

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT

SUFFOLK, SS

CIVIL ACTION NO.: 21-2246F

_____)
 KARSON BETHAY and HOLLY BETHAY,)
 Individually and as the Parents and Guardians of)
 SAVANNAH BETHAY and)
 KARSON BETHAY, JR., and)
 MATTHEW PARSON and CHRISTI PARSON,)
 Individually and Next Friend of)
 BRONSON PARSON and OLIVIA PARSON,)
)
 Plaintiffs,)
)
 v.)
)
 KONE, INC., MASSACHUSETTS BAY)
 TRANSPORTATION AUTHORITY, and)
 JOHN DOE,)
)
 Defendants.)
 _____)

2022 SEP 30 A 11:56
 SUPERIOR COURT
 CLERK'S OFFICE
 SUFFOLK COUNTY
 REGISTRAR

DEFENDANT MBTA'S ANSWER TO THE PLAINTIFFS' SECOND AMENDED COMPLAINT AND THE MBTA'S CROSSCLAIM AGAINST DEFENDANT KONE, INC. AND THE MBTA'S DEMAND FOR JURY

Now comes the defendant the Massachusetts Bay Transportation Authority (MBTA) and responds, paragraph by paragraph, to the plaintiffs' second amended complaint as follows:

A. The Action

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

B. The Parties

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. The MBTA is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.
4. The MBTA is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.
5. The MBTA is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.
6. The MBTA is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.
7. The MBTA is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.
8. The allegations in this paragraph refer to another defendant and therefore no response is required.
9. Admitted.
10. 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 admitted.
11. The allegations in this paragraph refer to another defendant and therefore no response is required.

C. General Allegations Applicable to All Counts

12. The MBTA admits that the escalator that is the subject of the plaintiffs' complaint is located at the intermodal passenger station on Dartmouth Street, in Boston known as

Back Bay Station. As to the remaining allegations, they contain conclusions of law to which a response is not required.

13. The MBTA admits that on September 26, 2021, and all relevant times, Kone was responsible to service, inspect, test and maintain the subject escalator. The contract referenced in this paragraph is a document that speaks for itself and to the extent the factual allegations contained therein are inconsistent therewith, they are denied. As to the remaining allegations, they contain conclusions of law to which a response is not required.
14. The MBTA admits that Kone was to furnish “pro-active preventative maintenance” and repair services of the subject escalator. The contract referenced in this paragraph is a document that speaks for itself and to the extent the factual allegations contained therein are inconsistent therewith, they are denied. As to the remaining allegations, they contain conclusions of law to which a response is not required.
15. The contract referred to in this paragraph is a document that speaks for itself and to the extent the factual allegations contained therein are inconsistent therewith, they are denied.
16. The contract referenced in this paragraph is a document that speaks for itself and to the extent the factual allegations contained therein are inconsistent therewith, they are denied.
17. The MBTA is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph.

18. The allegations contained in this paragraph refer to a document that speaks for itself and to the extent the factual allegations contained therein are inconsistent therewith, they are denied.
19. The MBTA is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph.
20. The MBTA is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph. Further, the allegations contained in this paragraph refer to a document that speaks for itself and to the extent the factual allegations contained therein are inconsistent therewith, they are denied.
21. Denied.
22. Denied.
23. The MBTA is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph.
24. Denied.
25. The allegations in this paragraph contain conclusions of law to which a response is not required. Further, the allegations in this paragraph refer to a document that speaks for itself and to the extent the factual allegations contained therein are inconsistent therewith, they are denied.

D. Claims

COUNT I – KARSON BETHAY and HOLLY BETHAY, Individually and as Parents of SAVANNAH BETHAY and KARSON BETHAY, JR. v. KONE, INC., MASSACHUSETTS BAY TRANSPORTATION AUTHORITY, and JOHN DOE
– NEGLIGENCE; PERSONAL INJURIES

26. The MBTA repeats, re-alleges, and re-avers, and incorporates its responses to paragraphs 1 through 25 of the plaintiffs' second amended complaint as if fully stated herein.

27. Denied.

28. (a-d). Denied.

29. Denied.

COUNT II – MATTHEW PARSON and CHRISTI PARSON, Individually and as Parents of
BRONSON PARSON and OLIVIA PARSON v. KONE, INC.,
MASSACHUSETTS BAY TRANSPORTATION AUTHORITY, and JOHN
DOE – NEGLIGENCE; PERSONAL INJURIES

30. The MBTA repeats, re-alleges, and re-avers, and incorporates its responses to paragraphs
1 through 29 of the plaintiffs' second amended complaint as if fully stated herein.

31. Denied.

32. (a- d). Denied.

33. 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 Plaintiff's 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 liable as a matter of law.
3. Plaintiff's 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 Plaintiffs'
injuries.

5. Plaintiffs' complaint is barred because the plaintiffs were comparative negligence exceeded the negligence, if any, of the MBTA.
6. Plaintiffs' damages, if any, must be reduced by their failure to mitigate their damages.
7. Plaintiffs' complaint is barred by the provisions of G.L. c. 258, §§ 1- 10 *et. seq.*
8. 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 plaintiff.
9. Plaintiffs' claims are barred because the plaintiff failed to adequately present her cause of action pursuant to G.L. c. 258, § 4.
10. The plaintiffs' claims are barred because they are based upon the exercise or performance or failure to exercise or perform a discretionary function.
11. The plaintiffs' claims are barred as they are out of an alleged act or failure to act to prevent the harmful consequences of a condition or situation for which the MBTA was not the original cause.
12. Any claim for interest and or punitive damages are barred by G.L. c. 258, 2
13. The plaintiffs' complaint is barred by the applicable statute of limitations and/or the statute of repose.
14. Plaintiffs' claims are barred as they are based upon acts or omissions of a public employee exercising due care in the execution of a statute or regulation of a public employer.
15. The MBTA's conduct was reasonable at all times.
16. Any liability or damages claimed by the plaintiffs are solely the result of acts and/or omissions by KONE.
17. The plaintiffs' claims are barred for failure to join an indispensable party.
18. The plaintiffs' claims are limited to the damages set forth in G.L. c. 258, § 2.
19. The MBTA cannot be liable for interest, costs, attorney's fees and punitive damages and therefore, such claims must be stricken.

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 plaintiff in her the 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 MBTA hereby asserts this crossclaim against defendant KONE, Inc. (KONE):

PARTIES

1. The plaintiff, Karson Bethay is an individual with a residential address of 1200 Papworth Avenue in Metairie Louisiana.
2. The plaintiff Holly Bethay is an individual with a residential address of 1200 Papworth Avenue in Metairie Louisiana.
3. The plaintiffs Karson and Holly Bethay are the parents of Savannah Bethay and Karson Bethay, Jr.
4. The plaintiff Matthew Parson is an individual with a residential address of 344 Melody Avenue in Metairie, Louisiana.
5. The plaintiff Christi Parson is an individual with a residential address of 344 Melody Avenue in Metairie Louisiana.
6. The plaintiffs Matthew and Christi Parson are the parents of Bronson Parson and Olivia Parson.
7. The defendant/plaintiff-in-crossclaim, the Massachusetts Bay Transportation Authority (MBTA) is a body politic and corporate, and a political subdivision of the Commonwealth of Massachusetts organized under M.G.L. c. 161A with a principal place at 10 Park Plaza in Boston.

8. The defendant-in-crossclaim, KONE, Inc. (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 Massachusetts registered agent located at Corporation Service Company, 84 State Street in Boston.

FACTS

9. The MBTA repeats, re-alleges and incorporates as fully set forth herein the allegations contained above in paragraphs 1 through 8.
10. The plaintiffs allege that on September 26, 2021, they sustained personal injuries when they were utilizing an escalator at Back Bay Station that malfunctioned.
11. The plaintiffs allege that the escalator was not maintained in a safe condition and in compliance with the applicable codes, accepted industry standards and trade practices. The plaintiffs allege that on September 26, 2021, they sustained personal injuries a result of those failures.
12. 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.
13. On or about July 1, 2017, the MBTA entered into a Vertical Transportation Maintenance Agreement contract (contract) for KONE to inspect, service, maintain, test, and repair the MBTA's vertical transportation assets, also known as elevators and escalators as outlined in the contract. The contract was in full effect at all relevant times herein. (Ex. 1).
14. If there is any liability as to the alleged 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.

15. Under the contract, KONE agreed 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, subcontractors or agents. (Ex. 2).
16. 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).
17. Additionally, pursuant to the contract, KONE was 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:

Commercial General Liability Insurance. The Contractor shall carry and maintain Commercial General Liability insuring the Contractor and the MBTA, and the Contractor’s subcontractors and agents for all activities allowed hereunder including the Contractor’s indemnification obligations with minimum liability coverage for personal injury, bodily injury, and property damage

Excess Liability Insurance. The Contractor shall carry and maintain Umbrella Liability Insurance with limits of Five Million Dollars (\$5,000,000) per occurrence and annual aggregate covering all work and services performed under the Contract.

Insurer; Additional Insurance Requirements ... Contractor shall provide an Owners and Contractors Protective Liability (“OCPL”) policy naming the MBTA as a Named Insured. This policy will remain in effect for the duration of this Agreement...Liability insurance requirements can be met with a combination of primary and excess/umbrella policies.

(Ex. 2).

18. On September 8, 2022, the MBTA wrote 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).
19. To date, no response has been received from KONE.

COUNT I – INDEMNIFICATION

20. The MBTA repeats, re-avers, and restates its allegations contained in the above paragraphs 1 through 19 as if fully set forth herein.
21. Notwithstanding the MBTA’s denial of any liability or damages as claimed by the plaintiffs, in the event that 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.
22. The plaintiffs allege that the escalator was not maintained in a safe condition and in compliance with the applicable codes, accepted industry standards and trade practices. The plaintiffs allege that on September 26, 2021, they sustained personal injuries a result of those failures.
23. On September 26, 2021, and at all relevant times hereto, KONE was responsible for the inspection, testing, servicing, safety, maintenance and repair of the subject escalator.
24. By Contract, KONE was required to indemnify, save harmless, and defend the MBTA and all of its officers, agents, and employees from and against the plaintiffs’ claim.

25. As a result, the MBTA is entitled to indemnification by KONE from and against any and all disbursements and liability that may be adjudged in favor of the plaintiff in her claim against the MBTA.

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

COUNT II – CONTRIBUTION

26. The MBTA repeats, re-avers, and restates its allegations contained in the above paragraphs 1 through 25 as if fully set forth herein.

27. Notwithstanding the MBTA's denial of any liability and/or damages as claimed by the plaintiff, 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.

28. The plaintiffs allege that the escalator was not maintained in a safe condition and in compliance with the applicable codes, accepted industry standards and trade practices. The plaintiffs allege that on September 26, 2021, they sustained personal injuries a result of those failures.

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

30. 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 attorneys' fees.

COUNT III – BREACH OF CONTRACT

31. The MBTA repeats, re-avers, and restates its allegations contained in the above paragraphs 1 through 30 as if fully set forth herein.
32. KONE entered into a contract with the MBTA.
33. By Contract, KONE was required to indemnify, save harmless, and defend the MBTA and all of its officers, agents, and employees from and against the plaintiff's claim.
34. Pursuant to the Contract, KONE was required to obtain insurance covering the MBTA for the plaintiff's claim.
35. KONE materially breached the agreement by failing indemnify, save harmless, and defend the MBTA from and against the plaintiffs' claim.
36. KONE materially breached the agreement by failing to obtain the required insurance covering the MBTA for the plaintiffs' claim.
37. 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

38. The MBTA repeats, re-avers, and restates its allegations contained in the above paragraphs 1 through 37 as if fully set forth herein

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

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

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

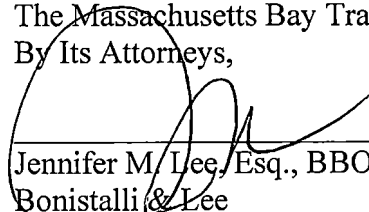
WHEREFORE, the MBTA demands judgment against KONE for damages, attorney's fees, costs, interest, and whatever other relief this court deems just and fair.

THE MBTA DEMANDS A JURY TRIAL

ON ALL TRIABLE ISSUES

Respectfully submitted,
Defendant/Plaintiff-in-Crossclaim
The Massachusetts Bay Transportation Authority,
By Its Attorneys,

Date: 9/29/22



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CERTIFICATE OF SERVICE

I, Jennifer M. Lee, attorney for the defendant MBTA, hereby certify that a true copy of the foregoing document was served via ~~hand-delivery/email~~/first class mail, postage prepaid, this 29th day of September, 2022 to:

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Jennifer M. Lee