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COMMONWEALTH OF MASSACHUSETTS

THE TRIAL COURT

SUPERIOR COURT DEPARTMENT

Essex, ss.

Civil Action No.: 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.

**PLAINTIFFS' OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Defendant seeks summary judgment under G.L. c. 260, § 2B, arguing that Plaintiffs' claims are barred by the six-year statute of repose because the Meriel Marina Bay project was opened to use in 2017 and substantially completed in 2018.

That argument fails for a threshold reason:

Defendant has not established — as a matter of undisputed fact — that the only "improvement to real property" relevant to Plaintiffs' claims was completed in 2017–2018.

Plaintiffs have submitted sworn testimony describing substantial façade demolition, system-level reconstruction, and building envelope replacement occurring between 2019 and 2021.

Whether that later work constituted:

- a separate improvement to real property;
- a capital betterment;
- a new professional undertaking; or
- continued architectural services within six years of suit is a fact-dependent inquiry

that cannot be resolved on this record.

Defendant has not met its Rule 56 burden.

II. STANDARD OF REVIEW

Summary judgment may be granted only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c).

The moving party bears the burden of affirmatively demonstrating the absence of a triable issue. See *Pederson v. Time, Inc.*, 404 Mass. 14, 16–17 (1989).

All evidence must be viewed in the light most favorable to the non-moving party. See *Augat, Inc. v. Liberty Mutual Ins. Co.*, 410 Mass. 117, 120 (1991).

Summary judgment is inappropriate where genuine disputes remain regarding material facts, including the scope, timing, and nature of the professional services at issue.

III. LEGAL FRAMEWORK: G.L. c. 260, § 2B

Section 2B bars tort actions arising out of deficiencies in the “design, planning, construction or general administration of an improvement to real property” more than six years after the earlier of:

- (1) opening of the improvement to use; or

(2) substantial completion and taking of possession.

The statute runs from the completion or opening of the relevant improvement.

D'Allessandro v. Lennar Hingham Holdings, LLC, 486 Mass. 150, 158 (2020).

An “improvement” is not synonymous with any repair or maintenance activity. In *Klein v. Catalano*, 386 Mass. 701, 716–17 (1982), the Supreme Judicial Court defined an improvement as a permanent addition or betterment that enhances capital value and involves expenditure of labor or money.

Whether particular work constitutes an “improvement” within the meaning of § 2B is a fact-specific inquiry that turns on the nature, scope, and permanence of the work performed.

IV. ARGUMENT

A. Defendant Has Not Established the Relevant Improvement as a Matter of Law

Defendant relies on:

- July 31, 2017 Certificate of Occupancy
- April–May 2018 Certificates of Substantial Completion

That establishes only that the original construction project was opened to use no later than 2018.

It does not establish that no separate improvement occurred thereafter.

Plaintiffs’ sworn affidavit describes work between 2019 and 2021 involving:

- Extensive scaffolding across multiple elevations;
- Removal of significant portions of exterior cladding;
- Removal and replacement of sheathing assemblies;

- Installation of new air-water barrier systems;
- Flashing system integration;
- Structural balcony evaluation and testing;
- Sustained, coordinated construction activity.

System-wide removal and replacement of building envelope assemblies implicates weather protection, structural interface, and long-term durability, all of which are core architectural components.

Under *Klein*, whether that work constituted a permanent betterment enhancing capital value is a factual question.

At minimum, the nature and scope of the 2019–2021 reconstruction present a genuine issue of material fact as to whether that work constituted a separate improvement within the meaning of § 2B, precluding summary judgment.

B. “Opening to Use” in 2017 Does Not Automatically Control Later Reconstruction

Defendant cites *Coca-Cola Bottling Co. v. Weston & Sampson Eng’rs, Inc.*, 45 Mass. App. Ct. 120 (1998).

Coca-Cola holds that once an improvement is opened to use, substantial completion becomes immaterial as to that improvement.

It does not hold that later system-level reconstruction of the same property is forever subsumed within the original improvement for repose purposes.

If the façade reconstruction constituted a separate capital betterment or a new professional undertaking involving architectural judgment the repose period applicable to that work would run from its completion or opening, not from 2017.

Defendant has not demonstrated, as a matter of law, that the 2019–2021 reconstruction was merely incidental to the original improvement rather than a separate qualifying improvement under § 2B. Accordingly, summary judgment is improper.

C. The Motion Improperly Assumes All Professional Services Ended in 2018

Section 2B applies to actions arising out of deficiencies in professional services.

Defendant assumes its professional involvement terminated upon substantial completion in 2018.

That assumption is unsupported by record evidence.

Plaintiffs have testified to large-scale façade reconstruction requiring professional coordination and engineering evaluation.

Whether Defendant provided:

- design input,
- construction administration,
- revised drawings,
- professional certification, or
- oversight services

after 2018 remains unresolved on the present record.

The present record contains no evidence establishing that Defendant's professional services terminated in 2018. Absent affirmative proof negating post-2018 professional involvement, Defendant has failed to carry its burden under Pederson to demonstrate the absence of a genuine issue of material fact. Summary judgment therefore cannot enter.

D. Plaintiffs Do Not Rely on Tolling

Defendant correctly notes that G.L. c. 260, § 2B is a statute of repose and is not subject to tolling. See *Bridgwood v. A.J. Wood Construction, Inc.*, 480 Mass. 349, 354–55 (2018); *Nett v. Bellucci*, 437 Mass. 630, 635–36 (2002); *Rudenaue v. Zafiropoulos*, 445 Mass. 353, 357–58 (2005). A statute of repose establishes an absolute outer limit on liability and is not extended by equitable doctrines.

Plaintiffs do not contend otherwise.

This case does not involve tolling, extension, or avoidance of the repose period. Rather, the dispute concerns identification of the relevant “improvement” and the corresponding triggering event under § 2B. The statute runs from the earlier of opening to use or substantial completion of the particular improvement at issue. Where subsequent reconstruction constitutes a separate improvement or professional undertaking, the repose period applicable to that work runs from its own completion or opening.

Accordingly, the question before the Court is not whether § 2B may be tolled, but whether the 2019–2021 façade reconstruction constituted a distinct qualifying improvement within the meaning of § 2B. That factual determination has not been resolved on the present record and cannot be decided as a matter of law at summary judgment.

E. Rule 56(d) Independently Requires Denial or Deferral

No discovery has occurred in this matter.

Documents likely within Defendant’s exclusive control include:

- Post-2018 engagement agreements;

- Change orders;
- Revised plans or Architect's Supplemental Instructions (ASIs);
- Permit applications;
- Construction administration records;
- Professional certifications;
- Insurance or remediation coordination documents.

These materials are directly relevant to whether Defendant performed professional services after 2018 and whether the 2019–2021 façade reconstruction constituted a separate improvement under G.L. c. 260, § 2B.

Without access to these materials, Plaintiffs cannot present facts essential to justify opposition to summary judgment.

Pursuant to Mass. R. Civ. P. 56(d), where material facts are likely within the exclusive control of the moving party and discovery has not yet occurred, summary judgment is premature and should be denied or deferred pending appropriate discovery.

V. CONCLUSION

Defendant has failed to demonstrate, as a matter of undisputed fact, that:

1. The only relevant improvement to real property was completed in 2017–2018;
2. No separate qualifying improvement occurred between 2019 and 2021;
3. No professional services were rendered within six years of the commencement of this action; or

4. No genuine issue of material fact exists as to the triggering event under G.L. c. 260, § 2B.

Because Defendant has not carried its burden under Mass. R. Civ. P. 56, summary judgment is improper.

In the alternative, and pursuant to Mass. R. Civ. P. 56(d), the Motion should be denied or deferred pending discovery necessary to resolve material factual issues concerning the scope and timing of Defendant's professional services.

Respectfully submitted,

K. F., a minor, by his mother,
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Date: March 2nd, 2026

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CERTIFICATE OF SERVICE

I hereby certify that on March 02, 2026 a copy of the foregoing was served electronically
on all counsel of record.

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