Timmons v National R.R. Passenger Corp.
2016 NY Slip Op 30133(U)
January 25, 2016
Supreme Court, New York County
Docket Number: 116134/2010
Judge: Carol R. Edmead
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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NELSON TIMMONS AND JENNIFER TIMMONS,

Plaintiffs,

-against-

NATIONAL RAILROAD PASSENGER CORPORATION, KONE, INC. and COURION INDUSTRIES, INC.,

Defendants.

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Index No. 116134/2010

DECISION/ORDER

Motion Seq. 005

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this personal injury action, defendants Kone Inc., sued herein as Kone, Inc. ("Kone") and National Railroad Passenger Corporation, also known as Amtrak ("Amtrak") (collectively, "movants") move pursuant to CPLR 3216[1] to preclude proof or testimony from plaintiffs' expert at the time of trial, and pursuant to CPLR 3212 for summary judgment dismissing the claims against them. Defendant Comprehensive Manufacturing Services, LLC, sued herein as Courion Industries, Inc. ("Courion") cross moves pursuant to CPLR 3212 for summary judgment dismissing the Amended Complaint and all cross claims against it.

Factual Background[2]

Plaintiffs Nelson Timmons ("Mr. Timmons") and his wife Jennifer Timmons (collectively, "plaintiffs") allege that Mr. Timmons was allegedly injured on March 28, 2010, while attempting to enter a freight elevator on the passenger platform at Penn Station in New

[1] While movants cite to CPLR 3216, the applicable provision is CPLR 3126, as it is apparent that movants are seeking a discovery sanction, rather than dismissal of the complaint for failure to prosecute.

[2] The factual background is taken in large part from the parties' moving and opposing papers.

York, New York, when he was struck in the head by the door and gate of said elevator, which closed upon him ("the incident" or "the accident"). At the time, plaintiffs were walking on the platform, towards an escalator, after having arrived at Penn Station by train from Washington, D.C. The subject elevator, designated as elevator B6 ("elevator B6" or "the elevator"), was parked at the level of the passenger platform, with both its front and rear doors open, and was located in the center of the passenger platform. Plaintiffs, along with other passengers, were attempting to pass through the freight elevator in order to proceed to the escalator.

Prior to the accident, Amtrak, the owner of the elevator, hired Kone to upgrade seven freight elevators at Penn Station, including elevator B6. Kone was responsible for maintaining these elevators for one year commencing June 27, 2009. In turn, Kone retained Courion to modernize the doors and gates of the freight elevators, including elevator B6. Courion supplied components for the renovation, including elevator doors and gates, and audible alarms to alert persons that elevator doors are closing; those components were installed by Courion's subsidiary, Freight Tech, during the week of June 27, 2009. Courion and Freight Tech had a one year warranty of parts and labor after installation of its doors and gates was complete.

After this action was commenced, plaintiffs moved to compel Amtrak and Kone to accept their further supplemental bill of particulars. In response, Amtrak and Kone cross-moved to dismiss the complaint for failure to comply with court orders or preclude plaintiffs from producing evidence at trial regarding those items in plaintiffs' bill of particulars to which plaintiffs failed to supplement. By order dated, April 28, 2015, this Court granted plaintiffs' motion to compel, and determined Amtrak and Kone's cross-motion, as follows, in relevant part:

"items #16 (actual notice) and #20 (constructive notice). The responses are

stricken. Plaintiffs are limited at trial to 'causing or creating' the condition, and no actual or constructive notice of the condition.

"item #29 (statutes, rules, and regulations allegedly violated). Defendants are entitled to a further deposition by an elevator expert as to how the ASME standard was violated and caused the accident."

In support of the instant motion to preclude plaintiffs' expert's testimony, Amtrak and Kone argue that plaintiffs failed to produce their elevator expert, Patrick Carrajat, for a deposition despite repeated requests for same.

In support of their motion for summary dismissal of the complaint, Amtrak and Kone argue that there is no evidence of actual or constructive notice, or evidence that they caused or created the alleged defective condition of the elevator. Movants assert that, based upon the deposition testimony of the President and one of the owners of Courion, Mike Garner, wherein Mr. Garner testified that Courion did not respond to any malfunctions concerning the subject gate on same, prior to the incident, "one could infer that there were no failures concerning the subject gate on [elevator B6]" (Aff. in Support, ¶ 16). Movants also submit Time Ticket Detail Reports for elevator B6, covering a period from July 2009 to May 2010, which record Kone's maintenance and service to the elevator. According to movants, said records do not indicate that the elevator failed to alert by bell and/or alarm upon closing of the gates and doors, or reference any problem with the elevator from the time it was installed, up until the time of the incident.

Further, Amtrak and Kone contend that the doctrine of *res ipsa loquitur* does not apply, since plaintiffs failed to establish that the alleged incident was of a kind that does not ordinarily occur in the absence of negligence, and there was culpable conduct on the part of Mr. Timmons. The movants point out that Mr. Timmons did not recall how the incident occurred.

Amtrak and Kone also argue that plaintiff Mr. Timmons did not sustain any cognitive damages, as none of the alleged cognitive impairments claimed by Mr. Timmons are supported by the report of his own psychologist, Mary Kay A. Pavol, PhD, ABPP.

In opposition, plaintiffs contend that their expert should not be precluded from testifying at trial, since they did not prevent the deposition from going forward, but merely insisted that defendants follow the procedure applicable to non-party depositions and pay all costs and fees for his deposition. The Court's April 28, 2015 order did not explicitly direct plaintiffs to produce their expert at their expense. Contrary to movants' interpretation of said order, the directive that "defendants are entitled to a further deposition by an elevator expert," indicates that the movants would be permitted to conduct their own deposition of plaintiffs' expert, without needing to show special circumstances to depose an adverse party's expert witness. Plaintiffs argue that, despite refusing to pay for the expenses and fees for their expert's deposition, they made a good faith effort to comply with this Court's April 28, 2015 order by providing movants with a sworn statement from the expert in response to the order as to "how the ASME standard was violated and caused the accident." Plaintiffs state that they will comply with any further directive that this Court issues as to movants' entitlement to depose an elevator expert.

Plaintiffs further argue that, as to summary judgment, questions of fact exist as to whether the movants' negligence by caused or contributed to the accident. Plaintiffs' elevator expert affidavit indicates, "to a reasonable degree of mechanical certainty that the signage was insufficient on the day of the accident," and that "[t]here was nothing to indicate to Mr. Timmons that he was walking into anything other than a passageway" (Aff of Carrajat, dated October 27, 2015 at 7). Mr. Carrajat opines, "Since there was no working visual or audible alarm present at

[the] time of the incident, the plaintiff [Mr. Timmons] was unaware of any danger, he was unaware of the possibility that the elevator gate would descend without warning, and so he proceeded into the elevator car" (Aff. in Opp, Exh. J, Sworn Response of Carrajat 6/10/15 at 1). According to Mr. Carrajat, "The violation of the [ASME] standard requiring a visual and audible alarm caused the incident because, had the plaintiff been warned that proceeding into the opening posed a danger, it is more likely than not that he would not have entered the elevator and would not have been injured" (*id.*).

Plaintiffs also provide the deposition testimony of Thomas Coutu, Kone's service superintendent, who stated that the signage located on one set of doors of elevator B6, which reads, "Freight Elevator Only," would not be visible if the elevator door was open (Aff. in Opp, Exh. G, EBT of Coutu at 46-50).

In addition, plaintiffs submit the deposition testimony of Kenneth Hurley, supervisor of buildings and bridges for Amtrak in Penn Station, New York, who testified that he oversaw inspection and maintenance of freight elevators in Penn Station and that the doors or gates of the elevator would not close upon a person if the light curtain was properly functioning.

Plaintiffs also cite to the incident report prepared by Officer Augustus Rivera, who responded to plaintiff's accident, wherein Mr. Timmons stated that he was injured "as he was walking through what he thought was a passage way [sic] but in fact was the opening for the freight elevator [and] that the door automatically came down and struck him in the head causing him to fall to the floor . . . ."

Plaintiffs also contend that issues of fact exist as to whether the doctrine of *res ipsa loquitur* applies, as plaintiffs' expert explicitly rejects movants' assertion that an elevator door

closing downward without warning and striking a pedestrian is not the type of event the does not ordinarily occur in the absence of negligence. Further, plaintiffs refute movants' contention that the accident was caused by Mr. Timmons. Plaintiff Mr. Timmons testified at his deposition that, before the accident happened, he did not hear any noise other than maybe people having conversations, nor did he see any signs, lights, or other type of warning which would indicate that there was a freight elevator in front of him. Moreover, Mrs. Timmons testified at her deposition that, before the accident, as she was walking behind Mr. Timmons on the platform, she did not discern any buzzers, sounds, bells, flashing lights, or "anything to say that this [elevator B6] is not the area of an exit. If it didn't happen to [Mr. Timmons], I might have gone right through [the elevator] myself" (Aff. in Opp, Exh. B, EBT of Jennifer Timmons at 20, lines 10-12). In addition, plaintiffs assert that movants offer no expert testimony on any issues relating to the doctrine of *res ipsa loquitur*, or on any issues relating to their liability in general.

Furthermore, plaintiffs contend that there is a question of fact as to whether Mr. Timmons suffered cognitive damages or traumatic brain injury from the accident. A report by Mr. Timmons' consulting neurologist, R.C. Krishna, MD, explicitly relates Mr. Timmons' decline in cognitive status to the traumatic brain injury that he suffered in the accident.

In reply, the movants argue that the Court should reject Mr. Carrajat's affidavit submitted *in lieu* of his deposition in light of plaintiffs' violation of a Court order. There is no standard of practice that a party make a "good faith effort" to comply with a court order, as compliance is required. Plaintiff never moved to reargue or filed and appeal. Since plaintiffs have the burden of proof and of forward, and movants have no duty to cure plaintiffs' pleading defect, movants should not bear the cost of deposing plaintiffs' expert to cure their pleading defect.

Amtrak and Kone further contend that plaintiffs are limited to presenting proof that defendants caused or created the alleged condition that caused Mr. Timmons' injuries, yet, plaintiffs' expert affidavit by Mr. Carrajat does not supply such proof and, thus, plaintiffs failed to raise an issue of fact. Additionally, movants assert that Mr. Carrajat's affidavit is deficient on its face, as it is not based on facts in the record, nor facts personally known to Mr. Carrajat. Moreover, Mr. Carrajat's affidavit must be rejected because his inspection of the subject elevator was conducted on September 19, 2012, approximately two and a half years after the accident. As such, Mr. Carrajat's findings are irrelevant as to the condition of the elevator on the date of the accident, or at any time prior to same. Moreover, all arguments by Mr. Carrajat that pertain to alarms and plaintiffs' contentions regarding the malfunctioning of the light curtains on the subject elevator involve notice, which has been stricken by the Court.

Amtrak and Kone contend that plaintiffs' opposition does not address how movants caused or created the alleged injury causing condition. Additionally, movants submit Mr. Coutu's *curriculum vitae*, to qualify him as an expert on behalf of movants.

Amtrak and Kone also argue that plaintiffs are not permitted to impeach their own witness, Dr. Palov, to show the alleged cognitive damage suffered by Mr. Timmons.[3]

In support of their cross-motion for summary judgment, Courion argues that there are no issues of fact regarding whether Courion caused, created, or had knowledge of any alleged dangerous condition or defect. Courion also contends that it did not have control over the subject

[3] It is noted that the parties' arguments, as to whether Mr. Timmons suffered cognitive damages or traumatic brain injury from the incident, are inapplicable to the issues herein and, thus, will not be considered for disposition on the within motion for summary judgment by Amtrak and Kone.

elevator after it completed the installation of the components in June 2009, approximately nine months prior to the subject incident, thus, summary dismissal of plaintiffs' claims based on negligence and *res ipsa loquitur* is warranted.

In opposition to Courion's cross-motion, plaintiffs argue that issues of fact exist as to whether Courion's alleged negligence caused or contributed to the accident. Plaintiffs, however, do not contest the claim that the doctrine of *res ipsa loquitur* does not apply as against Courion, as Courion did not have exclusive control of the instrumentality leading to Mr. Timmons' injury.

In reply, Courion adds that plaintiffs failed to raise any triable issue of fact with respect to its liability, and Mr. Carrajat's affidavit makes no mention as to Courion's negligence or liability.

Discussion

CPLR 3126 provides, in relevant part:

> If any party . . . refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:
>
> . . .
>
> 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses . . . ."

CPLR 3126 grants the Court wide discretion "in framing appropriate relief where a party 'refuses to obey an order for disclosure or wilfully fails to disclose information" (*Gross v Edmer Sanitary Supply Co.*, 201 AD2d 390, 391 [1st Dept 1994]). Nevertheless, where, as here, the "[offending party's] conduct was neither willful, contumacious nor in bad faith," the drastic remedy of preclusion is not warranted (*see Villega v New York City Hous. Auth.*, 231 AD2d 404, 404 [1st Dept 1996]; *see Holliday v Jones*, 36 AD3d 557, 557-58 [1st Dept 2007] ("In order to invoke the

drastic remedy of preclusion (CPLR 3126), the court must determine that the party's failure to comply with a disclosure order was willful, deliberate and contumacious . . . .")). Indeed, the letters and email correspondences exchanged between counsel for plaintiffs and defendants Amtrak and Kone, which were submitted by movants herein, indicate a willingness to cooperate. In light of the explanations proffered by plaintiffs, as well as their reasonable efforts to comply, the imposition of a penalty of preclusion is unwarranted (*see Villega, supra*).

Pursuant to CPLR 3116(d), "[u]nless the court orders otherwise, the party taking the deposition shall bear the expense thereof." Further, CPLR 3101(d)(iii) provides that "Further disclosure concerning the expected testimony of any expert may be obtained only by court order upon a showing of special circumstances and subject to restrictions as to scope and provisions concerning fees and expenses *as the court may deem appropriate*." (Emphasis added). The Court's order resolved the issue of whether special circumstances were shown to merit the deposition of plaintiffs' expert, and plaintiffs did not seek leave to reargue, renew or appeal the Court's order. While plaintiffs' claim that they do not need or want to take the deposition of their own expert, the deposition was precipitated by plaintiffs' own deficiencies in their discovery responses, which plaintiffs were under obligation to supply. And, plaintiffs' submission of an affidavit of their expert *in lieu* of compliance with the Court's order is insufficient. Plaintiffs' contention that the Court's order did not specify that the deposition was required of an expert of the *plaintiffs* is insufficient, in that the burden to demonstrate "how the ASME standard was violated and caused the accident," is upon the plaintiffs to establish. Therefore, this is not an instance where adherence to the general rule that the party who takes a deposition is expected to bear the cost thereof is warranted (*cf. Baralan Intl. v Vetrerie Bormioli*

Inc., 182 AD2d 412, 414 [1st Dept 1992]; *Swiskey v Lamotta*, 224 AD2d 274, 275 [1st Dept 1996]). Therefore, the expense in conducting the deposition of plaintiffs' elevator expert shall be borne by plaintiffs in this particular instance.

Turning to summary judgment, it is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR 3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky,* 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012], *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In a personal injury action, the defendant has the initial burden of making a *prima facie* showing that it neither created the hazardous condition, nor had actual or constructive notice thereof (*Manning v Americold Logistics, LLC*, 33 AD3d 427, 822 NYS2d 279 [1st Dept 2006]; *Mitchell v City of New York*, 29 AD3d 372, 815 NYS2d 55 [1st Dept 2006]).

Once such showing is made, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR 3212 [b]; *Farias v Simon*, 122 AD3d 466 [1st Dept 2014]), and here, plaintiff must raise a triable issue of fact as to the creation of the dangerous condition or defect, or notice thereof *(Kesselman v Lever House Rest.*, 29 AD3d 302, 816 NYS2d 13 [1st Dept 2006]; *Bosman v*

Reckson FS Ltd. Partnership, 15 AD3d 517, 790 NYS2d 201 [2d Dept 2005]). The opponent must "assemble, lay bare, and reveal his proofs in order to show his defenses are real and capable of being established on trial ... and it is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v Genger*, 123 AD3d 445, 447, 999 NYS2d 366, 368 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). In other words, the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

The function of a court in reviewing a motion for summary judgment "is issue finding, not issue determination, and if any genuine issue of material fact is found to exist, summary judgment must be denied" (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, 946 NYS2d 1 [1st Dept 2012]). Nor may the court determine issues of credibility (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, 946 NYS2d 1 [1st Dept 2012] (Where "credibility determinations are required, summary judgment must be denied"); *DeSario v SL Green Management LLC*, 105 AD3d 421, 963 NYS2d 24 [1st Dept 2013] (holding given the conflicting deposition testimony as to what was said and to whom, issues of credibility should be resolved at trial)).

Here, moving defendants Amtrak and Kone failed to establish *prima facie* entitlement to judgment as a matter of law. Contrary to movants' assertions, Mr. Garner's deposition testimony does not support the inference that the gate on elevator B6 had no failures. While Courion may not have responded to any malfunctions concerning the elevator gate, the Time Ticket Detail Reports for elevator B6 show that Kone responded to numerous maintenance and service

requests for various problems concerning the elevator's gate and doors prior to the incident. One report, for example, dated March 22, 2010 includes a complaint that "Rear doors not functioning" and describes the work as "Replace Landing door interlock contacts (mech)); two other reports dated March 11 and March 12, 2010 indicate "Door lock not working" and describes the work as "Repair Landing door panels"); another complaint was that the "doors closing too slow" and describes the work as "OKB/GATE DAMAGED BY MISUSE/ATT**." It is noted that movants submit no expert affidavit to support a conclusion, as movants claim, that the Time Ticket Detail Reports show that there were no problems with the elevator after its installation, up until the incident.[4] Moreover, although counsel for movants affirms that "there was a bell as well as an alarm that sounded when the freight elevator gate was closing," counsel does not make any reference to the record or evidence to prove such assertions (Aff. in Support, ¶ 31). The record indicates that the safety mechanisms, such as the light curtain, did not prevent the gate from falling upon plaintiff or warn him of the descending elevator gate. As movants failed to establish that they did not cause or create the alleged dangerous freight elevator door condition, summary dismissal of plaintiffs' negligence claims as against movants is denied.[5]

The doctrine of *res ipsa loquitur* may be invoked against a defendant in an action involving an allegedly malfunctioning elevator, where is it shown that the event is of a kind that does not ordinarily occur in the absence of negligence; the accident must be caused by an instrumentality within the exclusive control of the defendant; and nothing plaintiff did in any way

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[4] Although Amtrak and Kone contend in reply that Mr. Coutu's credentials qualify him as an expert, it is noted that no deposition testimony, sworn statement or affidavit of Mr. Coutu's was supplied in their moving papers.

[5] It is noted that, plaintiffs are precluded from arguing that defendants had actual or constructive notice of the alleged condition at trial, pursuant to this Court's April 28, 2015 order.

contributed to the happening of the event (*see Hodges v Royal Realty Corp.*, 42 AD3d 350, 351, 839 NYS2d 499 [1st Dept 2007] ("There is no dispute that such an abrupt and potentially catastrophic event could not have occurred if the elevator was operating properly or that plaintiff in any way contributed to the cause of this accident."); *Miller v Schindler Elevator Corp.*, 308 AD2d 312, 763 NYS2d 826 [1st Dept 2003]). "[T]he doctrine of res ipsa loquitur can be applied even when more than one defendant is in a position to exercise exclusive control" (*DiPilato v H. Park Cent. Hotel, L.L.C.*, 17 AD3d 191, 795 NYS2d 518 [1st Dept 2005] (applying the doctrine to both the hotel owner and elevator company that maintained elevator), *citing Wen–Yu Chang v Woolworth Co.*, 196 AD2d 708, 601 NYS2d 904 [1993]).

The movants failed to establish, as a matter of law, that the incident was not the kind that does not ordinarily occur in the absence of negligence, and that plaintiff's conduct contributed to the happening of the incident.

As to whether the incident is the kind of event that does not occur in the absence of negligence, defendants failed to establish as a matter of law that elevator gates do not generally fall in the absence of negligence (*e.g.*, *Pavon v. Rudin*, 254 A.D.2d 143, 679 N.Y.S.2d 27 [1st Dept 1998] ("Doors mounted on pivot hinges do not generally fall in the absence of negligence (*e.g.*, improper installation, maintenance or repair)"); *Ezzard v One E. Riv. Place Realty Co., LLC*, 129 A.D.3d 159, 8 N.Y.S.3d 195 [1st Dept 2015] ("long established jurisprudence in this Department recogniz[es] that elevator malfunctions" including a misleveled elevator, "do not occur in the absence of negligence")). Contrary to the movants' contention, the record sufficiently supports the claim that the freight elevator gate fell upon Mr. Timmons as he was attempting to walk through the freight elevator. The Court notes that Mr. Carrajat attests, in his

expert affidavit, that "a gate does not strike a passenger absent negligence in its maintenance and repair" (Aff of Carrajat, dated October 27, 2015 at 7-8). Additionally, Mr. Hurley testified at his deposition that no one could be struck by the elevator gate or door if the light curtain was properly functioning. Moreover, Mrs. Timmons testified that "something came down and knocked [Mr. Timmons] down to the ground," which "looked like a gate" (EBT of Mrs. Timmons at 18).

Further, the contention that plaintiff Mr. Timmons contributed to the happening of the incident by voluntarily entering the elevator is unavailing, as movants provide no caselaw, and no proof of how plaintiff Mr. Timmons contributed to the alleged condition of the elevator doors and gates to suddenly fall down on him without warning, causing him injury (*cf. Kemak v. Syracuse University*, 2002 WL 484331, 2002 N.Y. Slip Op. 40042(U) [Supreme Court, Seneca County] (finding that, where a parking gate under which plaintiff and others were walking fell on his head, defendants' defense of *res ipsa loquitur* that plaintiff contributed to his injury by deciding to walk thereunder or duck to avoid contact, was insufficient); *Baumann v. Long Island R.R.*, 110 A.D.2d 739, 487 N.Y.S.2d 833 [2d Dept 1985] (noting that plaintiffs were entitled to rely on the doctrine of *res ipsa loquitur* where railroad gate above tracks plaintiff was crossing fell upon her)). It is also noted that the expert affidavit and sworn statement of plaintiffs' expert indicate that movants failed to post adequate signage to prohibit Mr. Timmons from walking into the freight elevator, and failed to ensure that the elevator was equipped with a visual and audible alarm, consistent with safety codes and standards for elevators, set by the American Society of Mechanical Engineers ("ASME"). Notably, Mr. Coutu testified that the signage on elevator B6 was only visible when the doors were closed. It is also noted that plaintiffs' expert also opined

that based upon his review of deposition testimony and documents in the record, in addition to his work experience and personal examination of the elevator, "to a reasonable degree of mechanical certainty that Mr. Timmons did not in any manner cause or contribute to the accident or his injuries" (Aff of Carrajat, dated October 27, 2015 at 7).

Further, contrary to defendants' contention that plaintiffs' opposing papers are insufficient to establish that the alleged incident was of a kind that does not ordinarily occur in the absence of negligence, "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 501 NE2d 572, 574 [1986]).

As to defendant Courion's cross-motion, Courion sufficiently established that it did not have actual or constructive notice of the alleged injury causing condition. However, Courion failed to demonstrate that it did not cause or create same.

With respect to actual or constructive notice, Mr. Garner testified that neither Courion nor Freight Tech returned to Penn Station to do any subsequent installations to elevator B6, after the completion of the renovation project in June 2009. Moreover, neither Courion nor Freight Tech ever performed any maintenance to elevator B6 after the installation project was completed in June 2009. Further, Mr. Garner explained that Kone was responsible for maintaining the elevator and inspecting the light curtain during the one year period following complete installation of the elevator in June 2009. Although Kone had the option to perform its own repairs or call Courion to perform any repairs that were covered under Courion's one-year warranty (which ran to Kone), Mr. Garner testified that Courion was never made aware of any issue with respect to the light curtain or reversing edge on elevator B6.

As to whether Courion caused or created the alleged condition, no expert affidavit or other evidence has been supplied by Courion, sufficient to warrant dismissal. On the contrary, the deposition testimony of Mr. Garner, submitted by Courion, confirms that an accident such as Mr. Timmons' could occur in spite of a properly operating light curtain, under certain circumstances. Since Courion supplied the elevator gate, which was installed by Freight Tech, and the gate was equipped with two types of safety devices (a reversing edge and a light curtain) Mr. Garner's testimony indicates that Courion could have caused or created the alleged condition by providing defective components.

With respect to whether Courion had exclusive control of the instrumentality leading to Mr. Timmons' injury, plaintiffs concede that Courion did not have exclusive control over the elevator after June 2009, and do not oppose the cross-motion for dismissal of plaintiffs' claims based on *res ipsa loquitur* as against Courion. Thus, summary dismissal of such claims as against Courion is warranted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendants Kone, Inc. and National Railroad Passenger Corporation to preclude any proof or testimony from plaintiffs' expert at the time of trial is denied; and it is further

ORDERED that the deposition of plaintiffs' elevator expert, Patrick Carrajat, shall be conducted within 45 days of the date of this order, limited to questions relating to how the ASME standard was violated and caused the accident, with the expenses and fees of such deposition to be borne by plaintiffs; and it is further

ORDERED that the motion for summary judgment by defendants Kone, Inc. and National Railroad Passenger Corporation is denied; and it is further

ORDERED that the cross-motion for summary judgment by defendant Courion Industries, Inc. is granted solely as to plaintiffs' claims based on *res ipsa loquitur* as against Courion, and denied as to plaintiffs' remaining claims and any cross claims as against Courion; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: January 25, 2016

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.