

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

MIDDLESEX, ss.

SUPERIOR COURT DEPARTMENT
DOCKET NO. 2011 MICV-04095

TWENTY WAYLAND, LLC,

Plaintiff,

v.

TOWN OF WAYLAND and WAYLAND
WASTEWATER MANAGEMENT DISTRICT
COMMISSION,

Defendants.

**DEFENDANTS' REPLY BRIEF IN RESPONSE TO PLAINTIFF'S OPPOSITION TO
DEFENDANTS' POST-TRIAL MOTIONS**

The Town of Wayland (the "Town") and the Wayland Wastewater Management District Commission (the "WWMDC"), Defendants in the above-captioned action, respectfully submit the following reply brief in response to the Plaintiff's Opposition to Defendants' Post-Trial Motions.

ARGUMENT

I. **THE DEFENDANTS' POST-TRIAL MOTIONS ARE NOT UNTIMELY.**

Pursuant to the Defendants' request, on June 26, 2013, this Court extended the time for serving Defendants' post-trial motions to August 2, 2013. See Docket. Notice of the extension was sent to the Plaintiff. Id. In over 30 days, the Plaintiff did not object to the extension. In its opposition to the Defendants' Post-Trial Motions dated August 8, 2013, for the

first time, the Plaintiff objected to the extension by claiming that the post-trial motions are untimely. The objection is disingenuous. By failing to timely object to the extension, the Plaintiff has waived its objection and has, in effect, consented to the extension. Parties may extend the time for filing a motion for new trial by consent. Whayne v. Glenn, 114 F. Supp. (W.D. Ky. 1953).

In any event, the Defendants have requested, in the alternative, relief from judgment under Mass. R. Civ. P. 60 (b) (6). A motion to amend judgment is susceptible to treatment as a motion for relief from judgment under Mass. R. Civ. P. 60 wherein the 10-day post-judgment filing time limit does not apply. King v. Allen, 9 Mass. App. Ct. 821 (1980).

II. THE DEFENDANTS HAVE NOT WAIVED ANY OF THEIR DEFENSES OR ARGUMENTS ON THE MERITS.

The Plaintiff argues that the Defendants, by not moving for a directed verdict, have waived certain arguments on the merits and defenses addressed in their post-trial motions because they could have been addressed in a motion for a judgment notwithstanding the verdict. The Plaintiff cites no authority for this assertion because there is none. Mass. R. Civ. P. 50(b) makes a party's motion for a directed verdict a prerequisite to his motion for judgment notwithstanding the verdict. Hatton v. Meade, 23 Mass. App. Ct. 356 (1987); Mass. R. Civ. P. 50(b).

A motion for a new trial may be made as an alternative to a motion for judgment notwithstanding a verdict where "a jury's verdict is wholly without legal support...in order to prevent a *manifest injustice*" (emphasis added). Hatton *supra* at 23 Mass. App. Ct. 362 *quoting from* Sojak v. Hudson Waterways Corp., 590 F.2d 53, 54-55 (2^d Cir. 1978).

III. THE DEFENDANTS' POST-TRIAL MOTIONS DO NOT RELY ON EVIDENCE NOT PRESENTED AT TRIAL.

The Plaintiff had a duty to mitigate its damages. Burnham v. Mark IV Homes, 387 Mass 575 (1982). The Plaintiff offered no evidence to show that it met its duty. By arguing in their post-trial motion that Plaintiff failed to introduce such evidence at trial, the Defendants are not relying on any evidence - only the absence of it.

As to the real estate taxes related to the Residential Project, the evidence of assessments offered at trial was not complete or supported by the necessary base information for correct calculations. Such information is not new, but is an important part of the evidence presented at trial.

Respectfully submitted,
the Defendants, by their attorney,

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