COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

2184CV01017-BLS2

MICHAEL GERHARDT AND LAUREN SEAVERNS

v.

ROBERT S. BURR; COLLEGE STREET PARTNERS, LLC;
140 COMMONWEALTH AVENUE – DANVERS, LLC;
AND HAWTHORNE HILL DEVELOPMENT LLC

MEMORANDUM AND ORDER ALLOWING MICHAEL GERHARDT'S MOTION TO DISMISS COUNTERCLAIMS

Michael Gerhardt and Lauren Seaverns worked for College Street Partners LLC. They claim that Robert Burr agreed to give them ownership interests in certain of College Street's development projects as partial compensation, and that he has breached a contractual obligation to pay them a share of all amounts that College Street distributes to its owners.

College Street, in turn, has brought counterclaims for breach of contract against Mr. Gerhardt on the ground that he oversaw a commercial construction project that, according to the client, was built with a material defect in its flooring.

The Court will **allow** Mr. Gerhardt's motion to dismiss the counterclaims because the facts alleged by College Street do not plausibly suggest that Gerhardt is liable for the contractor's missteps. Cf. *Lopez* v. *Commonwealth*, 463 Mass. 696, 701 (2012) (to survive Rule 12(b)(6) motion to dismiss, complaint must allege facts that, if true, would "plausibly suggest[] … an entitlement to relief.") (quoting *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008), and *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007)).

The counterclaims allege that Gerhardt was employed by College Street, but do not assert that he entered into any written employment agreement or that he was employed for any fixed period of time. Thus, the facts alleged suggest that Gerhardt was an employee at will.

College Street contends that Gerhardt "failed to perform his duties and fulfill his obligations" because he was "responsible for ensuring that the Project was completed properly" and the project was completely improperly, "with a material defect in its flooring." College Street asserts claims for breach of contract and breach of the implied covenant of good faith and fair dealing.

These allegations fail to state a viable claim for breach of contract or for negligence because they do not plausibly suggest that Gerhardt failed to exercise reasonable care and skill in carrying out his job, or that Gerhardt is strictly liable for any construction defect in the Project.

Under Massachusetts law, any contract includes an implicit warranty or promise "to do a workmanlike job and to use reasonable and appropriate care and skill in doing it." *Herbert A. Sullivan, Inc.* v. *Utica Mut. Ins. Co.*, 439 Mass. 387, 395–396 (2003), quoting *Abrams* v. *Factory Mut. Liab. Ins. Co.*, 298 Mass. 141, 143 (1937). "Although the duty arises out of the contract and is measured by its terms, negligence in the manner of performing that duty as distinguished from mere failure to perform it, causing damage, is a tort." *Id.* at 396, quoting *Abrams*, 298 Mass. at 144. Thus, whether a party "has satisfied a contractually imposed duty to use reasonable care is tested by reference to ordinary principles of negligence." *Chow* v. *Merrimack Mut. Fire Ins. Co.*, 83 Mass. App. Ct. 622, 627 (2013).

The implicit duty to do a workmanlike job does not impose strict liability. "The law demands reasonable care, not perfection." *Sarkisian* v. *Concept Restaurants, Inc.*, 471 Mass. 679, 683 (2015).

Furthermore, the allegation that Gerhardt was the project manager responsible for overseeing the work by the construction contractor does not plausibly suggest that he can be held liable for negligence by the contractor, in the absence of any allegation that Gerhardt could control the manner in which the contractor installed the flooring. See *Herbert A. Sullivan*, 439 Mass. at 407–408 (someone who hires an independent contract is generally not liable for harm caused by contractor's negligence, unless they "retained some control over the manner in which the work was performed").

College Street's conclusory assertions that Gerhardt breach a contractual obligation cannot salvage this claim. When deciding a motion to dismiss under Rule 12(b)(6), a court must "look beyond the conclusory allegations in the complaint and focus on whether the factual allegations plausibly suggest an entitlement to relief." *Maling* v. *Finnegan, Henderson, Farabow, Garrett & Dunner, LLP*, 473 Mass. 336, 339 (2015), quoting *Curtis* v. *Herb Chambers I-95, Inc.*, 458 Mass. 674, 676 (2011). In other words, the court must accept as true only the facts alleged in the complaint, not any "legal conclusions cast in the form of factual allegations." *Sandman* v. *Quincy Mut. Fire Ins. Co.*, 81 Mass. App. Ct. 188, 189 (2012).

The second claim, for breach of the implied covenant of good faith and fair dealing, adds nothing of substance.

This implied covenant "does not create rights or duties beyond those the parties agreed to when they entered into the contract." *Boston Med. Ctr. Corp.* v. *Secretary of Executive Office of Health & Human Servs.*, 463 Mass. 447, 460 (2012) (affirming dismissal of claim), quoting *Curtis* v. *Herb Chambers I-95, Inc.*, 458 Mass. 674, 680 (2011). "The implied covenant 'concerns the manner of performance' and 'exists so that the objectives of the contract may be realized.' " *Beauchesne* v. *New England Neurological Assocs., P.C.*, 98 Mass. App. Ct. 716, 722 (2020), rev. denied, 486 Mass. 1111 (2021), quoting *Ayash* v. *Dana-Farber Cancer Inst.*, 443 Mass. 367, 385, cert. denied sub nom. *Globe Newspaper Co.* v. *Ayash*, 546 U.S. 927 (2005). In other words, it only governs "the manner in which existing contractual duties are performed." *Eigerman* v. *Putnam Investments, Inc.*, 450 Mass. 281, 289 (2007).

The facts alleged in the counterclaims do not plausibly suggest that Gerhardt violated the implied covenant.

ORDER

Plaintiff Michael Gerhardt's motion to dismiss defendant College Street Partners LLC's counterclaims is **allowed**.

Kenneth W. Salinger
Justice of the Superior Court

15 February 2022