

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	)
	)
<i>Plaintiffs,</i>	)
	)
v.	)
	)
CUBE 3 STUDIO LLC,	)
	)
<i>Defendant</i>	)

**DEFENDANT CUBE 3 STUDIO LLC’S REPLY TO PLAINTIFF’S OPPOSITION TO
DEFENDANT’S MOTION FOR JUDGMENT ON THE PLEADINGS**

In their Opposition, Plaintiffs abandon their Complaint’s reliance on G. L. c. 231, § 85B and G. L., c. 176D. Nevertheless, Plaintiffs argue that their Complaint has still successfully pleaded the torts of misrepresentation, fraudulent concealment and intentional infliction of emotional distress, and at a minimum. The Opposition has offered no ground to refute, diminish or meaningfully address the Motion’s arguments supporting judgment on the pleadings.

A. The Opposition abandons the Complaint’s statutory assertions pivotal to Counts IV, V and VI.

Challenged by the Motion, Plaintiffs now declare, “[t]o be clear: Plaintiffs do not plead § 85B or c. 176D as the source of Cube 3’s tort duties.” Opp., at 2. The Opposition offers no argument to defend any value in said statutory assertions in the Complaint. Instead, Plaintiffs attempt to justify their claims citing the Complaint’s remaining content. For example, the Opposition states, “[e]ven if statutory references were imperfect, these facts independently support common-law claims for misrepresentation, concealment, conspiracy, and intentional infliction of

emotional distress.” Opp., at p. 4. Thus, the Motion’s arguments that G.L. c. 231 § 85B and G.L. c. 176D are wholly inapplicable to Cube 3 are unopposed.

Divested of these two statutory assertions, Counts IV, V and VI of the Complaint must fail. Deleting the above statutory assertions would virtually delete Count IV. That count begins with alleging a request by Plaintiffs, expressly under G.L. c. 231 § 85B, which were invalidated by defense counsel, and the requested information, again expressly under § 85B, were then withheld by counsel. Compl., at ¶¶ 61-63. Paragraph 64 then asserts reasonable reliance of the above. Compl., at ¶ 64. Paragraph 65 then expressly concludes G.L. c. 176D, § 3(9) has been violated. *Id.*, at ¶65. Without the statutory assertions, Count IV would assert reasonable reliance on nothing.

Similarly, deprived of G.L. c. 231, § 85B in Paragraph 69 of the Complaint, Count V, “civil conspiracy,” alleges no underlying “unlawful objective.” Compl., at ¶ 69. The Opposition attempts to overcome this defect by arguing, “[b]ecause the underlying tort (fraudulent concealment) is plausibly pled, the conspiracy claim necessarily survives Rule 12(c).” Opp., at p. 6. This argument directly contradicts binding case law. The Appeals Court expressly held that “Massachusetts does not recognize an independent claim for fraudulent concealment.” *Niedner v. Ortho-McNeil Pharm., Inc.*, 90 Mass. App. Ct. 306, 313 (2016). Rather, fraudulent concealment is a tolling provision established by G.L. c. 260, § 12. *Id.* The Plaintiffs cite no law to the contrary.¹

Count VI is also defeated, absent its statutory assertion. Paragraph 75 of the Complaint states, “Cube 3's deliberate statement to Ms. Fernandez—“You have no right to insurance”^{2 3}—made after years of concealment and with knowledge of her child's injury, was extreme,

¹ Cube 3’s coming motion for summary judgment, currently under the Rule 9A process, addresses why fraudulent concealment does not toll the statute of repose at issue in G.L. c. 260, 2B.

² Cube 3 denies that it or its attorneys or representatives made any such statement. See Answer, at ¶ 75.

³ See also Paragraph 62 of the Complaint, asserting a more detailed version which shows the alleged statement is “‘no right’ to insurance information” and not “no right to insurance.” Compl., at ¶ 62. Cube 3 denies the allegation. Answer, at ¶ 62.

outrageous, and beyond all possible bounds of decency.” *Id.*, at ¶ 75. When the right to insurance information allegation does not exist,⁴ the alleged act of infliction is merely telling a person with no right to insurance information that the person has no right to insurance information.

B. Plaintiffs failed to allege any tort in Counts IV, V and VI on which a claim may be based.

Failing to save the above-discredited statutory allegations, the Opposition pivots to make repeated arguments that Plaintiffs have successfully alleged misrepresentation and fraudulent concealment, among other claims, stating, “[t]he 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.” Opposition, at p. 2. It also states, “[e]ven if statutory references were imperfect, these facts independently support common-law claims for misrepresentation, concealment, conspiracy, and intentional infliction of emotional distress.” Opposition, at p. 4.

Count IV of the Complaint does not satisfy the essential elements of misrepresentation, including supplying false information for the guidance of others. *Golber v. Baybank Valley Trust, Co.*, 46 Mass.App.Ct. 256, 257 (1999). The Complaint never claims that Cube 3 supplied false information. Divested of the above statutory assertions, Count IV asserts that Plaintiffs sought “information”, Cube 3 withheld “insurance information”, and Plaintiffs “reasonably relied on the concealment” of that some sort of information. See Compl, at ¶¶ 61-64. Even if such allegations were read into the pleading, there would still be no allegation that false information was supplied.

Count IV is not aided by other content in the Complaint. In the background portion, the Complaint alleges, “[t]hroughout this six-year period, the plaintiffs were repeatedly misled,

⁴ Not a representation by Cube 3 that, given applicable case law, the alleged act would be sufficient for intentional infliction of emotional distress even if a right to insurance information did exist.

including denial of any mold in building end of 2022, by management and representatives associated with the defendant.” *Id.*, at ¶ 26. Cube 3 is thus accused of denial of mold, through its representatives, and not of supplying false information. *See Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008)(“a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions...Factual allegations must be enough to raise a right to relief above the speculative level”). Moreover, Plaintiffs fail to allege that Cube 3 had a duty to disclose information. *See Golber, supra*, 46 Mass. App. Ct. at 258 (analyzing duty to disclose as an essential part of negligent misrepresentation); see also *Sampson v. MacDougall*, 60 Mass. App. Ct. 394, 401 (2004). Thus, the duty to disclose information being absent, Plaintiffs have failed to allege misrepresentation.

Additionally, regarding several elements of intentional infliction of emotional distress, the Complaint alleges nothing beyond mere labels and conclusions. As to the legal requirement that defendant had knowledge that the alleged conduct would cause emotional distress, the Complaint offers nothing beyond a rephrasing of the essential element. Paragraph 76 declares that Cube 3 “acted intentionally or, at minimum, recklessly in disregard of the near certainty that its conduct would cause severe emotional distress. The tort of intentional infliction of emotional distress requires more than “‘insults, indignities, threats, annoyances, petty oppressions, or other trivialities’ that fail to ‘go beyond all possible bounds of decency.’” *Roman v. Trs. of Tufts Coll.*, 461 Mass. 707, 718 (2012) (internal citation omitted). The Complaint has not alleged intentional infliction of emotional distress because there is no reasonable understanding of the above allegations that could support a conclusion that they “go beyond all possible bounds of decency.” This is not to minimize any suffering Plaintiffs may have borne, but as a matter of law, even conduct which causes a “major depressive disorder” is not sufficient for intentional infliction of

emotional distress because it demands a “‘high order of reckless ruthlessness or deliberate malevolence’ required for a showing of conduct that is ‘intolerable.’” *Conley v. Romeri*, 60 Mass. App. Ct. 799, 805 (2004), *citing Conway v. Smerling*, 37 Mass.App.Ct. 1, 8 (1994).

Finally, Plaintiffs’ assertion they have pleaded the tort of fraudulent concealment⁵ is necessarily false, as fraudulent concealment is a statutory tolling provision, not an independent claim. *Niedner, supra*, 90 Mass. App. Ct. at 313. Judgment on the pleadings should be granted.

Date: February 18, 2026

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

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CERTIFICATE OF SERVICE

I hereby certify that on February 18, 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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⁵ Not an admission by Cube 3 that Plaintiffs have successfully pleaded fraudulent concealment in any form.