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COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

SUPERIOR COURT DEPT.
CIVIL ACTION NO. 2182CV01044

MARINA BAY RESIDENCES, LLC,
Plaintiff,
v.
CUBE 3 STUDIO, LLC and CALLAHAN,
INC.,
Defendants.

CALLAHAN, INC.
Third-Party Plaintiff,
v.
EXTERIOR DESIGNS, INC.; SHAWLEE
CORPORATION, LLC; WELLESLEY
ROOFING, INC; d/b/a/ BOSTON ROOFING;
OPTILINE ENTERPRISES, LLC; AND BASF
CORPORATION,
Third-Party Defendants

EXTERIOR DESIGNS, INC.
Fourth-Party Plaintiff
v.
COPPOLA CONSTRUCTION &
REMODELING CORP.; FASADEx
DESIGNS, LLC; IMPERIOR HAMMER
CONTRACTING, LLC; PROFESSIONAL
WATERPROOFING & CAULKING, LLC;
TIM CAREY; HARVEY INDUSTRIES, INC.;
PLYCEM USA LLC; RIVERSIDE
CONSTRUCTION, INC.; EMPRIE
REMODELING, INC.; WHITE CAP SUPPLY
HOLDINGS, LLC, successor-in-interest to
and/or formerly known as KENSEAL
CONSTRUCTION PRODUCTS
CORPORATION; and FRY REGLET
CORPORATION.
Fourth-Party Defendants.

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NORFOLK COUNTY
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HARVEY INDUSTRIES, INC.'S REPLY
BRIEF IN SUPPORT OF ITS MOTION
FOR SUMMARY JUDGMENT

Now comes Harvey Industries, Inc. ("Harvey"), to respectfully submit its Reply Brief in Support of its Motion for Summary Judgment and request this Honorable Court its Motion for the reasons stated herein.

I. EDI FAILED TO PROVIDE ANY EVIDENCE OF CAUSATION

A. The WJE Report Does Not Support The Existence Of Any Defect With The Allura Siding Panels

EDI attempts to characterize damage to the building as reported in the WJE Report as being caused by the Allura siding products. A close reading of the text cited, however, does not support this conclusion. All EDI's cited passages tend only to show that the Allura fiber cement panels were in proximity to the damage. EDI offers no evidence that the Allura siding panels *caused* the damage. This Court can be assured that this is the case because the Plaintiff, through its corporate representative, David Walker, admitted that the WJE Report did not contain any such evidence.

Q. Are you aware of any evidence that the lap siding or panel products themselves were defective and that those defects contributed to Marina Bay's damages?

MR. CURRAN: Objection.

A. I don't think that that's conclusive from the reports to date.

Q. And it is a little bit different than the question I asked. I am just asking if you are aware of any evidence that the lap siding or panel products were detected or contributed to the damages?

MR. CURRAN: Objection.

A. I'm not aware of any specific evidence that those products did or did not contribute to the damages.

04/29/25 D. Walker Dep. 240:12-241:3. This interpretation is reaffirmed by Callahan:

Q. Does Callahan believe that the Allura fiber cement panels were defective?

MS. ESSINGER: Objection.

MR. ROURKE: Excluding any conversations you had with me, if you have made any observations of that, you can answer.

THE WITNESS: I have no observations that would suggest there was any -- any problem with the fiber cement panels.

* * *

Q. Sir, you reviewed the WJE report earlier in this deposition.

Do you recall that?

A. Yeah.

Q. Does anything in that report at all relate to the fitness of the Allura siding products for use on this project?

MR. ROURKE: Objection.

You can answer.

THE WITNESS: Not that I recall, no.

BY MR. WALTON:

Q. Are you aware from anyone at Wiss, Janney or any other expert that you've talked to besides the one that you've retained here informing you that the Allura siding products were not fit for use on this particular project?

A. No.

04/09/25 W. Gregg Dep. 375:13-21, 377:5-21. EDI's claims against Harvey are derivative of Callahan's claims against EDI. Callahan's claims against EDI are, in turn, derivative of the Plaintiff's claims against Callahan. Callahan does not contend there are "any problems with the fiber cement panels" nor does it content the WJE Report upon which the Plaintiff's initial claim was based in any way implicates the Allura fiber cement panels. The Plaintiff is similarly unaware "of any specific evidence that [the Allura lap siding or panel products] did or did not contribute to the damages." EDI cannot sustain claims against Harvey through cherry-picked quotes that misstate the express positions of the Plaintiff and Callahan.

B. EDI's Expert Affidavit

The preliminary opinion of EDI's expert architect, David Douglas, similarly fails to raise an actual issue of causation. The choice by the Plaintiff and/or Cube 3 to utilize "Direct Application" methods for the Project and suitability for Allura siding products on this construction is not the responsibility of the manufacturer, let alone middlemen involved in the supply chain like Harvey. Though there is evidence that Plycem was directly involved in the engineering phase, no

evidence whatsoever shows that Harvey was made aware, involved in, or otherwise engaged in any act or omission that would make it liable for such design defects.

II. HARVEY IS NOT “LOCAL DISTRIBUTOR” OF PLYCEM

EDI’s claim that Harvey is a “local distributor” of Plycem is untrue and contrary to the evidentiary record. Stephen Patt, speaking on behalf of Harvey, testified he did not “speak to Allura directly” about any project where he sold their products. J.A. Ex. 47:20-48:5. Plycem explained its supply chain as follows:

Plycem sells products to distributors. The distributors then sell the products to dealers, who in turn sell the products to end-users, such as contractors or homebuilders. By way of further answer, Plycem will produce correspondence related to the siding used at the Premises that was manufactured by Plycem and/or sold under the brand name Allura to the extent such correspondence exists and is within Plycem’s custody, possession, or control.

J.A. Ex. 41, Plycem Anw. to Harvey 2nd Req. for Int., No. 14. EDI does not contest that Coastal Forest Products, LLC was the “distributor” to whom Plycem initially “sold” the Allura siding products in this matter. SOMF 12, EDI Response (“Upon information and belief, Coastal Forest Products purchased the Allura products from Plycem and sold them to Harvey who then sold them to EDI”).

EDI’s attempt to connect Plycem and Harvey at a more fundamental level is supported by nothing more than conclusory statements and conjecture unsupported by EDI’s own citations. The record is bare of any evidence that Harvey and Plycem the manner of business relationship required for EDI’s claims to survive summary judgment.

III. TIMELINESS AND THE RELATION-BACK DOCTRINE

The relation back doctrine is codified in Rule 15(c) of the Massachusetts Rules of Civil Procedure, wherein a party is permitted to amend their pleadings, “including an amendment to

change a party” that “relates back to the original pleading.” Mass.R.Civ.P. 12(c). However, the amended claim or defense to be added must have arose out of the same underlying conduct, transaction, or occurrence, “or attempted to be set forth” in the original pleading. *Id.* “In Massachusetts, ‘where an action has been commenced before the statute of limitations has run, a plaintiff may be allowed to substitute one defendant for another after the statute of limitations has run against the proposed substitute defendant.’” Nat’l Lumber Co. v. LeFrancois Const. Corp., 430 Mass. 663, 671–72, 723 N.E.2d 10, 17 (2000), *quoting* Wadsworth v. Boston Gas Co., 352 Mass. 86, 89, 223 N.E.2d 807 (1967).

The relation-back doctrine, however, is inapplicable when it “would compromise one of the objections of a statutory scheme”. Golden v. Gen. Builders Supply LLC, 441 Mass. 652, 660–61, 807 N.E.2d 822, 828–29 (2004). *See, e.g.,* Tindol v. Boston Hous. Auth., 396 Mass. 515, 518–519, 487 N.E.2d 488 (1986), *quoting* James Ferrera & Sons v. Samuels, 21 Mass.App.Ct. 170, 173, 486 N.E.2d 58 (1985); Bernstein v. Gramercy Mills, Inc., 16 Mass.App.Ct. 403, 407–410, 452 N.E.2d 231 (1983), and cases cited.

A. Final Delivery Occurred On January 23, 2018, At Latest

In support of its Opposition, EDI conceded that deliveries were made on or before the date of Harvey’s Invoices to EDI. Michael Dion, EDI’s Manager and corporate designee, conceded, “Harvey only invoiced EDI after EDI received the Siding and related accessories.” J.A. Ex. 37, ¶ 9. Mr. Dion further stated that it received Harvey’s final pre-occupancy invoice for Allura siding products on January 24, 2018. *Id.* at ¶ 8; SOMF 85. EDI elsewhere admitted that work in performed after Certificates of Occupancy were issued was to fix “unrelated deficiencies” that were caused by “roofers, framers, and balcony installers”. SOMF 134-136.

EDI's cannot maintain that the remediation work it performed after Certificates of Occupancy were issued were unrelated "unrelated deficiencies" while also contending that the Allura siding products that it received during remediation work contributed to the Plaintiff's harms. Especially when such panels were the mere replacement of previously installed panels. As such, the date of final delivery for the purpose of the statute of limitations should be January 24, 2018.

In the alternative, it is undisputed that EDI and Harvey did not have an exclusive contract to supply the Allura siding panels for the Project. Notably, the only evidence of a "fixed" price for the Project is in purchase orders exchanged between Coastal Forest and Plycem. SOMF #. As such, each individual exchange of EDI Purchase Order and Harvey Invoice are, at most, one-off contract for the sale of goods and the statute of limitations for damages caused by the specific materials delivered begin upon delivery of goods from each individual contract. Accordingly, to the extent that EDI's claim for breach of contract for sale of goods can be sustained, EDI should be estopped from claiming damages from any goods delivered more than four (4) years from the date of filing.

B. Breach Of "Express" & Implied Warranties

This Court already addressed the issue of whether the three (3) year statute of limitations under G.L. c. § 2-318 for tort-based warranty or the four (4) year statute of limitations under G.L. c. 106 § 2-275 for contract-based warranty. *See* Memorandum of Decision and Order, pp. 9-10 (Docket No. 162). The Court applied the four (4) year statute of limitations, running from the date Plycem made tender of delivery, only because "EDI alleg[ed] that it had a written contract with Plycem". *Id.* However, EDI has since failed to provide *any* evidence of that an express warranty existed. At most, EDI argues that Harvey and Plycem's business relationship requires Harvey to

adopt manufacturer-provided documents.¹ Reliance upon written materials circulated by a manufacturer, even if “adopted” by Harvey, are not express warranties.

In *arguendo*, if this Court concludes that documents provided by Plycem were “adopted” by Harvey, EDI failed to cite any express warranty language contained therein. Therefore, those adopted documents would serve only as the basis for an implied warranty. Thus, this Court should apply the three (3) year statute of limitations for claims allegedly arising out of implied warranties of merchantability and fitness for a particular use.

“All actions under [G.L. c. 2-314 and 2-315] shall be commenced within three years next after the date the injury and damages occur.” G.L. c. § 2-318. EDI admitted that Certificates of Occupancy were issued for the buildings on July 31, 2017 and June 27, 2018. SOMF 25 and 26. The Plaintiff commenced this action on November 18, 2021, *more than fourth (40) months after construction was complete*. Thus, even accepting EDI’s claims relate back to the filing date of the original Complaint, its claims for breach of “express” and implied merchantability fall outside the statute of limitations.

C. The Future Performance Exception Does Not Apply

EDI fails to provide any substantive and relevant evidence in support of its contention that the future performance exception applies here. For example, EDI contends it “relied on the manufacturer’s installation instructions, which did not mention any Rainscreen requirement”. EDI Opp. at p. 4; SOMF 96. Beyond the obvious issue that the choice of whether to include a

¹ The evidence before this Court is that Cube 3, in selecting Allura siding products, relied on the representations of Plycem that Harvey was not privy to prior to the commencement of litigation in this matter. SOMF 50.

“Rainscreen” is a design issue for the architect of record, the evidence shows that Harvey did not provide “installation instructions”² nor the architect of record rely on such instructions.³

EDI’s further argument that Harvey had constructive knowledge of the Project Site conditions merely through physical proximity or Plycem’s 50-Year Limited Warranty is evidence of representations made by are absurd on their face. First, Harvey is not a subsidiary of Plycem and cannot be held strictly liable for any contract or agreements between them. Second, the argument the existence of a manufacture’s *limited* warranty is “evidence” that every person or entity involved in the downstream distribution agreed to be held strictly liable for product failure during some arbitrary of time warranted by the manufacturer is simply not the law. In the absence of any substantive evidence that *Harvey* made any representations or warranties to EDI as to future performance, its claims must fail.

IV. CONCLUSION

The so-called “crux” of EDI’s claim is fatally flawed both as a matter of law and on the evidentiary record. Attempting to hold a middleman in the supply chain liable for architectural design and product choice, both clearly the responsibility of the Project’s architect, Cube 3, is simply untenable. Juxtaposing undisputed facts with conclusory statements that do not flow from those facts does not create a record that can survive summary judgment. It is not disputed that the Plaintiff suffered some damage from water intrusion, but pointing to mere proximity of the Allura

² J.A. Ex. 4 at 48:6-15 (Harvey testified that if a customer had questions about product information or manuals, it would direct the customer to the manufacturer’s website and Harvey did not have such information on its own website).

³ SOMF 50 (Cube 3 testified that it relied on the representations of Plycem d/b/a Allura in its choice of Allura siding).

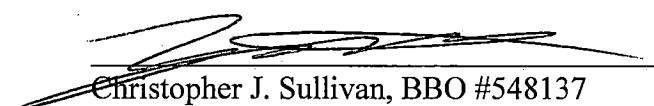
siding product to the damage, absent any factual evidence or expert testimony as to causation, is not evidence of damage.

For the foregoing reasons, the Fourth-Party Defendant, Harvey Industries, Inc., requests this Honorable Court to issue an order (1) allowing its Motion for Summary Judgment as to the Claims of Exterior Design; (2) granting Harvey judgment as to Counts Thirty to Thirty-Five of Exterior Designs, Inc.'s Amended Complaint; (3) entering judgment denying any derivative claims for contribution and common law negligence by Co-Defendants against Harvey; and (4) any other relief that it deems necessary.

Date: May 29, 2025

Respectfully submitted,

HARVEY INDUSTRIES, INC.,
By its Attorneys,



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