenors let four years pass without seeking to intervene. In that time, the parties have engaged in extensive discovery and are now in the midst of preparing expert analyses. To require the parties to pivot at this late stage to unrelated personal injury claims would impose great prejudice on the existing parties and would likely delay the final adjudication of the present claims. Further, the parties are in active settlement negotiations following two rounds of mediation, and adding a new, unrelated party at this stage, risks those efforts. For these reasons too, the motions to intervene should be denied.

4. *Fernandez may not represent the minor child in litigation.*

Even if there were a reason for the minor child to intervene in this case – and there is not – Fernandez is not an appropriate legal representative. In general, pro se litigants may not represent the legal interests of others, including their minor children. *See Verizon Yellow Pages Co. v. Sims & Sims, P.C.*, 2003 WL 836087, at *3 n.6 (Mass. Super. Ct. 2003) (citing authority that pro se litigants may not represent others under any circumstances, including spouses and children).

The Appeals Court, in *Laubinger v. Dep't of Revenue*, 41 Mass. App. Ct. 598, 610 n.15 (1996), discussed with approval federal precedent for prohibiting non-lawyer parents from litigating on behalf of their children. These cases, including *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990); *Osei-Afriyie v. Medical Coll. of Pa.*, 937 F.2d 876 (3d Cir. 1991); and *Meeker v. Kercher*, 782 F.2d 153, 154 (10th Cir. 1986), hold that minors must be represented by counsel and that a non-attorney parent may not litigate on behalf of a minor and must be represented by counsel themselves to assert claims on the child's behalf. Although a few limited exceptions have been recognized in narrow administrative contexts, none apply here. Fernandez is not an attorney, she is not represented by an attorney, and her motion, to the extent it seeks to represent any interests beyond her own, is improper.

5. *The claims are futile.*

Finally, even setting aside the untimeliness of the motion, its procedural impropriety, and Fernandez's inability to represent anyone other than herself, the claims are independently barred by the statute of repose under G.L. c. 260, § 2B. That statute imposes a six-year limit on tort claims arising from any alleged deficiency or neglect in the design, planning, construction, or general administration of an improvement to real property. Critically, this six-year period runs from the date the certificate of occupancy is issued, regardless of when the cause of action

accrues. *See* G.L. c. 260, § 2B(4). The Supreme Judicial Court has confirmed that the statute of repose is absolute and is not tolled even by a claimant's age or legal incapacity. *See Tindol v. Boston Hous. Auth.*, 396 Mass. 515, 517 (1986) (explaining that G.L. c. 260, § 7 does not toll the statute of repose under § 2B, even for minors).

Here, Marina Bay Residences, LLC received its certificates of occupancy in 2018. *See* Complaint ¶ 30. Thus, the statute of repose would have run in 2024. Whatever the intervenors' claims may be, to the extent they allege injuries arising out of the design and construction of the building, they are time barred and hence futile. This is another ground to deny the motions to intervene.

B. The companion motions and “notices” should also be denied.

The other filings from the intervenors should also be denied. The motion for a protective order as to the identity of the minor child, “K.F.” should be denied. Fernandez filed an identical motion in the class action case. This Court denied the request observing that Fernandez and Abouelkhier were “the only people who have made any detailed reference to K.F. on the record.” *See* 2382CV00389, File Ref. 80.0.

The other two companion filings were styled as “notices” rather than motions, so it is unclear whether responses are required. However, these “notices” purport to ask relief from this Court and, to that extent, the “notices” should be denied.

The Notice of Insurance Disclosure and Demand for Compliance seeks discovery of insurance information. Fernandez should not be permitted to use this action for discovery. Should she so choose, she can attempt to seek this information through other means in the appropriate action—not this one.

The Federal Preservation Notice on Behalf of Minor K.F. seems to ask the Court to declare that all rights of the minor child are preserved regardless of what happens in this case. As

a non-party to this action, that should be the case anyway; but it is not appropriate to ask the court to make such a blanket declaration.

C. The motions for temporary restraining orders should be denied.

It is unclear what the intervenors hope to “restrain” in their respective TRO motions. The motions identify no impeding conduct by the defendants that need restraining; certainly there has been no showing of a risk of immediate and irreparable harm as required per Rule 65(a). Fernandez’s motion for a TRO asks in part that defaults or counterclaims in other dockets be enjoined. The motion also seems directed against the clerk of this Court and not against the parties. None of these are proper subjects for any kind of injunctive relief. At any rate, if the motions to intervene are denied, these TRO motions can be discounted, apart from their own procedural deficiencies.

D. The motions were improperly filed as “ex parte” and “emergency.”

None of the motions were served under Rule 9A. The motions do not identify what the “emergency” is for them, or provide facts or affidavits that support a claim of an emergency. *See Nickerson v. Flynn-Morris*, 103 Mass. App. Ct. 703, 707-08 (2024). Similarly, the intervenors provide no explanation why they labeled some of their motions as “ex parte”; there certainly has been no showing that providing notice would likely lead to irreparable harm to the moving party’s interests. At any rate, intervenors did provide notice of these motions.

E. Conclusion: The motions and “notices” should be denied and some ground rules set for further motion practice by non-parties in this action.

The motions to intervene fail to follow the correct procedure, makes no showing that there are common questions of law or fact that need to be adjudicated together, is untimely, is not made by a property legal representative of the minor, and would be futile. The motions, and associated papers, should also be denied.

The constant filing of motions and notices in the other two cases and now in this case long ago passed into vexatious territory. To prevent the intervenors from interrupting this case further, Marina Bay Residences requests that this Court require that any non-parties to this case seek leave of court as a condition of any further filings under this docket number. *See State Realty Co. of Boston v. MacNeil*, 341 Mass. 123, 124 (1960) (courts have authority to impose limitations on “harassing, vexatious, and repetitious litigation”).

Submitted by,

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Dated: July 29, 2025

CERTIFICATE OF SERVICE

I, Daniel P. Dain, hereby certify that I have served a copy of the foregoing on the following by email and/or mailing same, postage prepaid, this 29th day of July 2025 to:

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