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COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

SUPERIOR COURT
DOCKET # 2577CV01253

K. F., a minor, by his mother,
SANDRA FERNANDEZ DE VILLAVICENCIO,
and SANDRA FERNANDEZ DE VILLAVICENCIO,
individually

Plaintiffs,

v.

CUBE 3 STUDIO LLC,

Defendant

**DEFENDANT CUBE 3 STUDIO LLC'S REPLY TO PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Defendant Cube 3 Studio LLC ("Cube 3") hereby replies to the plaintiffs K. F. and Sandra Fernandez De Villavicencio's ("Plaintiffs") memorandum of opposition, served on March 2, 2026 (the "Opposition"), against Cube 3's motion for partial summary judgment (the "Motion"). In their Opposition, Plaintiffs do not dispute and, by the nature of their argument, concede that claims arising from the improvement project, which was the subject of the 2017 Certificate of Occupancy and the 2018 Certificate of Substantial Completion, is barred by the statute of repose. Furthermore, Plaintiffs implicitly acknowledge the holding in *Coca-Cola Bottling Co. v. Weston & Sampson Eng'rs, Inc.*, that "general administrative" work (which may include repairs and remediation, among other work) may continue following the opening of an improvement for use.¹ Instead, Plaintiffs argue that post-2018 work constitutes a separate project, which they presume involved Cube 3. Plaintiffs support this argument with a self-serving affidavit stating that they saw

¹ The title of Opposition Section IV. B, "'Opening to Use' in 2017 does not automatically control later reconstruction" acknowledges the holding that general administration work may continue following the 'opening to use.'

construction activities in the 2019-2021 timeframe. The affidavit fails to establish the scope of the work or Cube 3's involvement. Essentially, Plaintiffs argue that the absence of evidence creates an issue of material fact. Plaintiffs' affidavit fails to provide the minimum amount of admissible evidence required to survive summary judgment under Mass. R. Civ. P. 56.

A. Under Appeals Court precedent, the statute of repose applies to "general administrative" work occurring after possession.

Plaintiffs read the term "general administration" out of G.L. c. 260, § 2B. In the *Coca-Cola Bottling Co. v. Weston & Sampson Eng'rs, Inc* case, after the facility constructed by the project at issue was open to use, "unceasing difficulties" occurred; the designer-defendant worked to remedy extensive issues with the project for five years, and the Appeals Court decided the remedial efforts were "general administration" covered by the statute of repose. *See Coca-Cola Bottling Co. of Cape Cod v. Weston & Sampson Eng'rs, Inc.*, 45 Mass. App. Ct. 120, 127 (1998), holding:

Section 2B contemplates the occurrence of three phases to any improvement to real property: the design phase, the construction phase, **and the administration phase following the completion of construction.** G.L. c. 260, § 2B. The purpose of the third phase is to **remedy design or construction problems** which may, and frequently do, emerge following construction.

Coca-Cola Bottling Co. of Cape Cod, 45 Mass. App. Ct. at 126 (emphasis added). Therefore, allegations of post-2018 Cube 3 involvement in the Meriel Marina Bay Project (the "Project") do not defeat the Motion. Rather, work by Cube 3 after construction was completed² to "remedy design or construction problems" would be exactly the kind of "general administration" covered by the statute of repose.

B. The Opposition fails to present evidence of a separate project.

Relying solely on a self-serving affidavit asserting new allegations, Plaintiffs argue that post-2018 work occurred which constituted a "separate improvement" under G.L. c. 260, § 2B.

² See Exhibit E to Mem. in Supp. of Mot. for Summ. J., final change order, dated November 16, 2018.

See Opposition, at p. 7; Affidavit of Defendant S. Fernandez De Villavicencio (“Affidavit”). The Opposition argues at various points that this creates a question of fact requiring the Motion to be denied. *E.g.*, Opposition, at p. 4. Mass. R. Civ. P. 56(e) states: “Supporting...affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” Most of the content within S. Fernandez’s affidavit is in violation of the rule. Any portion of the affidavit not based on personal knowledge should be excluded as self-serving.

Nevertheless, stripped of legal conclusions, foundationless³ and otherwise inadmissible testimony, the affidavit simply asserts that Ms. Fernandez personally witnessed various construction work after 2018 to the exterior of the Project’s buildings. It offers no specifics about the type or scope of work, Cube 3’s involvement, and no information about any work by Cube 3.

That there was construction, especially work involving large scale demolition and component replacement, does not help Plaintiffs, even if, only for argument’s sake, the highly technical representations were admissible. On the contrary, common sense suggests that a project as large⁴ as Meriel Marina Bay undergoing extensive demolition and replacements, within only months of completion at the end of 2018, is remediation work to fix problems. The ordinary person understands that businesses are very cost conscious. Without specific and compelling evidence

³ Among others:

(a) Paragraph 3 falsely claims “[n]o discovery has occurred in this matter,” specifically, it states, “Plaintiffs have not...served interrogatories, served requests for production...” when Plaintiffs served interrogatories on December 23, 2025. See Exhibit A. In fact, Plaintiffs even filed a motion to compel discovery, eventually held to moot, attaching Cube 3’s responses to Plaintiffs’ requests for production. See Paper No. 10.3;

(b) Paragraph 4 falsely claims that Cube 3 “relies upon a July 31, 2017 Certificate of Occupancy and 2018 Certificates of Substantial Completion to assert that its professional services concluded no later than April–May 2018” when there is no such claim in the Motion or the certificates mentioned; on the contrary, Cube 3 stated “[t]he final contract settlement and change order for the Project was executed on November 13, 2018.” Mem. in Supp. of Mot. for Summ. J., at p. 4;

⁴ See, e.g., Exh. A of the Motion, showing that the Building alone holds hundreds of units.

showing why, it would be absurd to believe that a developer would take the extraordinary step of launching an overhaul, renewal or reconstruction months after completion of construction. On the other hand, it is an exact fit for the kind of work to “remedy design or construction problems which may, and frequently do, emerge following construction,” falling squarely within the definition of “general administration” covered by the statute of repose. *Coca-Cola, supra*, 45 Mass. App. Ct. at 126. The larger the project, the larger the remediation may be. Extensive scaffolding, evaluation and component replacement, while perhaps costly, are consistent with remedying a large project.

C. There is no merit in Plaintiffs’ speculative claim that further discovery will provide a basis to defeat the Motion.

There is no merit to Plaintiffs’ repeated claim that discovery will enable them to defeat the Motion. Plaintiffs have failed to properly raise a challenge under Mass. R. Civ. P. 56(f), never invoking the rule and submitting the Fernandez Affidavit expressly pursuant to Mass. R. Civ. P. 56(d), to request partial denial of the Motion as to post-2018 work. See Affidavit, at ¶ 1. Nevertheless, that affidavit claims that discovery into activity in 2019 to 2021 will reveal information and documents of the sort “directly material to determining when the statute of repose under G.L. c. 260, § 2B commenced” and “present facts essential to justify their opposition to summary judgment.” Affidavit, at ¶¶ 12-13.

Regarding Mass. R. Civ. P. 56(f), the Supreme Judicial Court has held:

Litigants may be denied an opportunity for discovery if their complaints and affidavits have “not made even a minimal showing warranting the requested discovery.” “[D]iscovery cannot be used as a vehicle for discovering a right of action.” Having failed to make a minimal, threshold showing that there is a factual basis to support their complaint, litigants are not entitled to discovery prior to disposition of a motion for summary judgment.

E.A. Miller, Inc. v. S. Shore Bank, 405 Mass. 95, 100 (1989)(internal citations omitted). There, the Superior Court judge issued “a protective order staying all discovery prior to a determination of the motion for summary judgment.” *Id.* at 99. That Supreme Judicial Court found that, even though

those plaintiffs sought discovery regarding an essential element of the claim, namely bad faith, their affidavit failed to describe conduct consistent therewith. Further, the court noted if actions showing bad faith had occurred, “the plaintiffs would have at least some evidence themselves.” Holding that “[p]arties may not “fish” for evidence on which to base their complaint “in hopes of somehow finding something helpful to [their] case in the course of the discovery procedure,” the court affirmed the motion judge’s allowance of summary judgment. *Id.* at 100-102.

Here, Plaintiffs seek discovery of “professional services during 2019–2021,” naming construction agreements, communications, plans and etc. Fernandez Affidavit, at ¶ 10. These items are apparently meant to support the Opposition’s contention that there was a “separate improvement” not subject to the same six-year statute of repose period of the original project. See, e.g., Opposition, at pp. 2, 3, 4 and 7. But there is no evidence of such. There is no admissible evidence to suggest the work was anything other than “general administration.”

Finally, “[o]ur case law establishes that a party, purely in the hopes of defeating summary judgment, may not submit at the eleventh hour an affidavit that contradicts the party’s earlier statements and discovery responses. Such an affidavit is not enough to create a triable issue.” *Locator Servs. Grp., Ltd. v. Treasurer & Receiver Gen.*, 443 Mass. 837, 864 (2005). In their complaint, Plaintiffs alleged that “remediation and reconstruction” work was performed in 2021. Compl., at ¶ 21. Realizing that the allegations are barred by the statute of repose, Plaintiffs now contradict their own statements and submit a self-serving affidavit.

WHEREFORE, judgment should be rendered against Plaintiffs regarding all portions of the Complaint addressed by the Motion. The same judgment should be rendered upon any tort claims addressed by the accompanying motion for judgment on the pleadings which the Court

considers more proper for treatment under summary judgment standards regarding the statute of repose at issue.

Date: March 16, 2026

Respectfully submitted,
The Defendant,
Cube 3 Studio LLC
By its Attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2026, I served a true and accurate copy of the foregoing document upon the named plaintiffs via email and first-class mail as follows:

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/s/ Michael Schaefer
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