

COMMONWEALTH OF MASSACHUSETTS

THE TRIAL COURT

SUPERIOR COURT DEPARTMENT

Essex, ss.

Civil Action No.: 2577CV01253

**K.F., a minor, by his mother and next friend,
SANDRA FERNANDEZ DE VILLAVICENCIO
and SANDRA FERNANDEZ DE VILLAVICENCIO, individually,
Plaintiffs,**

v.

**CUBE 3 STUDIO, LLC,
Defendant.**

**PLAINTIFFS' OPPOSITION TO DEFENDANT CUBE 3 STUDIO LLC'S
MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS
(Mass. R. Civ. P. 12(c))****

I. INTRODUCTION

Defendant Cube 3 Studio, LLC ("Cube 3") seeks the extraordinary remedy of judgment on the pleadings with prejudice as to Counts IV, V, and VI at the very outset of this case—before any discovery, before any depositions, and before any factual record exists regarding Cube 3's post-2018 involvement in the building where a minor child lived for years. Compl. ¶¶ 3, 18–24.

Rule 12(c) is not a mechanism to adjudicate contested facts, resolve credibility disputes, or terminate serious tort claims involving a child based on a defendant's preferred characterization of the pleadings. The only question today is whether, accepting Plaintiffs' well-pleaded allegations as true and drawing all reasonable inferences in Plaintiffs' favor, the Complaint plausibly states any viable common-law claim. It does.

Cube 3 reframes Counts IV–VI¹ as if they were solely “insurance disclosure” claims under G.L. c. 231 § 85B and G.L. c. 176D. That framing is incorrect. The gravamen of the Complaint is not insurance—it is a multi-year course of misrepresentation and concealment of hazardous conditions in a child’s home, including repeated denials that any mold existed, concealment of structural water intrusion, and resulting injury to a minor. Compl. ¶¶ 6–8, 18–24.

To be clear: Plaintiffs do not plead § 85B or c. 176D as the source of Cube 3’s tort duties. Any reference to insurance is pleaded as evidence of concealment, intent, and consciousness of liability, not as an independent cause of action. Compl. ¶ 5. Even if certain statutory references were imperfect, that would not justify judgment on the pleadings where the pleaded facts plausibly support common-law liability. Mass. R. Civ. P. 8(f); *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 635–36 (2008). (holding that a complaint need not contain detailed legal or technical specificity so long as it alleges facts plausibly suggesting entitlement to relief).

Finally, Cube 3 seeks the harshest remedy—dismissal with prejudice—without attempting to show futility under Mass. R. Civ. P. 15(a). If the Court perceives any pleading deficiency, the proper course is denial of the motion or, at most, dismissal without prejudice with leave to amend.

¹ Cube 3’s motion requests judgment on “Counts IV, V, and IV.” Plaintiffs assume Cube 3 intended to seek relief as to Counts IV, V, and VI. Plaintiffs do not contend this clerical error is dispositive; however, it underscores the overbreadth of seeking dismissal with prejudice at the pleadings stage without any showing of futility.

II. STANDARD OF REVIEW — RULE 12(c)

A Rule 12(c) motion is evaluated under the same standard as Rule 12(b)(6). The Court must:

1. accept all well-pleaded facts as true;
2. draw all reasonable inferences in Plaintiffs' favor; and
3. deny the motion unless, accepting the allegations as true, the Complaint fails to state a claim that is plausible on its face. See *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 635–36 (2008).

Rule 12(c) does not permit the Court to resolve factual disputes, weigh evidence, or draw inferences for the movant. If matters outside the pleadings are considered and not excluded, the motion must be converted to one for summary judgment under Rule 56, with notice and an opportunity to respond. Mass. R. Civ. P. 12(c).

Cube 3's arguments invert this standard by asking the Court to accept its factual characterizations and to disregard Plaintiffs' pleaded allegations. Compl. ¶¶ 6–8, 18–24.

Any merits-based or statute-of-repose arguments regarding Cube 3's post-completion conduct require a factual record and are categorically inappropriate on Rule 12(c).

III. CUBE 3 MISCHARACTERIZES COUNTS IV–VI

Cube 3 frames Counts IV–VI as if they stand or fall solely on whether § 85B or c. 176D create a statutory insurance duty. That is a straw man.

The Complaint alleges far more than statutory issues, including:

- chronic water intrusion and mold over multiple years;

- repeated denials—by management and representatives associated with Cube 3—that any mold existed;

- ongoing reconstruction and “mock-up” work outside Plaintiffs’ unit;
- concealment of structural defects causing recurrent leaks; and
- prolonged exposure of a minor child to hazardous conditions in his home.

Compl. ¶¶ 18–24.

Even if statutory references were imperfect, these facts independently support common-law claims for misrepresentation, concealment, conspiracy, and intentional infliction of emotional distress. Rule 12(c) requires the Court to evaluate the Complaint as a whole, not as reframed by the movant.

Insurance materials are plainly discoverable under Mass. R. Civ. P. 26 once litigation has commenced; Plaintiffs’ requests were therefore not legally baseless.

A “good faith settlement” in another case does not adjudicate liability to these Plaintiffs, does not resolve causation, and cannot negate well-pleaded allegations on a Rule 12(c) motion—especially where Plaintiffs were not parties to that settlement.

IV. COUNT IV — FRAUDULENT CONCEALMENT / MISREPRESENTATION IS PLAUSIBLY PLED

Count IV is not an “insurance claim.” It is a common-law fraud and concealment claim grounded in safety misrepresentations and concealment of hazardous conditions in a child’s residence.

The Complaint plausibly alleges that Cube 3 knew of recurring leaks through site reports, participated in or was aware of remediation and reconstruction cycles, and that management and representatives associated with Cube 3 repeatedly denied the

existence of mold despite ongoing water intrusion—while Plaintiffs reasonably relied on those representations as their child remained exposed. Compl. ¶¶ 6–8, 18–24.

Under Massachusetts law, fraudulent concealment may arise not only from affirmative misstatements but also from partial disclosures or “half-truths” that are misleading absent disclosure of material facts. See *Kannavos v. Annino*, 356 Mass. 42, 48–49 (1969). (establishes that a defendant may be liable for fraud not only for false statements, but also for partial or incomplete disclosures that create a misleading impression by omitting material facts).

Cube 3’s argument that § 85B does not apply is therefore beside the point. Even if that statute were inapplicable, the pleaded facts state a viable common-law claim—which alone requires denial of Rule 12(c).

The § 85B request is pleaded as evidence of concealment and intent, not as the source of liability. Compl. ¶ 5. These are quintessentially fact-bound issues that cannot be resolved on the pleadings.

V. COUNT V — CIVIL CONSPIRACY (CONCERTED ACTION) IS PLAUSIBLY PLED

Massachusetts recognizes civil conspiracy under a concerted action or substantial assistance theory, whereby a defendant may be liable if they knowingly provide substantial assistance or encouragement to another in committing a tort. See *Kurker v. Hill*, 44 Mass. App. Ct. 184, 188–89 (1998). (A person who knowingly assists another in committing a tort can be held liable for the harm caused, even if that person did not directly commit the wrongful act).

The Complaint alleges that Cube 3 acted in concert with other project parties to suppress insurance disclosure and foreclose the minor's rights while litigation was pending, thereby substantially assisting in the underlying tort of fraudulent concealment. Compl. ¶¶ 6–8, 18–24, 68–71.

The alleged agreement is not wrongful because of settlement or insurance alone, but because it substantially assisted the underlying tort of fraudulent concealment of known safety hazards affecting a minor.

At the pleading stage, Plaintiffs need only allege a plausible agreement and substantial assistance—which they have done. Representation by counsel does not immunize coordinated tortious conduct.

Because the underlying tort (fraudulent concealment) is plausibly pled, the conspiracy claim necessarily survives Rule 12(c).

VI. COUNT VI — IIED SHOULD NOT BE DISMISSED ON THE PLEADINGS

Cube 3 improperly reduces Count VI to a single statement while ignoring the alleged multi-year course of conduct, including years of water intrusion and mold exposure, repeated denials of hazards, knowledge that a child was being harmed, and dismissive responses to Plaintiffs' safety concerns. Compl. ¶¶ 6–8, 18–24, 75.

Massachusetts law evaluates IIED based on the totality of conduct, not isolated remarks. Whether conduct is “extreme and outrageous” is typically fact-intensive and inappropriate for resolution on the pleadings—especially where a minor's health is implicated.

Even if any one statement were insufficient standing alone, a sustained course of conduct can support IIED under Massachusetts law. Moreover, Plaintiffs allege that Cube 3's later intentional refusal to provide insurance information occurred against a backdrop of known hazards, making that statement more outrageous in context.

VII. DEFENDANT'S RELIANCE ON MATERIALS OUTSIDE THE PLEADINGS IS IMPROPER

Cube 3 relies on filings from other cases and disputed factual inferences to argue delay or bad faith. That is improper on Rule 12(c).

While the Court may take judicial notice that filings exist, it may **not** accept Cube 3's characterizations of those filings to contradict well-pleaded allegations. If Cube 3 seeks a merits determination based on evidence, the proper vehicle is Rule 56—not Rule 12(c).

Moreover, Defendant has served this Rule 12(c) motion simultaneously with a Rule 56 motion for summary judgment. This posture illustrates why Rule 12(c) is not the proper vehicle to resolve Plaintiffs' claims. To the extent Cube 3 relies on materials outside the pleadings or disputed facts, those issues belong—if anywhere—under Rule 56 after discovery, not at the pleadings stage.

VIII. DISMISSAL WITH PREJUDICE WOULD BE IMPROPER

Dismissal with prejudice is reserved for claims that are legally incurable under any set of facts. That is not the case here.

Even if the Court perceived any pleading defect, dismissal with prejudice would be improper because:

1. any defect is potentially curable by amendment;
2. Plaintiffs have had no discovery regarding Cube 3's post-2018 role; and
3. a minor child's health and safety are at issue.

Compl. ¶¶ 3, 6–8, 18–24.

Rule 15(a) requires that leave to amend be “freely given when justice so requires.”

Cube 3 bears the burden to show futility as a matter of law—and has not even attempted to do so.

At most, the appropriate remedy would be dismissal **without prejudice** with leave to amend.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court:

1. **DENY** Cube 3's Motion for Partial Judgment on the Pleadings in its entirety;
- or
2. In the alternative, grant any dismissal **without prejudice** and allow leave to amend under Mass. R. Civ. P. 15(a).

Respectfully submitted,

Sandra Fernandez De Villavicencio
Individually and in behalf of her minor son K.F. (Plaintiffs),

By: Sandra Fernandez De Villavicencio
550 Liberty St., Unit 905
Braintree, MA 02184
(617) 806-6566
sandrea14@yahoo.com
Date: February 5th, 2025

/s/ Sandra Fernandez De Villavicencio
Sandra Fernandez De Villavicencio (Pro Se)

CERTIFICATE OF SERVICE

I hereby certify that on February 5th, 2026 a copy of the foregoing was served electronically on all counsel of record.

Cube 3 Studio, LLC
Michael P. Schaefer, Esq.
MGM Law
125 High Street
Oliver Street Tower, 6th Floor
Boston, MA 02110
MSchaefer@mgmlaw.com

By: Sandra Fernandez De Villavicencio
Individually and in behalf of her minor son K.F.

/s/ Sandra Fernandez De Villavicencio
Sandra Fernandez De Villavicencio (Pro Se)