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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION NO.
2014-08766

KAPILOFF'S GLASS, INC. & others,[1]
Plaintiffs,

vs.

UNIVERSITY OF MASSACHUSETTS & another,[2]
Defendants.

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS

This case arises out of a public construction project orchestrated by the defendant University of Massachusetts, Lowell ("UMass Lowell"). Plaintiffs Kapiloff's Glass, Inc.; Orestil Construction, LLC; Rockwell Roofing, Inc.; and ATR Sales, Inc. (collectively, "Plaintiffs") were subcontractors on said project and have not been paid in full for their work. Relying on G. L. c. 149, §29, Plaintiffs claim UMass Lowell and the defendant University of Massachusetts (together, "Defendants") were negligent in not ensuring that its general contractor's payment and performance bond was furnished by a licensed surety business. Defendants now move to dismiss Plaintiffs' complaint pursuant to Mass. R. Civ. P. 12(b) (6), arguing they owed no duty, statutory or otherwise. After a hearing, and upon review and consideration, the motion is **DENIED**.

BACKGROUND

The following background is taken from the allegations in Plaintiffs' complaint and the exhibits attached thereto, which the court accepts as true for the purposes of Defendants' Rule 12

[1] Orestil Construction, LLC; Rockwell Roofing, Inc.; and ATR Sales, Inc.

[2] University of Massachusetts Lowell

motion. See *Schaer v. Brandeis University*, 432 Mass. 474, 477 (2000). This Court has drawn all reasonable inferences in Plaintiffs' favor. *Okerman v. VA Software Corp.*, 69 Mass. App. Ct. 771, 774 (2007).

In February 2012, UMass Lowell accepted the bid of general contractor KGCI, Inc. ("KGCI") for a near $1.75 million renovation project on its campus (the "Project"). At some point, KGCI executed a bond with First Mountain Bancorp ("First Mountain") to secure payment of labor and materials on the Project (the "payment bond"). KGCI subcontracted Plaintiffs to supply and install various items on the Project, including metal windows, interior glass, roofing materials, and custom laser curtains.

All subcontracted work was completed in a timely manner; however, KGCI failed to pay each plaintiff subcontractor in full. Plaintiffs filed suit against KGCI and First Mountain to recover under the payment bond. Thereafter, Plaintiffs learned that First Mountain was not licensed as a surety in the Commonwealth, and, in fact, existed as a false business entity without assets. Plaintiffs further discovered that First Mountain never registered with the Massachusetts Division of Insurance, as required by G. L. c. 149, §29D.[3]

Throughout the following years, various Massachusetts Superior Courts entered judgments in Plaintiffs' favor against First Mountain and, in some cases, KGCI. The collective amount due to Plaintiffs under those orders exceeds $500,000. Neither KGCI nor First Mountain has responded to or made payment on the judgments. Defendants have filed a motion to dismiss the complaint.

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[3] G. L. c. 149, § 29D states, "Every bid bond, every performance bond and every payment bond issued for any construction work in the commonwealth shall be the bond of a surety company organized pursuant to section 105 of chapter 175 or of a surety company authorized to do business in the commonwealth under the provisions of section 106 of said chapter 175 and be approved by the U.S. Department of Treasury and are acceptable as sureties and reinsurers on federal bonds under Title 31 of the United States Code, sections 9304 to 9308."

DISCUSSION

I. Standard of Review

To withstand Defendants' motion to dismiss, Plaintiffs' complaint must allege facts "plausibly suggesting (not merely consistent with) . . . entitlement to relief." *Iannacchino v. Ford Motor* Co., 451 Mass. 623, 636 (2008) (internal quotations omitted). In conducting this analysis, the court accepts well-pleaded allegations as true and draws all reasonable inferences in Plaintiffs' favor. *Service Employees Int'l Union, Local 509 v. Department of Mental Health*, 469 Mass. 323, 329 (2014). *Marran v. Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 45 (2004). Rule 12 envisions a relatively low standard for survival of a motion to dismiss, see *id.*; and a complaint will not be dismissed merely because it puts forth a new theory of liability. See *Pontremoli v. Spaulding Rehabilitation Hosp.*, 51 Mass. App. Ct. 622, 624 (2001).

II. Analysis

In relevant part, G. L. c. 149, § 29 states:

> Officers or agents contracting in behalf of the commonwealth . . . for the construction, reconstruction, alteration, remodeling, repair or demolition of public buildings or other public works when the amount of the contract is more than $25,000 shall obtain security by bond in an amount not less than one half of the total contract price, for payment by the contractor and subcontractors for labor performed or furnished and materials used or employed therein[.]

Plaintiffs insist that this statute imposed on Defendants a duty to ensure the legitimacy of KGCI's First Mountain payment bond. Although the complaint presents a theory of liability not yet directly addressed by any Massachusetts appellate court, the undersigned concludes that it states a viable claim as a matter of law and should be adjudicated on its merits.

The parties primarily dispute the meaning of the terms "officer" and "agent" as used in the statute. Plaintiffs claim those titles apply to UMass and UMass Lowell and that the statute therefore directed Defendants to obtain a sufficient payment bond upon contracting for the Project. Defendants maintain that neither entity is an officer or agent of the Commonwealth and that the sole duty outlined was that of KGCI to submit a payment bond as security on the Project. In examining the plain meaning of the words in the framework of the statute as a whole, this Court agrees with Plaintiffs.

"Where the language of a statute is plain, it must be interpreted in accordance with the usual and natural meaning of the words." *Gurley v. Commonwealth*, 363 Mass. 595, 598 (1973). The term "agent"—and its synonym in this context, "officer"—has been deployed in the legal sphere for centuries. See, *e.g.*, *Allen v. School District No. 2*, 32 Mass. 35, 39 (1833). The core of the concept is that an agent acts on the behalf and for the benefit of a principal, subject to the principal's control. Restatement (Third) of Agency § 1.01 (2006); *Theos & Sons, Inc.* v. *Mack Trucks, Inc.*, 431 Mass. 736, 742-744 (2000). In doing so, an agent may contractually bind the principal. Id.

Where, as here, the Legislature did not provide definitions for "officers or agents," Massachusetts courts "presume that its intent [was] to incorporate the common-law definition[s]," unless expressly stated otherwise. *Commonwealth v. Stokes*, 440 Mass. 741, 747 (2004). As the words are commonly defined, general contractors are not "officers or agents" of the Commonwealth when engaging in contractual negotiations for public projects, but rather act in their own best interest. For this reason, Defendants' interpretation is neither logical nor in accord with common sense, and the court declines to entertain it here. See *L.L. v. Commonwealth*, 470 Mass. 169, 178 (2014) (refuting interpretation of statute that would be

contrary to logic and common sense); *Molly A v. Commissioner of the Dep't of Mental Retardation*, 69 Mass. App. Ct. 267, 282 (2007) (courts should avoid an "unreasonable result when statutory language is susceptible of a sensible, workable construction").

Moreover, if, as Defendants contend, the Legislature intended for the only duty referenced in G. L. c. 149, § 29 to be that of KGCI, it could have clearly stated as much. Indeed, the section deploys the terms "general contractor" and "subcontractors" expressly throughout. Ultimately, the drafters directed the law to "officers or agents" acting on the Commonwealth's behalf, not to the general contractors. The court will not read into the statute a meaning that would undermine its plain language as written. *Cameron Painting, Inc. v. University of Massachusetts*, 83 Mass. App. Ct. 345, 349-350 (2013); *Hartford Ins. Co. v. Hertz Corp.*, 410 Mass. 279, 283 (1991) ("As a general rule, when the Legislature has employed specific language in one part of a statute, but not in another part which deals with the same topic, the earlier language should not be implied where it is not present."). See also *DePierre v. United States*, 131 S. Ct. 2225, 2233 (2011) ("That we may rue inartful legislative drafting . . . does not excuse us from the responsibility of construing a statute as faithfully as possible to the actual text.").

Next, for the purpose of this analysis, this Court assumes Defendants' argument that they are "one and the same" as the Commonwealth of Massachusetts. *Hannigan v. New gamma-Delta Chapter of Kappa Sigma Fraternity, Inc.*, 367 Mass. 658, 659 (1975). But see *Robinson v. Commonwealth*, 32 Mass. App. Ct. 8-9 (1992) (holding, after analysis, "the University of Massachusetts is an agency of the Commonwealth"). Even so, by this reading of G. L. c. 149, § 29, it was the "officers or agents" acting on Defendants' behalf who were obligated to "obtain security by bond" when contracting for the Project. KGCI certainly was not acting on the behalf or for the benefit of Defendants when negotiating the Project. That role was filled by

Defendants' employees who orchestrated the Project on the ground. Thus, it was the "officers or agents" of UMass and UMass Lowell whom the statute directed to "obtain security by bond."

That the Commonwealth—via Defendants—owes some duty is clear in the plain language of G. L. c. 149, § 29. Such an interpretation also accords with the history of the statute. Since the law's enactment in 1878, government entities have routinely demanded payment bonds in connection with construction contracts in order to provide insurance that their projects will be completed and its subcontractors paid. *Reliance Ins. Co. v. Boston*, 71 Mass. App. Ct. 550, 557-558 (2008). Indeed, the Supreme Judicial Court ("SJC") read the statute in the decades following its enactment as obligating the Commonwealth to ensure a sufficient payment bond or other similar security existed to protect subcontractors. See *Friedman v. County of Hampden*, 204 Mass. 494 (1910) (describing contracting parties' relationship under G. L. c. 149, § 29 predecessor statute as one in which public entity has duty "to see that [a security] is furnished"); *Otis Elevator Co. v. Long*, 238 Mass. 257, 267 (1921) ("The statute is satisfied if an adequate bond be taken . . . ."). Thus, at its core, the law has always protected subcontractors, not the Commonwealth. See *Peters v. Hartford Accident & Indemnity Co.*, 377 Mass. 863, 866-869 (1979); *Nash v. Commonwealth*, 182 Mass. 12, 16 (1902).

The Commonwealth's duty to at least preliminarily ensure the legitimacy of a payment bond is further warranted when considering the statute's purpose. As the SJC has pronounced:

> An examination of the many decisions construing and applying G. L. c. 149, Section 29, and the several predecessor statutes now merged therein reveals the repeated statements that the statutes were intended to protect laborers and materialmen from nonpayment by contractors and subcontractors engaged in the construction of public buildings or public works. The examination also reveals repeated statements that the statute should be given a broad or liberal construction to accomplish its intended purpose.

American Air Filter Co., Inc. v. Innamorati Bros., Inc., 358 Mass. 146, 150 (1970) (internal citations omitted). "[A] contrary holding . . . could make possible an effective subversion of the

broadly remedial statutory purpose" of protecting subcontractors. *Peters*, 377 Mass. at 871. Defendants insist the Commonwealth has no mandate regarding a general contractor's payment bond under G. L. c. 149, § 29. Yet, practically speaking, there was no party in a better position than Defendants to protect Plaintiffs from KGCI and First Mountain's bond failure in this case. Plaintiff subcontractors did not have access to any payment bond information at the time they accept the Project. In contrast, the Commonwealth encompasses the Division of Insurance, which monitors sureties. A brief inspection of the Division's records could have revealed that First Mountain was not licensed, solvent, or registered to conduct business in Massachusetts and accordingly could not supply a payment bond that would adequately protect plaintiff subcontractors. "The legislative intent [of G. L. c. 149, § 29] was to provide security for those who furnish labor and materials. . . . The intent would not be achieved by a security in name only." *Lock Joint Pipe Co. v. Commonwealth*, 331 Mass. 346, 353 (1954).[4]

Moreover, the Commonwealth's duty under G. L. c. 149, § 29 promotes efficient and economical completion of government projects, which courts time and again have recognized as a significant public interest. See, *e.g.*, *First National Ins. Co. of Am. v. Commonwealth*, 391 Mass. 321, 325 (1984) ("The Government has an important interest in the timely and efficient completion of [its] contract work."); *Peters*, 377 Mass. at 872 (ensuring security for public project laborers "promotes the unhampered completion of such projects"); *Manganaro Drywall, Inc. v. White Constr. Co., Inc.*, 372 Mass. 661, 664 (1977) (G. L. c. 149, § 29 "encourage[s] subcontractors to bid on public works projects and tends to alleviate concerns of subcontractors

[4] Defendants argue that to acknowledge the Commonwealth's duty under G. L. c. 149, § 29 would impose a significant burden on the Commonwealth to become the insurer of the continued financial viability of surety companies. This Court is mindful of this significant concern, but resolution of this motion does not require a determination of the necessary scope of the Commonwealth's duty under the statute—whether it be to simply cross-check the payment bond contract with the Massachusetts Division of Insurance records or continuously monitor a surety's solvency—at this time. It is noted, however, that the SJC has favored protection of subcontractor expectations over a payor's potential requirement to pay twice for the same project. See *American Air Filter Co., Inc.*, 358 Mass. at 153.

which might prompt higher bids as a precaution against unreasonable delays in the flow of funds to them").

"When interpreting a statute, a court's primary duty is to effectuate the intent of the Legislature in enacting it." Cameron Painting, Inc., 83 Mass. App. Ct. at 347 (internal citations omitted). Reading the law broadly to protect subcontractors and effect its established purpose, this Court finds Plaintiffs' claim that Defendants breached a duty under G. L. c. 149, § 29 viable as a matter of law. See Lawrence Plate & Window Glass Co. v. Varrasso Bros., Inc., 353 Mass. 631, 633 (1968) (court mandate to interpret G. L. c. 149, § 29 broadly leads to determination that amendments "increase, rather than diminish, the protection afforded to subcontractors"). The case may proceed on its merits.

ORDER

For the foregoing reasons set forth above, it is hereby **ORDERED** that Defendants' Motion to Dismiss is **DENIED**.

Kenneth J. Fishman
Justice of the Superior Court

Dated: January 11, 2016