Plaut v Ralbag
2018 NY Slip Op 30442(U)
March 8, 2018
Supreme Court, New York County
Docket Number: 152706/2017
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED** **PART** **2**

Justice

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ALLAN PLAUT, **INDEX NO.** 152706/2017

Plaintiff,

- v -

ARYEH RALBAG, UNION OF ORTHODOX RABBIS OF THE UNITED STATES AND CANADA, **MOTION SEQ. NO.** 001 002

Defendants.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 34, 35, 36, 37, 38, 39, 40, 41, 42, 47, 48, 49

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 33, 43, 44, 45

were read on this motion to/for DEFAULT JUDGMENT.

Upon the foregoing documents, it is ordered that the motions are decided as follows.

Motion sequence numbers 001 and 002 are hereby consolidated for disposition.

Plaintiff Allan B. Plaut commenced this action against defendants Aryeh Ralbag (Ralbag) and the Union of Orthodox Rabbis of the United States and Canada (UOR) (collectively, defendants) seeking to void an agreement to arbitrate in front of the UOR on the basis of, among other things, fraudulent inducement. In motion sequence 001, Ralbag moves, pursuant to CPLR 3211 (a) (4), to dismiss the complaint based on a prior pending action. In the alternative, Ralbag moves, pursuant to CPLR 2201, for a stay of the action. In motion sequence 002, plaintiff moves, pursuant to CPLR 3215 (a) and (b), for an order granting a default judgment against the UOR. Plaintiff also seeks a declaration that the arbitration agreement is null and void, rescission of the

agreement, and an injunction prohibiting defendants from enforcing the agreement. In the alternative, plaintiff requests that the matter be set down for an inquest to assess the damages he is owed.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff commenced this action seeking to void an agreement to arbitrate his pending matrimonial dispute in front of the UOR. The UOR, acting as a Beis Din, or Rabbinical court, may conduct binding arbitration of disputes between parties who voluntarily pursue this route of dispute resolution. Among other things, the arbitrators in the UOR may fashion the arbitration award based on the rules of the Jewish law. As set forth in the complaint, Ralbag, a Rabbi, is a head of the UOR.

Plaintiff states that, after 33 years of marriage, he and his wife, nonparty Surie M. Plaut (Surie), were planning to divorce. On May 11, 2016, plaintiff visited with Ralbag seeking advice regarding the situation. Plaintiff is a member of the congregation where Ralbag is Rabbi. Ralbag allegedly told plaintiff he would "mediate" the dispute and that "he would obtain 2.6 million dollars for [plaintiff]." Complaint, ¶ 41.

Plaintiff, who insists that he became increasingly anxious during his conversations with Ralbag, claims that he takes medications and that he has been "diagnosed with mental and physical health issues including debilitating agoraphobia and anxiety." *Id.*, ¶ 32. Plaintiff alleges that, although Ralbag was aware of his medical conditions, he (Ralbag) would not let him leave and pressured plaintiff to sign the arbitration agreement. Plaintiff now maintains that his "deteriorated medical condition, coupled with the fact that [plaintiff] was heavily medicated prevented him from

appreciating the consequences and ramifications of legal actions and is the reason why [plaintiff] seeks to avoid the Arbitration Agreement." *Id.*, ¶ 51.

Plaintiff alleges that, although the forum of the Beis Din severely disadvantages him, Ralbag did not explain this consequence to him. Plaintiff contends that he "would clearly be better served in a secular court system that provides for various protections of husbands who act as 'Stay at home' husbands." *Id.*, ¶ 16. Plaintiff recounts that, during the marriage, he and Surie agreed that she would run the family business and that he would stay home to take care of the children. However, plaintiff claims that neither equitable distribution nor pendente lite relief is available through the Beis Din.

In addition, plaintiff alleges that he and Surie accumulated substantial assets over the course of their marriage and that distribution of the assets is a "contested agenda." *Id.*, ¶ 14. He believes that Surie has hidden assets away from him. Plaintiff contends that he requires extensive discovery to ascertain whether there is marital property or other items that he is entitled to. However, plaintiff asserts that there is no formal discovery mechanism in a Beis Din. Plaintiff further alleges that Ralbag previously contacted Surie's counsel but did not disclose this to plaintiff and that Ralbag did not contact plaintiff's counsel.

According to plaintiff, Ralbag had undue influence on him as his Rabbi, and "stood to make a great deal of money from the arbitration." *Id.*, ¶ 53. Plaintiff states that, at the time that he signed the arbitration agreement, he was not given a copy of the agreement. He alleges that the blank form was "missing the scope" of the arbitration and that, after plaintiff signed the agreement, certain things were added without his consent. Further, Ralbag allegedly "represented that he would simply act as a Mediator. Disturbingly enough instead of a mediation agreement for Rabbi Ralbag's Beis Din, the Rabbi had [plaintiff] sign an Arbitration Agreement, something that was

completely outside the scope . . . ." *Id.*, ¶ 59. In addition, plaintiff contends that, although he signed an arbitration agreement containing three blank spaces where the names of arbitrators were to be inserted, only one space, bearing Ralbag's name, was filled out.

The arbitration agreement sets forth, in pertinent part:

> "The Union of Orthodox Rabbis of the United States and Canada . . . .
>
> Agreement to Submit to Arbitration
>
> "We the undersigned hereby agree to submit to binding arbitration the following controversy: between [Plaintiff] and [Surie] . . . all disputes between the parties arising out of or related to: their marriage, divorce and marital assets and all related matters
>
> We further agree that the controversy be heard and determined by the three following arbitrators: Rabbi Aryeh Ralbag, Rabbi___ , and Rabbi___ .
>
> * * *
>
> "The parties understand that they have the right to be represented by attorneys and/or other advisors in the arbitration at any time . . . .
>
> * * *
>
> "The parties submit themselves to the personal jurisdiction of the courts of the State of New York for any action or proceeding to confirm or enforce a decree of the arbitrators pursuant to Article 75 of the New York Civil Practice Law and Rules or to enforce the provisions of this Agreement to Submit to Arbitration.
>
> * * *
>
> "We affix our signature today May 11, 2016 in Brooklyn, N.Y. [Plaintiff] [Surie]."

Plaintiff's Exhibit A at 1.

In the first cause of action, plaintiff seeks a declaration that the arbitration agreement is null and void since he was fraudulently induced to enter into the same. Plaintiff claims that "no monetary damages could rectify this matter" as Surie is attempting to enforce the arbitration agreement in a divorce proceeding and to deprive plaintiff of his rights. Plaintiff alleges that Ralbag, "head of the UOR stood to receive personal benefit from having this dispute in his organization as he was going to collect large fees for himself and his organization." *Id.*, ¶ 65. Although Ralbag represented a certain outcome to plaintiff, "a promise of an outcome is highly suspect." *Id.*, ¶ 68.

In the second cause of action, plaintiff alleges that he was fraudulently induced to enter into an agreement with the UOR and Surie. Plaintiff states that Ralbag, "head of the UOR, made numerous material and false representations about his own and UOR's involvement in the divorce between the Plaintiff and his wife." *Id.*, ¶ 74. Further, Ralbag allegedly did not inform plaintiff that he would be sacrificing certain advantages by arbitrating through the Beis Din, rather than in a secular court. Plaintiff seeks a judgment declaring the arbitration agreement to be null and void. He is also requests that he be compensated for legal fees, costs and expenses that he incurred.

Current Motions:

In motion sequence 001, defendants move to dismiss the complaint pursuant to CPLR 3211 (a) (4), on the basis that a prior pending action will resolve the same factual and legal issues.[1] The

[1] Ralbag initially moved in motion sequence 001 as the sole defendant. Although plaintiff subsequently moved for a default judgment against the UOR, in his opposition to Ralbag's dismissal motion, plaintiff states that he is opposing defendants' motion to dismiss. As the UOR appeared and joins this action with the same counsel as Ralbag, this Court will address the motion to dismiss with respect to both defendants.

captioned action was commenced in March 2017. However, in November 2016, Surie filed an action for divorce against plaintiff in Supreme Court, Kings County (*Surie M. Plaut v Allan B. Plaut*, Index No. 55057/2016) (the Prior Action) and moved to compel arbitration of their marital dispute pursuant to the arbitration agreement. In opposition to the motion, plaintiff challenged the validity of the arbitration agreement on the same grounds as those herein, alleging that he was not competent to sign the agreement, and that he was fraudulently induced by Ralbag to execute the same. In his affirmation in opposition in the Prior Action, he said "I ask that this Court deny this Order to Show Cause and dismiss this case altogether and let the matter proceed in the fair and unbiased Court system . . . and not in the rigged arbitration that I was tricked into entering without my understanding." *See* Sullivan affirmation, Exhibit C, [plaintiff's] affirmation, ¶ 30.

In a memorandum of law submitted by plaintiff's attorney in the Prior Action, counsel claimed that plaintiff's "deteriorated medical condition, coupled with the fact that Mr. Plaut was heavily medicated prevented him from appreciating the legal actions and is the reason why Mr. Plaut seeks to avoid the Arbitration Agreement. . . . [Ralbag] had an undue influence on Mr. Plaut, as he was a confidante of Mr. Plaut for many years as well as being his Rabbi and in this case misleading him." *Id.*, Exhibit D, memo of law at 9.

Defendants assert that the same issues that plaintiff seeks to have adjudicated herein, including the enforceability of the arbitration agreement, are already being adjudicated in the Prior Action and, since the Prior Action will necessarily and conclusively resolve plaintiff's claims, the complaint in the captioned action must be dismissed.

Defendants further assert that plaintiff does not allege any cognizable damages in the complaint. They also maintain that plaintiff's claim for attorneys' fees, costs and expenses must be dismissed because there is no contractual provision entitling him to this relief. Additionally,

defendants assert that the Prior Action will determine whether or not the arbitration agreement is enforceable, leaving plaintiff with no further claims to pursue.

As an alternative to dismissal, defendants request that this Court stay the current action, pending the adjudication of the Prior Action. Defendants maintain that, since the two actions have identical issues, judicial economy warrants a stay. In addition, a stay would prevent the possibility of two inconsistent decisions.

In opposition, plaintiff argues that defendants' motion to dismiss must be denied because the parties herein are different than those in his divorce action, as are the underlying facts and causes of action.[2]

According to plaintiff, the Prior Action between he and Surie is different than the instant action, in which plaintiff claims that defendants misled and took advantage of him. Plaintiff maintains that the facts in this case arise from his "recent discovery of the reasons why Rabbi Ralbag mislead me deliberately." Plaintiff's aff, ¶ 4. Plaintiff reiterates the allegations that Ralbag used his undue influence as plaintiff's Rabbi and confidante, as a way to mislead plaintiff and make money. According to plaintiff, he "found out later that [Ralbag] has a history of pressuring men to give divorces." *Id.*, ¶ 24. Thus, urges plaintiff, there is relief he can obtain in the captioned action which he cannot obtain in the Prior Action.

Plaintiff argues that the motion to dismiss is defective insofar as it was not supported by an affidavit from either of the defendants. Further, plaintiff asserts that the attorney's affirmation is deficient and cannot support a motion to dismiss since the attorney lacks personal knowledge and the affirmation is not verified.

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[2] Plaintiff does not address or oppose a possible stay pursuant to CPLR 2201.

Plaintiff adds that, even if the arbitration agreement is upheld as valid, his damages are cognizable. In addition to legal fees, he asserts that he is seeking actual damages, which would include the money lost as a result of arbitrating with the Beis Din instead of with the court.[3]

On November 17, 2017, defendants' counsel informed this Court that Justice Ingrid Joseph of the Supreme Court, Kings County, held a hearing in the Prior Action regarding Surie's motion to compel arbitration and reserved decision. Although defendants represented that "a decision on the Prior Pending Arbitration Motion is now forthcoming . . . ." (Sullivan letter at 1), this Court has yet to learn of a decision on the motion.

Default Judgment:

In motion sequence 002, plaintiff seeks, among other relief, a default judgment against the UOR. Plaintiff alleges that, on May 6, 2017, the UOR was served with a summons and notice. Plaintiff attaches a copy of the affidavit of service, indicating that the UOR was served "by leaving a true copy with Jon Doe (refused name), being authorized to accept legal papers stated." Plaintiff's Exhibit C at 1. Plaintiff alleges that, despite being served, the UOR did not appear. In addition, plaintiff states that the UOR still failed to appear, even after plaintiff sent it a letter advising of its potential default.

In opposition, the UOR argues that the motion should be denied because it was not properly served. The affidavit of service indicates that a John Doe was served. However, since the UOR is a domestic corporation, it argues that serving John Doe was inadequate, and that a summons must be personally delivered to an officer, director or authorized agent of the UOR. Moreover,the

[3] For example, possibly not being provided with pendente lite relief.

UOR argues that plaintiff will not suffer any prejudice from the UOR's appearance and joinder, as the UOR plans to join the pending motion to dismiss on the same grounds as set forth by Ralbag, and the motion has not yet been adjudicated. Defendants also allege that the motion for a default judgment should be denied because plaintiff's complaint is not verified, and his affidavit contains only conclusory statements.

LEGAL CONCLUSIONS:

Dismissal

Plaintiff's procedural arguments regarding why defendants' motion is defective are unavailing. For example, citing *Zuckerman v City of New York* (49 NY2d 557 [1980]), plaintiff alleges that the motion to dismiss is "unsupported by probative evidence," and that the attorney's affirmation "fails to demonstrate his personal knowledge [and] is without evidentiary value and insufficient to support a motion to dismiss." Plaintiff's memo of law at 7. However, plaintiff is referring to the supporting proof required in a motion for summary judgment, which is not applicable to defendants' motion to dismiss. *See* CPLR 3212 (b); *Zuckerman v City of New York*, 49 NY2d at 563.

Furthermore, plaintiff is mistaken in his assertion that the motion to dismiss must be denied for lack of verification. In pertinent part, CPLR 3020 sets forth the verification requirements for pleadings. CPLR 3020 (a) provides that, in certain circumstances, an answer must be verified. However, Ralbag did not submit an answer. Moreover, a motion to dismiss is not a responsive pleading. *See e.g. Harris v Ward Greenberg Heller & Reidy LLP*, 151 AD3d 1808, 1809 (4th Dept 2017) ("motion pursuant to CPLR 3211 does not fall within the meaning of a 'pleading' as defined by CPLR 3011").

Pursuant CPLR 3211 (a) (4), a party may move to dismiss an action on the ground that "there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires." Here, defendants moved to dismiss the complaint on the basis that the Prior Action will dispose of the same legal and factual issues raised in the complaint.

"Where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same, a court has broad discretion in determining whether an action should be dismissed pursuant to CPLR 3211 (a) (4) on the ground that there is another action pending." *Aurora Loan Servs., LLC v Reid,* 132 AD3d 788, 788-789 (2d Dept 2015) (internal quotation marks and citations omitted). The Prior Action and the instant one contain a substantial identity of the parties, are sufficiently similar and seek similar relief. However, only Surie and plaintiff, and not defendants, are parties in the Prior Action. Further, the causes of action are different since here plaintiff alleges fraud and undue influence. Although plaintiff made the same allegations regarding Ralbag's undue influence in the Prior Action, the instant action will allow defendants to address the specific allegations directed towards them.

This Court does not agree with defendants' contention that, if it is determined in the Prior Action that the arbitration agreement is invalid, plaintiff's claims will have been resolved. In the Prior Action, plaintiff raised the issue of Ralbag's liability in opposing the validity of an arbitration agreement pursuant to CPLR 7503. However, only in the captioned action would plaintiff be able to seek relief that is unique to defendants. *See e.g. Jadron v 10 Leonard St., LLC*, 124 AD3d 842, 844 (2d Dept 2015) ("[T]he claims asserted in both actions are not 'sufficiently similar' to warrant dismissal simply because the plaintiff raised an argument pertaining to constructive fraud as a basis for the imposition of liability . . . in the personal injury action"). Accordingly, in its discretion,

this Court denies the motion to dismiss, and, as set forth below, grants the request for a stay, which, under the circumstances, is more appropriate. *See e.g. SafeCard Servs. v American Express Travel Related Servs. Co.*, 203 AD2d 65, 65-66 (1st Dept 1994) (Court granted stay of the action and denied dismissal, stating "[o]ne alternative available to a court faced with a motion to dismiss [pursuant to CPLR 3211 (a) (4)] where it appears that the other action may be resolved in a manner which would not bar further proceedings in New York is to stay the New York action pending resolution of the other action").

Pursuant to CPLR 2201, "[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." In general, a stay is justified "where the decision in one action will determine all of the questions in the other action, and the judgment on one trial will dispose of the controversy in both . . . ; this requires a complete identity of the parties, the causes of action and the judgment sought." *952 Assoc., LLC v Palmer*, 52 AD3d 236, 236-237 (1st Dept 2008). However, stays have been upheld even absent the complete identities and issues of the parties where "there were overlapping issues and common questions of law and fact, and the determination of the prior action may dispose of or limit issues which are involved in the subsequent action." *Beopolsky v Renew Data Corp.*, 41 AD3d 322, 322-323 (1st Dept 2007) (internal quotation marks and citations omitted).

In the Prior Action, the plaintiff herein seeks to invalidate the arbitration agreement asserting, among other things, that he lacked the mental capacity to agree to arbitrate and was unduly influenced by Ralbag, and that the arbitration agreement was altered without his consent. Here, plaintiff seeks to invalidate the arbitration agreement for the same reasons and also seeks unspecified damages against defendants. Thus, the primary dispute in the Prior Action, i.e., whether or not the arbitration agreement is valid, is directly related to the instant action, and may

dispose of it. Although Surie is a nonparty in the captioned action, the declaratory relief requested in this matter regarding the arbitration agreement directly affects her. Accordingly, "[a] stay is proper, since the determination of the [Prior Action] may dispose of or limit issues involved in this action." *SSA Holdings LLC v Kaplan*, 120 AD3d 1111, 1111 (1st Dept 2014).

According to defendants, a hearing has already been held on the motion to compel arbitration which Surie filed in the Prior Action, and a decision is forthcoming. As a result, staying the instant action pending resolution of the Prior Action will avoid the possibility of inconsistent adjudications regarding the validity of the arbitration agreement. *See e.g. Asher v Abbott Labs.*, 307 AD2d 211, 212 (1st Dept 2003) ("[A] stay avoids the risk of inconsistent rulings . . ."). Further, the issuance of a stay will promote judicial economy, as it is likely that the instant action will be resolved if the Prior Action results in an unfavorable outcome for plaintiff. *Id.* at 212 ("[A] stay will avoid duplication of effort and waste of judicial resources since the scope of discovery sought from the state plaintiffs is dependent on the Eleventh Circuit's disposition of defendants' appeal of the District Court's ruling that the agreements constituted per se violations . . . ").

In light of the above, defendants are granted a stay of the captioned action pending adjudication by the Supreme Court, Kings County of the motion to compel arbitration which Surie filed in the Prior Action.

Legal Fees and Damages

Plaintiff is seeking to recover legal fees as part of the relief requested in his complaint. However, it is well settled that, irrelevant of the outcome, as there is no contractual agreement between the parties that provides for legal fees, plaintiff is not entitled to recover them. *See National Union Fire Ins. Co. of Pittsburgh. PA v Odyssey Reins. Co.*, 143 AD3d 626, 626 (1st Dept

2016) ("In the absence of a statute, agreement between the parties or court rule, the court was without authority to award petitioner legal fees").

Defendants moved to dismiss, pursuant to CPLR 3211 (a) (4), on the ground that there was a prior action pending. However, in their reply, they argue that plaintiff's failure to plead actual damages warrants dismissal of the complaint. In general, pursuant to CPLR 2214 (a), "a notice of motion or order to show cause must state the relief demanded and the grounds therefor." *HCE Assoc. v 3000 Watermill Lane Realty Corp.*, 173 AD2d 774, 774 (2d Dept 1991). While the court, in its discretion, may grant relief that is requested outside of the notice of motion, the court declines to do so at this time. *Id.* at 775.[4]

Default Judgment

Plaintiff moved, pursuant to CPLR 3215 (a) and (b), directing that a default judgment be entered against the UOR for failing to appear. In support of his motion, plaintiff alleges that the UOR was properly served on May 6, 2017. However, since plaintiff cannot demonstrate that he properly served the UOR, the motion for default judgment is denied.

"When a defendant has failed to appear, plead or proceed.. . . the plaintiff may seek a default judgment against him . . .. [P]laintiff shall apply to the court for judgment." CPLR 3215 (a). Pursuant to CPLR 3215 (f), "[o]n any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served . . ." CPLR 311 (a) (1) provides, in relevant part, that personal service on a domestic corporation "shall be made by delivering the summons as follows: (1) upon any domestic or foreign corporation, to

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[4] This Court notes that plaintiff's complaint may ultimately be dismissed if he is unable to specify compensable damages.

an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service." Although Business Corporation Law § 306 (b) (1) allows the secretary of state to be served as an agent of a domestic or authorized foreign corporation, there is no indication that plaintiff attempted service pursuant to that statute.

In the instant case, while plaintiff states that he properly served the UOR with a summons and notice, he does not demonstrate that he complied with CPLR 311 (a) (1). Although plaintiff claims that he served John Doe, the affidavit of service does not reflect that the person served was an agent for receiving service of process on UOR's behalf. *See Matter of Jiggetts v MTA Metro-N. R.R.*, 121 AD3d 414, 414 (1st Dept 2014) ("Petitioner failed to comply with CPLR 311 (a) (1), which requires that the process server tender process directly to an authorized corporate representative, rather than an unauthorized person who later hands the process to an officer or other qualified representative"). Since plaintiff did not properly effect service upon the UOR, his application to enter a default judgment is statutorily defective and must be denied.

Contrary to plaintiff's contentions, this Court does not find that the UOR willfully failed to appear. Moreover, it is well settled that there is a "strong public policy in favor of disposing of cases on their merits." *Auerbach v Tregerman*, 106 AD3d 633, 633 (1st Dept 2013).

CONCLUSION

In light of the foregoing, it is hereby:

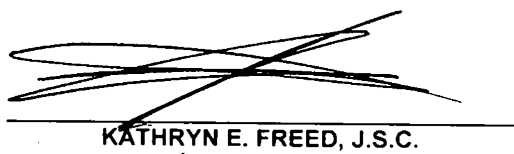
ORDERED that the branch of the motion by defendants Aryeh Ralbag and the Union of Orthodox Rabbis of the United States and Canada seeking to stay this action pursuant to CPLR

2201 (motion sequence 001) is granted, and that branch of the motion seeking dismissal under CPLR 3211 (a) (4) is denied; and it is further

ORDERED that the motion by plaintiff Allan B. Plaut for a default judgment to be entered against the Union of Orthodox Rabbis of the United States and Canada (motion sequence 002) is denied in its entirety; and it is further

ORDERED that all further proceedings in this action are stayed, except upon leave of this Court, until the determination of the pending motion to compel arbitration in the matter of *Surie M. Plaut v Allan B. Plaut* (Supreme Court, Kings County, Joseph, J., Index No. 55057/2016); and it is further

ORDERED that this constitutes the decision and order of the court.



3/8/2018
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION	
	☐ GRANTED	☐ DENIED	☐ GRANTED IN PART	☒ OTHER
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ DO NOT POST		☐ FIDUCIARY APPOINTMENT	☐ REFERENCE