Ezzard v One East River Place Realty Co.
2014 NY Slip Op 30426(U)
February 19, 2014
Sup Ct, New York County
Docket Number: 114803/08
Judge: Jeffrey K. Oing
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[* 1]
ANNED ON 2/24/2014

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JEFFREY K. OING J.S.C. Justice

PART 48

Index Number : 114803/2008
EZZARD, DANIELLE
vs.
ONE EAST RIVER PLACE REALTY
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Mtn is decided in accordance w/ the accompanying memorandum decision/order of this court.

FILED

FEB 24 2014

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 2/19/14

JEFFREY K. OING, J.S.C.
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

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DANIELLE EZZARD,

Plaintiff,

- against -

ONE EAST RIVER PLACE REALTY COMPANY, LLC, SOLOW MANAGEMENT CORP., and NEW YORK ELEVATOR & ELECTRICAL CORP.,

Defendants.

Index No.: 114803/08

Mtn Seq. Nos. 003 & 004

DECISION AND ORDER

FILED
JUN 24 2014
COUNTY CLERK'S OFFICE
NEW YORK

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JEFFREY K. OING, J.:

Plaintiff, Danielle Ezzard ("Ezzard"), commenced this negligence action against defendants, One East River Place Realty Company, LLC ("One East"), Solow Management Corporation ("Solow"), and New York Elevator & Electrical Corporation ("NYE"), for injuries allegedly caused by the misleveling of elevator number six (the "subject elevator") at 525 East 72nd Street, a/k/a One East River Plaza (the "premises").

In motion sequence no. 003, One East and Solow move, pursuant to CPLR 3212, for an order granting them summary judgment dismissing the complaint and cross-claims. Plaintiff cross-moves, pursuant to CPLR 3126, for a spoliation ruling based on One East and Solow's failure to produce surveillance footage of the accident and requests that the Court strike One East and Solow's answers or, in the alternative, preclude these defendants from offering evidence at trial on the issue of liability.

In motion sequence no. 004, NYE moves, pursuant to CPLR 3212, for an order granting it summary judgment dismissing the complaint and cross-claims against it.

Motion sequence nos. 003 and 004 are consolidated for disposition.

Background

NYE entered into a full service elevator maintenance contract with One East and Solow, dated August 2, 2007, wherein NYE agreed to "furnish all material and replacement parts, and ... provide all labor, supervision, tools, supplies and other expenses necessary to perform a full maintenance service program, and repairs of every description" on seven elevators on the premises, including the subject elevator (Elevator Maintenance Contract at pp. 4-5, Hitchcock Reply Affirm., Ex. B). In addition, NYE agreed to provide a mechanic for at least "one hour per elevator per week for preventative maintenance" and for emergency repairs at any time (Id. at pg. 2). The maintenance contract required NYE to maintain the leveling accuracy of the elevators within a range of 1/4 inch (Id. at pg. 8). The contract went into effect on September 1, 2007 (Id. at pg. 15).

Richard Vosseler, an elevator inspector licensed by New York City, testified in an Examination Before Trial ("EBT"), that he inspected the subject elevator on August 21, 2007, during which time he noted violations for, inter alia, dirt and "unsecured" electrical switch covers on the roof of the subject elevator (Vosseler 5/24/12 EBT at pp. 9, 16, 23, 41, 63, 68-70). Vosseler also testified that a missing cover could cause leveling problems (Id. at pg. 63). Vosseler, however, testified that he found the

elevator to be leveling properly during his inspection (Id. at pp. 29-31, 34-35).

Thomas Ballato, an elevator technician for ThyssenKrupp Elevator Corporation ("ThyssenKrupp"), the successor in interest to NYE, testified in an EBT that he performed a Local Law 10 inspection of the subject elevator on August 27, 2007, six days after Vosseler's inspection (Ballato 12/16/11 EBT at pp. 8, 15-16). According to Ballato's testimony, during this inspection he found that the elevator was level at each floor and that the electrical switch covers on the roof of the elevator were attached (Id. at pp. 21, 30, 75, 83).

Plaintiff testified at her EBT that on September 13, 2007, at approximately 4:15, she attempted to step out of the subject elevator into the lobby when her right foot became caught on the "lip of the floor," causing her to fall forward onto the floor (Ezzard 12/1/2010 EBT at pp. 104, 171-172). She also testified that she had previously observed the elevator mislevel, but had never complained about the misleveling to anyone employed by the defendants before September 13, 2007 (Id. at pp. 332-334). In a subsequent affidavit, dated September 25, 2012, plaintiff stated that the elevator had misleveled approximately two inches below the lobby floor when she tripped (Ezzard 9/25/2012 Aff., ¶ 4).

Eloy Morel, a doorman at the premises, testified in an EBT that he heard, but did not see, the plaintiff fall (Morel 12/5/11 EBT at pp. 8-9, 13-5, 31-32). Morel further testified that he turned around and saw the plaintiff on the ground (Id. at p. 34). Morel testified that any complaints regarding the elevators would

be written down in the elevator log book and nowhere else (Id. at pg. 78).

Michael Galvin, a concierge at the premises, testified that he did not recall receiving any complaints about the elevator misleveling before the date of plaintiff's accident (Galvin 7/26/11 EBT at pp. 7-8, 22). He testified that any complaints about an elevator misleveling would have been recorded in the building's elevator log book, but no entries concerning misleveling were made in the six months prior to the accident (Id. at pp. 107, 117-118). Galvin testified that he informed the premises' Residential Manager about the accident after it had occurred, and was told to have NYE send someone to check that the elevator was leveling properly (Id. at pp. 63-64). According to Galvin's testimony, Solow Management's practice is to call the elevator maintenance company to check the leveling of the elevators whenever someone said he or she had tripped exiting the elevator (Id. at pp. 65-66).

William Andrade, an employee of ThyssenKrupp, stated in an affidavit that he was called to the premises on September 13, 2007, the date of the accident (Andrade 8/15/12 Aff., ¶¶ 1, 4). He stated that upon entering the premises he was told that someone had tripped leaving the subject elevator, and was then asked to make sure the subject elevator was leveling properly (Id. at ¶ 4). According to Andrade, he inspected the elevator and found it was leveling properly at every floor (Id. at ¶¶ 5, 7-8). While Andrade stated that he found no leveling difference between the subject elevator and the lobby floor, even when using

a tape measure, he wrote that the subject elevator was "within 1/4 inch of industry standard at plaza level" on the work ticket for the call (Id.).

John Diorio, a supervisor at ThyssenKrupp and its predecessor, NYE, stated in an affidavit that NYE's work tickets for the premises indicated that no complaints involving the subject elevator were reported to NYE's mechanics or office from the time NYE assumed the contract on September 1, 2007 through September 13, 2007 (Diorio 8/13/12 Aff., ¶¶ 1, 7, 9).

Delia Cruz, a Hospital for Special Surgery employee, testified at her EBT that during the eleven years she has worked at One East River Plaza she witnessed the elevator "open up where it was not even with the floor outside" at least once a week, although she later testified that she had never seen the subject elevator "open when the elevator was not even with the floor" (Cruz 3/16/12 EBT at pp. 8-9, 23-24, 29). Cruz testified that she once spoke to a concierge about the subject elevator "bouncing," "moving up and down," and "not getting steady so that [she] could get out of the elevator," but made no other complaints (Id. at pg. 29).

In a prior affidavit dated October 17, 2007, Delia Cruz stated that the subject elevator sometimes misleveled "between two to three inches" and that, as a result, she had previously tripped while attempting to exit the elevator (Cruz 10/16/2007 Aff.). She stated that she was "sure" that management was aware

of the problems with this elevator, though she did not state that she informed the management of this problem (Id.).

Rochelle Butler, another Hospital for Special Surgery employee, testified at her EBT that she had observed the subject elevator misleveling on multiple occasions, but never reported this misleveling to anyone associated with defendants (Butler 2/21/2011 EBT at pp. 11-12, 14-15, 19, 30-31).

Michael Sena, a licensed New York City Elevator Inspector, stated in an affidavit that he examined the subject elevator on May 26, 2010, and found that the electrical switches on the roof of the elevator were not covered (Sena 9/21/12 Aff., ¶¶ 1-3, 5,).

Discussion

I. Plaintiff's Cross-Motion for Spoliation Sanctions

Plaintiff contends that by failing to preserve surveillance footage that may have recorded her fall, One East and Solow are responsible for the spoliation of essential evidence and should be sanctioned. Sanctions for spoliation are appropriate where a litigant "intentionally or negligently disposes of crucial items of evidence ... before the adversary has an opportunity to inspect them" (Kirkland v New York City Hous. Auth., 236 AD2d 170, 173 [1st Dept 1997]). The "determination of spoliation sanctions is within the broad discretion of the court" (Barnes v Paulin, 52 AD3d 754, 755 [2d Dept 2008]).

A party seeking sanctions based on the spoliation of evidence must demonstrate: "(1) that the party with control over the evidence had an obligation to preserve it at the time it was

destroyed; (2) that the records were destroyed with a 'culpable state of mind'; and finally, (3) that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense" (VOOM HD Holdings LLC v EchoStar Satellite L.L.C., 93 AD3d 33, 45 [1st Dept 2012]). In short, the party to be sanctioned must have reasonably anticipated litigation when it disposed of relevant evidence under its control (New York City Hous. Auth. v Pro Quest Sec., Inc., 108 AD3d 471, 473 [1st Dept 2013]).

One East and Solow represent that they are unable to produce the requested surveillance footage because the tape on which it was recorded was reused after thirty days. In support of this claim, they provide an affidavit from Haresh Persaud, an employee of New York Security and Communications, the company responsible for the operation of the surveillance cameras at the premises on the date of the accident. Persaud stated that all surveillance videotapes of the premises' lobby were reused automatically after thirty days as part of the normal course of business (Persaud 5/23/2011 Aff., ¶¶ 1-2).

One East and Solow argue that a spoliation sanction is inappropriate because they could not have reasonably anticipated this lawsuit at the time the tape was re-used because plaintiff did nothing to alert them that she would be bringing this suit until she commenced this action on October 24, 2008, over a year

after the accident and eleven months after the recording was erased.

Plaintiff argues that One East and Solow demonstrated that they reasonably anticipated this lawsuit by requesting that an NYE employee inspect the leveling of the elevator after being informed of plaintiff's accident. That fact is not dispositive. Here, the record demonstrates that Solow Management had a regular practice of having the leveling checked after anyone tripped leaving the elevator (Galvin EBT at pp. 65-66). As such, One East and Solow's actions demonstrate that they were acting to ensure the safety of others in the building, rather than preparing for a lawsuit (cf. New York City Hous. Auth. v Pro Quest Sec., Inc., 108 AD3d at 473, supra). Given that plaintiff has failed to produce any evidence that One East or Solow could have reasonably anticipated a lawsuit "at the time [the footage] was destroyed" (VOOM HD Holdings LLC, 93 AD3d at 45, supra), plaintiff's cross motion for sanctions is denied.

II. Defendants' Summary Judgment Motions

The proponent of a summary judgment motion must "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" and the "[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (Winegrad v New York University Med. Ctr., 64 NY2d 851, 853 [1985]).

To establish a prima facie case for negligence, a plaintiff must demonstrate (1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached this duty, and (3) that the injury proximately resulted from this breach (Friedman v Anderson, 23 AD3d 163, 164-165 [1st Dept 2005]).

A. One East and Solow's Summary Judgment Motion

The owner and manager of a building have "a nondelegable duty to ... maintain [their] building's elevator in a reasonably safe manner" (Rogers v Dorchester Assoc., 32 NY2d 553, 562 [1973]). Solow and One East "may be liable for elevator malfunctions or defects ... about which [they had] constructive or actual notice" or for their failure to notify an elevator company "with [whom] they have an exclusive maintenance and repair contract about a known defect" (Isaac v 1515 Macombs, LLC, 84 AD3d 457, 458 [1st Dept 2011]).

One East and Solow can "demonstrate their prima facie entitlement to summary judgment by showing that they did not have actual or constructive notice of an ongoing misleveling condition and did not fail to use reasonable care to correct a condition of which they should have been aware" (Id.). A lack of actual and constructive notice is established by demonstrating: (1) that no complaints about the subject elevator misleveling were made prior to the incident at issue, and (2) that regular inspections of the subject elevator were conducted which did not reveal any misleveling condition (Gjonaj v Otis El. Co., 38 AD3d 384 [1st Dept 2007]). For instance, in Isaac v 1515 Macombs, LLC, supra,

the defendant building manager and elevator company demonstrated their lack of actual or constructive notice of an ongoing misleveling condition through, inter alia, testimony by the management company representative that he had received no complaints from tenants or building staff about misleveling, and evidence that the elevator passed inspection about a week before the accident as well as the elevator mechanic's testimony that he did not observe the elevator misleveling during his monthly maintenance inspections or his post-accident inspection (Isaac, 84 AD3d at 458-459).

Similarly, here, One East and Solow have demonstrated that they had no notice of a misleveling condition through Galvin's testimony that no complaints about misleveling were made and Solow's elevator logs, which have no record of any misleveling problems for the relevant time period. They have further demonstrated that no misleveling problems were found during the subject elevator's August 21, 2007 inspection, its August 27, 2007 inspection, which it passed, or Andrade's inspection immediately following the accident on September 13, 2007.

Plaintiff argues that her testimony concerning her prior observation of the subject elevator misleveling, along with similar testimony by Rochelle Butler and Delia Cruz, creates a factual issue as to whether One East and Solow had notice of a misleveling problem. Plaintiff, Butler, and Cruz, however, never gave testimony or statements that they had ever informed anyone associated with the defendants that they observed the subject elevator mislevel. As such, their testimony and statements are

insufficient to raise an issue of fact as to defendants' actual or constructive notice, as there is no evidentiarily sufficient proof in the record to indicate that defendants had any knowledge of these observations, even if they were true (Id. at 459 [1st Dept 2011]; San Andres v 1254 Sherman Ave. Corp., 94 AD3d 590, 591 [1st Dept 2012]). Furthermore, Cruz's assertion that she reported a problem with the subject elevator "bouncing" fails to create a question of fact as to notice, as there is no evidence that this "bouncing" was "similar in nature to the accident alleged ... and caused by the same or similar contributing factors" sufficient to establish One East and Solow's notice of a leveling problem (Gjonaj, 38 AD3d at 385, supra).

Plaintiff also points to the elevator service orders and logs kept by Schindler Elevator Corp. and Solow prior to the accident which record instances in which the subject elevator's doors failed to open (Harnick Affirm. In Opp., Exs. I, J). Plaintiff argues that such mechanical failure is consistent with a leveling malfunction because elevator doors will not open if the elevator does not "come to rest within the door zone" (Sena 9/21/2012 Aff., ¶ 8). These logs and service reports, however, cannot create a question of fact as to defendants' notice because all of the problems recorded in the logs and service reports occurred before August 27, 2007, the date the subject elevator passed the Local Law 10 inspection. Indeed, the record demonstrates that there were no malfunctions recorded between the

August 27, 2007 inspection and September 13, 2007, the date of the accident (Isaac, 84 AD3d at 459, supra).

Similarly, plaintiff's argument that the subject elevator's August 21, 2007 violation for unsecured covers over the elevator's electrical switches gave One East and Solow notice of a misleveling problem fails because Thomas Ballato's testimony establishes that the covers were secured six days later when he inspected the elevators and plaintiff offers no evidence that the covers were taken off between Ballato's inspection on August 27, 2007 and the date of the accident. The fact that the cover was unattached when Sena inspected the elevator three years after the accident does not establish that the cover was unattached three years earlier, particularly in light of the elevator inspector Nickolas Ribaudo's statement that the New York City Department of Buildings' records indicate that the subject elevator was inspected three times between the date of the accident and Sena's inspection with no violations for unsecured covers noted (Ribaudo 10/4/12 Aff., ¶8).

In the alternative, plaintiff argues that One East and Solow are liable under a theory of res ipsa loquitor, which "allows the factfinder to infer negligence from the mere happening of an event where the plaintiff presents evidence (1) that the occurrence would not ordinarily occur in the absence of negligence, (2) that the injury was caused by an ... instrumentality within the exclusive control of defendant, and (3) that no act or negligence on the plaintiff's part contributed

to the happening of the event" (Miller v Schindler Elevator Corp., 308 AD2d 312, 313 [1st Dept 2003]).

While the "alleged misleveling of the elevator [is] not an event that ordinarily occurs in the absence of negligence" (Gutierrez v Broad Fin. Ctr., LLC, 84 AD3d 648, 649 [1st Dept 2011]), the full service elevator maintenance contract between One East, Solow, and NYE establishes that One East and Solow did not exercise exclusive control over the elevator (Compare Hodges v Royal Realty Corp., 42 AD3d 350, 352 [1st Dept 2007] [res ipsa not applicable to building manager where elevator company had, by contract, exclusive control over inspection, maintenance and repairs of the elevators, provided mechanic on site to handle all service calls, and performed all routine maintenance and periodic inspections] with Singh v United Cerebral Palsy of New York City, Inc., 72 AD3d 272, 277 [1st Dept 2010] [door sensor not removed from defendant building owner's exclusive control where door repair company "occasionally" performed repairs on sensor but did not have exclusive repair contract]). Although the contract here does not explicitly prevent One East or Solow from hiring third parties to repair the elevators on the premises, it is sufficiently similar to the contract in Hodges v. Royal Realty Corp., supra, to take the subject elevator out of the exclusive control of One East and Solow, as it required NYE to furnish all material and replacement parts, provide all labor, supervision, tools, supplies and other expenses necessary to perform a full maintenance service program -- which included maintaining the elevators' leveling accuracy -- and provide a mechanic for

preventative maintenance and emergency repairs (Elevator Maintenance Contract at pp. 1-5, 8, Hitchcock Reply Affirm., Ex. B).

Based on the foregoing, One East and Solow have established that they did not have actual or constructive notice of a misleveling condition in the subject elevator, and did not exercise exclusive control over the subject elevator. Accordingly, their motion for summary judgment dismissing plaintiff's complaint and cross-claims against them are granted, and the complaint and cross-claims are hereby dismissed against them.

B. NYE's Summary Judgment Motion

Plaintiff argues that NYE's motion should be denied as untimely. NYE's motion was served and filed fifty-nine (59) days after the note of issue was filed, in violation of the March 23, 2012 stipulation agreement requiring all dispositive motions to be brought within 45 days of the filing of the note of issue (Coleman Affirm., Ex. B). As a result, it is untimely (Giudice v Green 292 Madison, LLC, 50 AD3d 506 [1st Dept 2008]). For an untimely motion to be addressed, however, the movant must show good cause for the delay (Brill v City of New York, 2 NY3d 648, 652 [2004]).

Here, NYE's motion was untimely because its attorney did not notice the March 23, 2012 stipulation agreement, and, as a result, erroneously believed that the summary judgment motion was due 60 days after the note of issue was filed (Coleman Affirm. at

pp. 5-6). Delay due to a misunderstanding or "failure to appreciate [when] the motion was due" is "no more satisfactory than a perfunctory claim of law office failure ... [and] is insufficient to constitute good cause under CPLR 3212(a)" (Crawford v Liz Claiborne, Inc., 45 AD3d 284, 285-86 [1st Dept 2007] [citations omitted] rev'd on other grounds, 11 N.Y.3d 810 [2008]; Azcona v Salem, 49 AD3d 343 [1st Dept 2008]).

NYE argues that its untimely motion should nevertheless be considered on its merits because it makes the same arguments as One East and Solow's timely motion for summary judgment and does not prejudice plaintiff, as it was returnable the same day as One East and Solow's timely summary judgment motion. That argument misses the point. Allowing untimely summary judgment motions that are "essentially duplicative of a timely motion" would "continue to perpetuate a culture of delay" in the judicial system (Kershaw v Hospital for Special Surgery, 978 NYS2d 13, 21 [1st Dept 2013]). While there is an exception to this rule for untimely cross motions that address the same issues as the original motion, NYE's motion is not a true cross motion because it addresses the complaint, rather than cross-claims by One East and Solow (Id. at 23). Accordingly, NYE's motion for summary judgment must be denied as untimely.

Nonetheless, even if NYE's summary judgment motion were timely, the result would not be different. An elevator company that "agrees to maintain an elevator in safe operating condition may be liable to a passenger for failure to correct conditions of which it has knowledge" or for "failure to use reasonable care to

discover and correct a condition which it ought to have found" (Isaac, 84 AD3d at 458, supra).

Although NYE demonstrated that it did not have actual or constructive knowledge of a misleveling condition through John Diorio's EBT testimony that no complaints concerning the subject elevator had been made to NYE during the relevant time period, William Andrade's EBT testimony that the elevator was not misleveling after the accident, and the elevator's passage of the Local Law 10 inspection on August 27, (Santoni v Bertelsmann Prop., Inc., 21 AD3d 712, 713-14 [1st Dept 2005]), and plaintiff "failed to produce evidence of a prior problem with the elevator that would have provided notice of the specific defect alleged" (Meza v 509 Owners LLC, 82 AD3d 426, 427 [1st Dept 2011]), plaintiff has presented a viable negligence claim against NYE under the doctrine of res ipsa loquitor (Miller v Schindler Elevator Corp., 308 AD2d at 313, supra).

Here, the "alleged misleveling of the elevator was not an event that ordinarily occurs in the absence of negligence" and the full service contract between NYE and One East established that NYE had exclusive control over the inspection, maintenance and repair of the subject elevator (Gutierrez v Broad Fin. Ctr., LLC, 84 AD3d 648, 649 [1st Dept 2011]; Bryant v Blvd. Story, LLC, 87 AD3d 428 [1st Dept 2011] [citations omitted]). The record is also devoid of any evidence that plaintiff contributed to the misleveling of the elevator.

NYE's reliance on Cortes v Central Elevator, Inc. is misplaced. In Cortes, plaintiff could not rely on res ipsa

loquitor in his claim for injuries sustained while exiting an elevator because he testified at his EBT that he did not see the elevator in a misleveled state before or after his fall (Cortes v Cent. Elevator, Inc., 45 AD3d 323 [1st Dept 2007]). By contrast, plaintiff's EBT testimony is that she felt the elevator mislevel and that the elevator was approximately two inches below the lobby floor when she fell. Accordingly, NYE's motion for summary judgment is denied.

Accordingly, it is

ORDERED that defendants One East River Place Realty Company, LLC and Solow Management Corporation's motion for summary judgment (mtn seq. no. 003) is granted, and the complaint and cross-claims are dismissed against them; and it is further

ORDERED that defendant New York Elevator & Electrical Corporation's motion for summary judgment (mtn seq. no. 004) is denied, and it is further

ORDERED that counsel shall call the Clerk of Part 48 at 646-386-3265 to schedule a status conference.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 2/19/14

FILED
FEB 24 2014
NEW YORK
COUNTY CLERK'S OFFICE

HON. JEFFREY K. OING, J.S.C.