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COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT

SUFFOLK, SS

CIVIL ACTION NO.: 2384CV00340

LAURA SAPP and
KATHLEEN LAMKIN,

Plaintiffs,

v.

KONE, INC., and
MASSACHUSETTS BAY
TRANSPORTATION AUTHORITY,

Defendants.

SUFFOLK SUPERIOR COURT
CIVIL CLERK'S OFFICE
2023 MAR 29 P 12:28
JOHN E. POWERS III
ACTING CLERK MAGISTRATE

**DEFENDANT MBTA'S ANSWER TO THE PLAINTIFFS' COMPLAINT, CROSS CLAIM AGAINST DEFENDANT
KONE, INC., AND JURY DEMAND**

The defendant, the Massachusetts Bay Transportation Authority (MBTA) responds, paragraph by paragraph, to the plaintiffs' complaint as follows and asserts cross claim against defendant KONE; Inc.

(KONE):

THE PARTIES

1. The MBTA is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.
2. The MBTA is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.
3. Admitted.
4. The allegations in this paragraph contain conclusions of law to which a response is not required. To the extent that a response is necessary, they are denied. The MBTA states that it provides public transportation services throughout the Greater Boston area.

5. The allegations in this paragraph refer to another defendant and therefore a response is not required.

6. The allegations in this paragraph refer to another defendant and therefore a response is not required.

7. The allegations in this paragraph contain conclusions of law to which a response is not required.

FACTUAL ALLEGATIONS

8. The MBTA repeats, re-alleges, and re-avers and incorporates its responses to paragraphs 1 through 7 of the plaintiffs' complaint as if fully stated herein.

9. The allegations in this paragraph contain conclusions of law to which a response is not required. To the extent a response is necessary, they are denied.

10. The MBTA is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.

11. The MBTA is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.

12. The MBTA is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.

13. The allegations in this paragraph contain conclusions of law to which a response is not required. To the extent a response is necessary, they are denied.

COUNT I

Claims Against The Defendant MBTA Predicated On Negligence

14. The MBTA repeats, re-alleges, and re-avers and incorporates its responses to paragraphs 1 through 13 of the plaintiffs' complaint as if fully stated herein.

15. The allegations in this paragraph contain conclusions of law to which a response is not required.

16. The allegations in this paragraph contain conclusions of law to which a response is not required.

17. Denied.

18. Denied.

19. Denied.

20. Denied.

21. The allegations in this paragraph contain conclusions of law to which a response is not required.

22. Denied.

23. Denied.

Wherefore, the MBTA requests that the court dismiss the plaintiffs' complaint with prejudice, award the MBTA its reasonable costs and attorney's fees, and order such other relief that the court deems just and proper.

COUNT II

Claims Against Defendant KONE Predicated On Negligence

24. The MBTA repeats, re-alleges, and re-avers and incorporates its responses to paragraphs 1 through 23 of the plaintiffs' complaint as if fully stated herein.

25. The allegations in this paragraph refer to another defendant and therefore a response is not required. The document referenced in this paragraph speaks for itself and to the extent that factual allegations contained in this paragraph are inconsistent therewith, they are denied.

26. The allegations in this paragraph refer to another defendant and contain conclusions of law to which a response is not required.

27. The allegations in this paragraph refer to another defendant and therefore a response is not required. Moreover, the document referenced in this paragraph speaks for itself and to the extent that factual allegations contained in this paragraph are inconsistent therewith, they are denied.

28. The allegations contained in this paragraph refer to another defendant and therefore a response is not necessary.

29. The allegations contained in this paragraph refer to another defendant and contain conclusions of law to which a response is not required. To the extent this paragraph can be construed to be read against the MBTA, they are denied.

30. The allegations contained in this paragraph refer to another defendant and contain conclusions of law to which a response is not required. To the extent this paragraph can be construed to be read against the MBTA, they are denied.

31. The allegations in this paragraph refer to another defendant and therefore a response is not necessary. To the extent this paragraph can be construed to be read against the MBTA, they are denied.

32. The allegations in this paragraph refer to another defendant and therefore a response is not necessary. To the extent this paragraph can be construed to be read against the MBTA, they are denied.

Wherefore, the MBTA requests that the court dismiss the plaintiffs' complaint with prejudice, award the MBTA its reasonable costs and attorney's fees, and order such other relief that the court deems just and proper.

AFFIRMATIVE DEFENSES

Responding further to the plaintiffs' complaint, the MBTA asserts the following affirmative defenses:

1. Plaintiffs' complaint fails to state a claim upon which relief may be granted.
2. Plaintiffs' damages, if any, were caused by superseding causes/events and therefore the MBTA cannot be held liable as a matter of law.
3. Plaintiffs' damages were caused by persons or entities for whom the MBTA is not responsible.
4. The MBTA's acts or omissions were not the proximate or legal cause of the plaintiffs' injuries.

5. The instrumentality causing the accident was not in the sole and exclusive control and management of the MBTA nor is the incident one which would have occurred absent some negligence by the MBTA.
6. The MBTA cannot be liable for interest, costs, attorney's fees and punitive damages and therefore, those claims must be stricken.
7. The plaintiffs' claims are limited to the damages set forth in G.L. c. 258 § 2.
8. The plaintiffs' claims are barred for failure to join an indispensable party.
9. Any liability or damages claimed by the plaintiffs are solely the result of acts and/or omissions by KONE, INC.
10. The MBTA's conduct was reasonable at all times.
11. The plaintiffs' claims are barred as they are based upon acts or omissions of public employee exercising due care in the execution of a statute or regulation of a public employer.
12. The plaintiffs' claims are barred as they are based upon an alleged act or failure to act to prevent or diminish the harmful consequence of a condition or situation of which the MBTA was not the original cause.
13. The plaintiffs' claims are barred because they are based upon the exercise or performance or failure to exercise or perform a discretionary function.
14. Plaintiffs' claims are barred because they failed to adequately present her cause of action pursuant to G.L. c. 258 § 4, in that it was untimely, not noticed to the proper official, and failed to adequately identify the cause of action pursuant to G.L. c. 258 § 4.
15. The plaintiffs' claims are barred because the MBTA had no notice of and could not have reasonably known of the alleged unsafe condition(s) alleged by the plaintiffs.
16. The plaintiffs' complaint is barred by the provision of G.L. c. 258 §§ 1-10.
17. The plaintiffs' damages, if any must be reduced by their failure to mitigate their damages.

18. The plaintiffs' complaint is barred because their comparative negligence exceeded the negligence, if any of the MBTA.

19. The plaintiffs' claim is barred by the applicable statute of limitations or statute of repose.

20. The plaintiffs' damages were caused by persons or entities for whom the MBTA is not responsible.

The MBTA hereby gives notice that it intends to rely upon such other and further defenses as may become available or apparent during discovery proceedings in this action and hereby reserves the right to amend its answer and to assert such defense by appropriate motion.

Wherefore the MBTA respectfully requests that this court deny the relief sought by the plaintiffs in their complaint and dismiss said complaint with prejudice; award the MBTA its reasonable costs and attorney's fees; and order such other and further relief as the court deems just and proper.

THE MBTA'S CROSSCLAIM AGAINST CO-DEFENDANT, KONE, INC.

The Massachusetts Bay Transportation Authority (MBTA) asserts this crossclaim against defendant KONE, INC. (KONE).

THE PARTIES

1. Upon information and belief, the plaintiff Laura Sapp is a resident of the state of Louisiana and resides at 4932 Jasper Street, Metairie, Jefferson Parish, Louisiana.
2. Upon information and belief, the plaintiff Kathleen Lamkin is a resident of the state of Louisiana and resides at 23525 Silver Springs Drive, Abita Springs, St. Tammany Parish, Louisiana.
3. The plaintiff-in-crossclaim, the MBTA is a body politic and corporate and a political subdivision of the Commonwealth of Massachusetts organized under G.L. c. 161A, with a principal place of business at 10 Park Plaza in Boston.

4. The defendant, KONE is a foreign corporation organized under the laws of Delaware with a principal office located at One KONE Court in Moline, Illinois. KONE has a Massachusetts office located at 55 Brooks Drive in Braintree and a registered agent located at Corporation Service Company, 84 State Street in Boston.

FACTS

5. The MBTA repeats, re-alleges, and incorporates as fully set forth herein the allegations contained above in paragraphs 1 through 4.

6. The plaintiffs allege that on September 26, 2021, they sustained personal injuries when they were utilizing an escalator at Back Bay Station that malfunctioned.

7. The plaintiffs allege that the defendants failed to exercise care in "inspecting, servicing, repairing, and/or maintaining" the subject escalator. The plaintiffs further allege that the defendants failed to service, test and maintain the escalator in a safe condition and in compliance with all applicable codes and regulations. The plaintiffs claim that they sustained personal injuries on September 26, 2021, as a result of those failures.

8. The MBTA denies all allegations of negligence and other wrongdoing alleged in the plaintiffs' complaint and denies that it caused or contributed to the plaintiffs' claimed injuries.

9. On or about July 1, 2017, the MBTA entered into a Vertical Transportation (a/k/a elevators and escalators) Maintenance Agreement (contract) for KONE to inspect, service, maintain, test, and repair the MBTA's vertical transportation assets, i.e., elevators and escalators, including this subject escalator as outlined in the contract. The contract was in full effect at all relevant times herein. (Ex. 1).

10. The contract was intended to be a pro-active preventive maintenance, service and repair agreement that included, but was not limited to, repairs, callbacks, maintenance,

inspections and other services for the equipment to facilitate the consistently safe, code-compliant operation of escalators. (Ex. 1, § 3.2).

11. KONE was required to maintain the escalator in accordance with applicable codes, laws, and standards. (EX. 1, § 5.3.4).

12. KONE was required to perform its services in conformance with the provisions of the contract, in conformance with legal statutes and code requirements, in conformance with applicable original equipment manufacturer's specifications, in conformance with the MBTA's rules, policies, regulations, and requirements, by qualified, careful and efficient employees in conformity with best industry practices, diligently and in a first class, complete and workmanlike manner, free from defect or deficiency, and in such manner as to minimize any annoyance, interference, or disruption to occupants and users of property and their invitees. (Ex. 1, § 5.3.6).

13. Under the contract, KONE was required to regularly and systematically test, inspect, examine, adjust, lubricate, clean and when conditions warrant, repair or replace necessary parts, components and other associated mechanical and electrical equipment of the escalator. (Ex. 1, § 5.3.1).

14. The preventive maintenance, service, repair, inspection and testing work specified in the contract was to be considered the minimum work requirements for escalators and if additional preventive maintenance, service, repair, inspections or testing was required for safe, reliable operation, KONE was required to perform this work at any time throughout the duration of the contract. (Ex. 1, 5.3.13).

15. KONE further agreed and acknowledged that that it was satisfied as to the specification, data, instructions, performance standards and schedules as well as pre-existing

conditions pertaining to the escalators in this contract and accepted the units "as-is."

(Ex. 1, § 5.4).

16. KONE acknowledged and agreed that the MBTA would be relying on KONE's professional expertise in the performance of its escalator services. (Ex. 1, § 3.3).

17. By contract, it was the duty and responsibility of KONE to discover and appropriately remedy conditions which might cause the escalator to operate poorly, fail, become damaged or cause a safety hazard to passengers. (Ex. 1, § 5.11.3).

18. If there is any liability as to the claimed damages sustained by the plaintiffs, that said damages were caused by or contributed to by the negligence of KONE, through its agents, servants, or employees, without any negligence or want of due care on the part of the MBTA.

19. Moreover, under the contract, KONE agreed to indemnify, save harmless, and defend the MBTA and all of its officers, agents and employees from and against any and all third party suits, claims, or proceedings (claims), and any losses, damages, charges or expenses, whether direct or indirect, and liability of every name and nature related to such claims (liabilities) for or due to any loss or injury to persons or damages to real or tangible property to the extent caused by KONE or its employees, subcontractor or agents. (Ex. 2).

20. Pursuant to the contract, if the MBTA decided to itself conduct the defense of an indemnified claim against it or to conduct any other response itself, KONE was required to reimburse the MBTA for all reasonable costs and expenses (including, without limitation, reasonable attorneys' fees and expenses) incurred by the MBTA in connection with the MBTA's defense of the indemnified claim against it and/or the conduct of all response actions. (Ex. 2).

21. Additionally, KONE was contractually required to obtain insurance covering the MBTA for the plaintiffs' claims. The contract required KONE to carry and maintain, throughout the term of the contract, the following insurance:

- a. Commercial General Liability Insurance. The Contractor shall carry and maintain Commercial general Liability insuring the contract and the MBTA and the contractor's subcontractors and agents for all activities allowed hereunder including contractor's indemnification obligations with minimum liability coverage for personal injury, bodily injury, property damage....
- b. Excess Liability Insurance. The Contractor shall carry and maintain Umbrella Liability Insurance with limits of Five Million Dollars per occurrence and annual aggregate covering all work and services performed under the contract.
- c. Insurer; Additional Insurance Requirements....contractor shall provide an Owners and Contractors Protective Liability (OCPL) policy naming the MBTA as a Named Injured. (Ex. 2).

22. On or about March 23, 2023, the MBTA sent a letter to KONE demanding and asserting its right to indemnification from KONE and that KONE tender the plaintiffs' claim against the MBTA to the applicable insurance providers under the contract. (Ex. 3).

COUNT I – INDEMNIFICATION

23. The MBTA repeats, reavers, and incorporates its allegations contained in the above-paragraphs 1 through 22 as if fully set forth herein.

24. Notwithstanding the MBTA's denial of liability or damages as claimed by the plaintiffs, in the event that the MBTA is found liable for such damages, all such liability is the result of the negligence and/or other acts and/or omissions by KONE and not that of the MBTA.

25. The plaintiffs allege that the defendants failed to exercise care in "inspecting, servicing, repairing, and/or maintaining" the subject escalator. The plaintiffs further allege that the defendants failed to maintain the escalator in a safe condition and in compliance with all applicable codes and regulations. The plaintiffs claim that they sustained personal injuries on September 26, 2021, as a result of those failures.

26. On September 26, 2021, and at all relevant times hereto, KONE was contractually responsible for the inspection, testing servicing, safety, maintenance and repair of the subject escalator.

27. KONE was required to maintain the escalator in accordance with applicable codes, laws, and standards.

28. KONE was required, at a minimum, to regularly and systematically test, inspect, examine, adjust, lubricate, clean and when conditions warrant, repair or replace necessary parts, components and other associated mechanical and electrical equipment of the escalator.

29. If additional preventive maintenance, service, repair, inspections or testing was required for safe reliable operation, KONE was required to perform this work at any time throughout the duration of the contract.

30. By contract, KONE accepted the escalators "as-is" and it was the duty and responsibility of KONE to discover and appropriately remedy conditions which might cause the escalator to operate poorly, fail, become damaged or cause a safety hazard to passengers.

31. KONE acknowledged and agreed that the MBTA was relying upon KONE's professional expertise in the performance of its escalator services.

32. By contract, KONE was required to indemnify, save harmless, and defend the MBTA from and against the plaintiffs' claim.

33. As a result, the MBTA is entitled to indemnification and defense by KONE from and against the plaintiffs claim and any losses, damages, charges, expenses related to such claims.

WHEREFORE, the MBTA demands judgment against KONE for the full amount of any disbursements and/or judgment against the MBTA as a result of any and all claims made by the plaintiffs against it, plus reasonably attorney's fees, costs, and expenses of the MBTA for having to defend against such claims, and for such other relief as it may be just and proper.

COUNT II – CONTRIBUTION

34. The MBTA repeats, reavers, and incorporates its allegations contained in the above-paragraphs 1 through 33 as if fully set forth herein.

35. Notwithstanding the MBTA's denial of any liability and/or damages as claimed by the plaintiffs, in the event that the MBTA is found liable for such damages, all such liability is the result of the negligence and/or other acts and/or omissions of KONE.

36. The plaintiffs allege that the defendants failed to exercise care in "inspecting, servicing, repairing, and/or maintaining" the subject escalator. The plaintiffs further allege that the defendants failed to maintain the escalator in a safe condition and in compliance with all applicable codes and regulations. The plaintiffs claim that they sustained personal injuries on September 26, 2021, as a result of those failures.

37. On September 26, 2021, and at all relevant times hereto, KONE was contractually responsible for the inspection, testing, servicing, safety, maintenance and repair of the subject escalator.

38. KONE was required to maintain the escalator in accordance with applicable codes, laws, and standards.

39. KONE was required, at a minimum, to regularly and systematically test, inspect, examine, adjust, lubricate, clean and when conditions warrant, repair or replace necessary parts, components and other associated mechanical and electrical equipment of the escalator.

40. If additional preventive maintenance, service, repair, inspections or testing was required for safe, reliable operation, KONE was required to perform this work at any time throughout the duration of the contract.

41. By contract, KONE accepted the escalators "as-is" and it was the duty and responsibility of KONE to discover and appropriately remedy conditions which might cause the escalator to operate poorly, fail, become damaged or cause a safety hazard to passengers.

42. KONE acknowledged and agreed that the MBTA was relying upon KONE's professional expertise in the performance of its escalator services.

43. As a result, the MBTA is entitled to contribution from KONE for any judgment entered against the MBTA.

WHEREFORE, the MBTA demands contribution from KONE for the sum as may be adjudged against the MBTA in favor of the plaintiff, including interest, costs, and attorney's fees.

COUNT III – BREACH OF CONTRACT

44. The MBTA repeats, reavers, and incorporates its allegations contained in the above-paragraphs 1 through 44 as if fully set forth herein.

45. KONE entered into a binding contract with the MBTA.

46. By that contract, KONE was required to indemnify, save harmless, and defend the MBTA from and against the plaintiffs' claims.

47. Pursuant to the contract, KONE was required to obtain insurance covering the MBTA for the plaintiffs' claim.

48. KONE materially breached the agreement by failing to indemnify, save harmless, and defend the MBTA from and against the plaintiffs' claim.

49. KONE materially breached the agreement by failing to obtain the required insurance covering the MBTA for the plaintiffs' claim.

50. As a result of KONE's breach, the MBTA has incurred and will continue to incur actual direct and consequential damages.

WHEREFORE, the MBTA demands judgment against KONE for damages, attorney's fees, costs, interest and whatever other relief this Honorable Court deems just and fair.

COUNT IV – BREACH OF IMPLIED GOOD FAITH AND FAIR DEALING

51. The MBTA repeats, re-avers, and restates its allegations contained in the above paragraphs 1 through 50 as if fully set forth herein.

52. KONE had an obligation to engage in good faith, and to deal fairly with the MBTA upon contracting with them.

53. By KONE's actions, KONE breached that implied covenant.

54. As a result of KONE's breach, the MBTA suffered, and continues to suffer, damages.

COUNT VII – DECLARATORY JUDGMENT

55. The MBTA repeats, re-avers, and restates its allegations contained in the above paragraphs 1 through 55 as if fully set forth herein

56. There is an actual controversy between the parties in that, based upon the facts stated herein, the MBTA asserts that it is entitled to indemnification, defense, contribution, and insurance coverage by KONE for the plaintiffs' claims.

57. The MBTA requests a declaration that by contract, KONE is obligated to indemnify, save harmless, and defend the MBTA from and against the plaintiffs' claims, and any losses, damages, charges, and expenses related to the plaintiffs' claims, to reimburse the MBTA for all reasonable costs and expenses including reasonable attorney's fees and expenses incurred by the MBTA in connection with the MBTA's defense of the plaintiffs' claim against it and the conduct of all response actions, and that KONE was contractually obligated to obtain and maintain general liability insurance to cover the plaintiffs' claim and that it failed to do so.

WHEREFORE, the MBTA demands judgment against KONE for damages, attorney's fees, costs, interest, and whatever other relief this court deems just and fair.

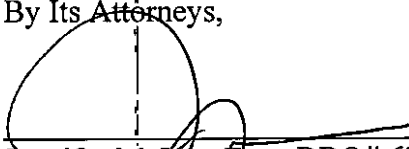
THE MBTA DEMANDS A JURY TRIAL ON ALL TRIABLE ISSUES

Defendant,

The Massachusetts Bay Transportation Authority,
By Its Attorneys,

Dated:

3/28/2023



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CERTIFICATE OF SERVICE

I, Jennifer M. Lee, attorney for the defendants, hereby certify that a true copy of the foregoing document was served via ~~the court's electronic file & serve system/hand-delivery/enail~~ first class mail, postage prepaid on March 28, 2023, to:

Joseph P. Musacchio, Esq.
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Boston, MA 02116
(counsel for plaintiffs)

KONE, INC.
Corporation Service Company
84 State Street
Boston MA 02109



Jennifer M. Lee