SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

DCM PART 6

BAJRAM CAUSEVIC and CAME CAUSEVIC,

Plaintiff(s),

HON. PHILIP G. MINARDO

-against-

DECISION AND ORDER

Index No. 102190/06

KONE, INC., RECKSON ASSOCIATES REALTY CORPORATION and 100 WALL CO., LLC,

Motion No. 1891 - 010

Defendant(s).

The following papers numbered 1 to 4 were fully submitted on the 24th day of September, 2009.

	Papers Numbered
Notice of Motion by Defendant KONE, INC., with Supporting Papers and Exhibits (dated June 14, 2009)	1
Affirmation in Opposition by Plaintiffs BAJRAM CAUSEVIC and CAME CAUSEVIC, with Exhibits (dated August 5, 2009)	2
Reply Affidavit by Defendant KONE, INC., (dated September 2, 2009)	3
Affirmation in Opposition by Defendant RECKSON ASSOCIATES REALTY CORP., (dated September 23, 2009)	4

Upon the foregoing papers, the motion for summary judgment of defendant KONE, INC. is granted.

CAUSEVIC v. KONE, INC., et al.

Plaintiffs commenced this action to recover damages for injuries sustained by BAJRAM CAUSEVIC (hereinafter "plaintiff") when his left shoulder was struck by the door of a freight elevator in a building owned by defendant 100 WALL CO., LLC, in New York City. Plaintiff was employed at the time as a freight elevator operator in the subject building, and was manually operating the elevator for a laborer who was transporting trash from various floors to the loading dock. Upon reaching the loading dock, plaintiff stepped off the elevator to allow the laborer to unload the trash, and when he stepped back into the elevator, the door allegedly began to close on him and struck his left shoulder, causing him to sustain personal injuries. Defendant KONE, INC. had contracted with codefendant/building manager RECKSON ASSOCIATES REALTY CORP. to provide elevator maintenance services at the subject location.

In their bill of particulars, plaintiffs allege, *inter alia*, that KONE was negligent in its ownership, operation, management, maintenance and control of the subject freight elevator by (1) failing to employ adequate personnel to maintain the elevator in a safe and proper manner, (2) causing, allowing or permitting an uneven, un-leveled, dangerous, defective, hazardous and trap-like condition to exist on the elevator, (3) failing to hire adequate and competent personnel to ensure that the subject elevator would be safe for all persons lawfully using same, (4) failing to adequately maintain, inspect and service and/or repair said elevator, (5) hiring incompetent or poorly trained personnel to maintain, inspect, service and/or repair the elevator, thereby failing to properly adjust and/or have adjusted the closing devices so that the elevator doors would not

improperly close on their own, (6) failing to use proper leveling devices which would provide safe ingress and egress for persons using the elevator, and (7) failing to make timely and proper inspections of the condition of the elevator. It is further alleged that defendant knew or should have known of the unsafe condition of the elevator yet failed to take the necessary and proper steps to avoid and/or correct the condition which caused the subject accident.

In moving for summary judgment dismissing all claims and cross claims against it, KONE contends that plaintiffs have failed to establish either that the elevator was unsafe or that a defective condition existed at the time of plaintiff's accident. In support, KONE relies on the EBT testimony of both the plaintiff and a KONE employee, Damian Szatkowski, each of whom explained that the elevator door could be operated in two separate modes, automatic or attendant. It was further stated by these witnesses that it was necessary for a key to be inserted into the elevator's control panel in order to change the mode of operation from automatic to attendant. According to these witnesses, in "automatic mode", the doors would close automatically after a certain amount of time had elapsed. However, when the elevator was set in "attendant mode", it was necessary for an elevator operator to start the elevator by inserting a key, pressing the desired floor, and then pressing the "close door" button. Once the elevator reached the desired floor, the doors would open automatically and would not close until the operator again pressed the "close door" button. According to plaintiff, the elevator was operating in "attendant mode" at the time of the accident, and therefore, the door should not have closed automatically. Even if this was so, KONE points out that plaintiff's own testimony indicated that once the door came into contact with his shoulder, it immediately retracted, thereby indicating that the door sensor

was functioning properly. As a result, KONE contends that there is no proof that the door malfunctioned.

In further support of its motion, KONE contends that there is no proof that it either created the alleged hazardous condition which purportedly caused the elevator door to close automatically on plaintiff, or had notice thereof. Rather, KONE contends that there were no reports that the door had been closing improperly, and that the EBT testimony of its employee, Damian Szatkowski, indicates that KONE performed routine preventive maintenance on the elevator on several occasions prior to the subject accident. According to the witness, this involved speaking to building personnel and inspecting the doors to make sure that they are operating properly. In addition, it was stated that cleaning is performed, and that any components which need to be replaced were replaced. KONE also points to the EBT testimony of the building's chief engineer, Richard Gama, who indicated that he used the freight elevator on an average of five to ten times per week in the year prior to plaintiff's accident; never experienced a problem; and was unaware of any complaints or accidents involving this elevator or that the door was not working properly. In fact, plaintiff, himself, testified that he had used the elevator without any malfunction for at least two prior trips on the day of his accident.

Finally, KONE notes that while plaintiff claims that the elevator door had closed automatically while in "attendant mode" on previous occasions, he never personally reported the problem to KONE, but rather to the building manager, his secretary and a security supervisor for the building. According to KONE, such complaints made to building personnel cannot constitute evidence of notice to KONE. Thus, KONE contends that plaintiff has failed to present any

evidence demonstrating that KONE either created or had notice of any hazardous condition affecting the subject elevator, and is therefore entitled to summary judgment dismissing all claims against it.

In opposition, plaintiffs claim that KONE has failed to produce sufficient evidence establishing its prima facie entitlement to judgment as a matter of law. In particular, plaintiffs claim that KONE merely relies on its attorney's affirmation to support its claim that it lacked notice of the condition which caused plaintiff to be injured, and has failed to offer any non-negligent explanation as to how the door in question suddenly and violently drew closed upon plaintiff. Plaintiffs further contend that the EBT testimony of KONE's employee with regard to its service contract, maintenance schedule and "time tickets" (indicating when an elevator needs servicing) is insufficient to establish a lack of notice. According to plaintiffs, the time tickets produced during EBTs are without probative value (1) because problems with the elevator were not always reflected thereon and (2) the tickets are not clear as to the work that was actually performed upon the elevator. Accordingly, plaintiffs contend that the EBT testimony of KONE's own witness indicates that some of the problems with the elevator were merely communicated through "word of mouth", and the resulting repairs were not always documented. Thus, plaintiffs argue that the time tickets cannot serve to establish that KONE never received notice of problems with the subject elevator.

In addition, plaintiffs contend that the further EBT testimony of KONE's employee and that of the building owner conclusively establish that the subject elevator was always operated in attendant mode, and never operated automatically. Accordingly, the elevator door should only

have closed when an operator inside the elevator pushed the button to close the doors. In fact, according to this testimony, the doors could not be closed by an operator on another floor even if he had a key. Plaintiffs maintain that this proof directly contradicts KONE's version of the facts, *i.e.*, that the subject door may have closed because a second keyed operator had summoned the elevator to another floor. Therefore, plaintiffs maintain that questions of fact exist, at the very least, with regard to the cause of the door's malfunction and the presence or absence of notice to KONE.

In further support, plaintiffs contend that in the six months prior to plaintiff's accident, he made numerous complaints to the building's security supervisor on a daily or weekly basis that the elevator door was not operating properly, and that the sensor was allowing the door to close on its own. According to plaintiff, the security supervisor told him that maintenance would be notified. Plaintiff further claims that he personally spoke to mechanics from KONE, and told them of the problem with the elevator door. Although plaintiff did not recall if the elevator door was working properly the morning of the accident, he claimed that the malfunction in question was an on-going problem for at least six months prior to his accident.

Finally, plaintiffs contend that KONE has failed to establish a lack of notice as a matter of law because its moving papers failed to contain proof of its maintenance schedule. According to plaintiffs, this would have disclosed KONE's inspection and maintenance regimen, thereby demonstrating its ability to discover the on-going problem with the elevator door and to remedy same. Plaintiffs also contend that KONE's failure to respond to their demands to produce its maintenance schedules and/or elevator inspection certificates has prejudiced plaintiffs by

impeding their efforts to establish notice of the existing problems with the elevator door. Thus, plaintiffs maintain that summary judgment must be denied.

In its own opposition papers, defendant RECKSON ASSOCIATES REALTY CORP. (hereinafter "RECKSON"), the managing agent of the building, adopts those arguments submitted by KONE as they relate to dismissal of the complaint, but opposes KONE's attempt to obtain dismissal of all of its cross claims against it.

In order to grant summary judgment, it must clearly appear that no triable issue of material fact is presented. "[I]ssue-finding rather than issue-determination, is the key to the procedure" (Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395, 404). Because summary judgment is the procedural equivalent of a trial, it should not be granted where there is significant doubt as to the existence of a triable issue, or where such an issue is even "arguable" (Phillips v. Kantor & Co., 31 NY2d 307, 311). Nevertheless, it is only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or speculative allegations which will suffice to defeat summary judgment (*see* Rotuba Extruders v. Ceppos, 46 NY2d 223, 231).

In a premises liability case, a defendant moving for summary judgment has the initial burden of establishing that it did not create the purported defective condition or have actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*see* Smith v. New York City Hous. Auth., 52 AD3d 808). In a case involving an injury allegedly caused by a malfunctioning elevator, the burden is somewhat similar, as the company which agrees to maintain the elevator in safe operating condition must demonstrate that is lacked

knowledge of the condition causing the injury, or could not have discovered same through the use of reasonable care (*cf.* Rogers v. Dorchester Assoc., 32 NY2d 553, 559).

Here, it is the opinion of this Court that defendant KONE has met its initial burden of establishing that it neither created the alleged defect in the subject elevator, nor had knowledge, either actual or constructive, of any such defect for a period of time sufficient to discover and correct it. In opposition, plaintiffs have failed to submit proof, *e.g.*, in the form of an expert's affidavit, or any other evidence sufficient to raise a triable issue regarding KONE's knowledge of the defect.

More specifically, plaintiffs have adduced no proof that KONE either created or knew of an existing problem with the freight elevator door, or failed to act within the exercise of reasonable care to discover and remedy the situation prior to plaintiff's injury (*see* Mercer v. City of New York, 223 AD2d 688, 689-690, *affd* 88 NY2d 955). Neither is there any proof that KONE was chargeable with notice of the alleged defective condition and failed to act (*id.*). Contrary to plaintiffs' contention, the EBT testimony of KONE's employee, Damian Szatkowski, and the production of the "time ticket detail reports" provides sufficient detail with regard to the complaints and resulting repairs made to the subject freight elevator, as well as the regimen of regular preventive maintenance that was performed by KONE. This witness also explained the procedures employed by KONE if an elevator at the instant location needed servicing. According to Mr. Szatkowski, building personnel from 100 WALL would contact KONE at its call center in Illinois, and a general dispatching service would contact either Mr. Szatkowski or another KONE repairman to indicate that a given elevator needed servicing. Each time a repair call was

made and a repairman or mechanic was dispatched, KONE would produce a "time ticket" providing a description of the incident reported; the work to be performed on the elevator, the billing status of the repair; and the time taken to make the repair. Here, however, none of the complaints reported on the time tickets reflected that the subject elevator door was said to close on its own while in the "attendant mode". In addition, these time tickets reflect a schedule of regular maintenance of the subject elevator prior to the date of plaintiff's accident, and there is no indication that any defective condition causing the door to close on its own was discovered. Even though plaintiffs claim to have made numerous complaints to *building personnel* at 100 WALL that the elevator door would close on its own while in the "attendant mode", they have failed to submit any proof establishing that KONE received notice of these complaints. In addition, Mr. Szatkowski's testimony indicates that he was not aware of any complaints and or violations with regard to the subject elevator in the year prior to plaintiff's accident. Accordingly, plaintiffs have submitted no proof to refute KONE's showing of lack of notice.

With regard to the issue raised by plaintiffs regarding KONE's alleged untimely response to their demand for the production of its maintenance schedule and a complete copy of its service contract with codefendant RECKSON ASSOCIATES REALTY CORP., each of the parties has since received copies of both documents, and plaintiffs in particular have not sought leave to serve a sur-reply. Moreover, a careful review of these documents does not support any of the claims made by plaintiffs with regard to KONE's notice of any defective condition regarding the subject elevator, nor does it establish that KONE had failed to properly maintain the subject elevator in accordance with its service contract. In view of plaintiffs' failure to raise issues of fact

requiring a trial of this action, defendant KONE is entitled to summary judgment (*see* Alvarez v. Prospect Hosp., 68 NY2d 320).

As for the opposition papers submitted by codefendant RECKSON ASSOCIATES REALTY CORP., there is no proof offered in support its claim that its cross claims against KONE should not be dismissed.

Accordingly, it is

ORDERED that the motion for summary judgment of defendant KONE, INC., for dismissal of the complaint and all cross claims against it is granted, and the complaint and all such cross claims are hereby severed and dismissed; and it is further

ORDERED that the Clerk enter judgment accordingly.

E N T E R,

s/ Philip G. Minardo
J.S.C.

DATED: October 30, 2009