SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT D. KALISH **PART** IAS MOTION 29EFM

Justice

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YSABEL BATISTA,

Plaintiff,

- v -

NEW YORK CITY HOUSING AUTHORITY, THE CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF SANITATION,

Defendants.

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INDEX NO. 162515/2014

MOTION DATE 09/26/2018

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60

were read on this motion for SUMMARY JUDGMENT.

Motion by Defendant New York City Housing Authority for summary judgment, pursuant to CPLR 3212, dismissing the complaint, is granted for the reasons stated herein:

BACKGROUND

Plaintiff Ysabel Batista alleges that on January 21, 2014 at approximately 2:40 PM she slipped and fell on ice while walking on a pathway through the Jefferson Houses near 113th Street and 3rd Avenue. Plaintiff brings the instant action against Defendant New York City Housing Authority[1] ("NYCHA"), alleging that NYCHA was negligent "in that they failed and neglected to properly remove snow and ice from the premises." (Affirm. in Supp., Ex. A [Notice of Claim] ¶ 3.)

NYCHA now moves for summary judgment, arguing that at the time of the accident, it had been snowing since roughly 8:12 AM, that three to four inches of snow had fallen, and that 10.8 inches of snow would fall by midnight that same

[1] On April 19, 2016, the parties filed a stipulation of discontinuance as against Defendant City of New York. (NYSCEF Document No. 6.) However, the caption was never amended to reflect this discontinuance. At oral argument, the parties confirmed that Plaintiff and NYCHA are the only two parties remaining in this action.

day. Accordingly, NYCHA argues that it should be awarded summary judgment pursuant to the storm in progress doctrine. Plaintiff opposes the motion.

I. Plaintiff's 50-H Testimony of July 9, 2014

At Plaintiff's 50-H hearing, Plaintiff testified that she slipped and fell on ice, between 2:30 and 2:40 PM, as she was walking her children home from school. Plaintiff testified that her accident occurred in an area along an internal pathway through the Jefferson Houses near 113th Street and 3rd Avenue. Plaintiff further stated that, at the time, it had not been snowing since she left her home to pick her children up at 2:00 PM but that it had snowed during the night before. (Affirm. in Supp., Ex. B [50-H Hearing] at 19:06-25.) Plaintiff testified that she slipped "on that ice that was there." (Id. at 33:14-15.) Plaintiff testified that the ice she slipped on covered the entire pathway. (Id. at 37:15-38:24.)

Plaintiff further testified that she had walked on the same pathway when she took her children to school earlier that morning, but that the pathway was "not that bad like that compared to the way it was in the afternoon." (Id. at 33:16-20, 38:25-39:12.) Plaintiff further testified:

> "Q. When you saw the area where the accident happened in the morning when you took your kids to school, was there any ice at all on the pathway where the accident later happened?
>
> A. No."

(Id. at 40:04-08.) Plaintiff testified that she did not notice any snow removal efforts on the morning that she took her children to school, but that in the afternoon it appeared that some snow had been removed "[t]oward the side maybe." (Id. at 40:09-41:04.)

II. Plaintiff's Deposition of April 4, 2016

At Plaintiff's deposition, Plaintiff reiterated her 50-H testimony that she slipped and fell on ice on a pathway in the Jefferson Houses near 113th Street, between 2:30 and 3:00 PM, as she was walking her children home from school. (Affirm. in Supp., Ex. I [Plaintiff EBT] at 24:08-21, 35:13:36:08.) Plaintiff stated that, at the time of her accident, it was no longer snowing but roughly three inches of snow had fallen and "it had already become slippery." (Id. at 48:25-50:25.) Plaintiff stated that it did not appear that anyone had undertaken any snow removal

efforts and that "[n]ot even a small pathway had been created, sometimes they do that where they throw some to the sides, but nothing was done." (Id.)

Plaintiff stated that she had previously walked through the subject pathway in the morning between 7:20 and 8 AM when she was walking her children to school—and also returning home after dropping them off—and that "[t]here was a lot of snow." (Id. at 31:17-37:20, 41:06-20.) Plaintiff stated that it was snowing when she brought her children to school that morning. (Id.)

During her deposition, Plaintiff testified that the snow had stopped falling "sometime after 12 p.m." on the day of her accident. (Id. at 40:19-21.) Plaintiff later amended this answer in her errata sheet, referencing page 40, line 21, to state that, "[t]he snow] could have stopped before 12:00 p.m. I do not know the exact time." (Id. at Errata Sheet.) Plaintiff stated that she was amending her answer because "I did not understand the question." (Id.)

III. Meteorological Evidence

In support of its motion, NYCHA submits the affidavit of Howard Altschule, who states that he is recognized as a Certified Consulting Meteorologist by the America Meteorological Society. (Affirm. in Supp., Ex. K [Altschule Aff.] ¶ 2.) Mr. Altschule further states that, at the request of NYCHA, he "performed an in-depth weather analysis and forensic weather investigation at [the area of the accident] in order to determine what the weather conditions were leading up to and including the day of incident." (Id. ¶ 7.) Mr. Altschule states that he reviewed various "official weather records and climatological data" for his analysis, including:

- "National Weather Service Hourly Surface Weather Observations/Local Climatological Data (LCD) from the **Central Park Observatory** in New York, New York (approximately 1.9 miles southwest of the incident location)";
- "National Weather Service Hourly Surface Weather Observations/Local Climatological Data (LCD) from **LaGuardia Airport** in Queens, New York (approximately 3.3 miles east-southeast of the incident location)";
- "National Weather Service Hourly Surface Weather Observations/Local Climatological Data (LCD) from the **Teterboro Airport** in Teterboro, New Jersey (approximately 7.4 miles northwest of the incident location)";
- "5-Minute Surface Observations from the **Central Park Observatory** in New York, New York";

- "5-Minute Surface Observations from **LaGuardia Airport** in Queens, New York";
- "5-Minute Surface Observations from the **Teterboro Airport** in Teterboro, New Jersey";
- "Super-resolution **Reflectivity Doppler Radar** images from the Upton, New York radar site that were zoomed in over the incident location";

(Id. ¶ 8 [emphasis added].) The information relied upon by Mr. Altschule has been submitted on the instant motion as separate exhibits. (Affirm. in Supp., Exs. K-U.)

Reviewing the aforesaid information, Mr. Altschule opines that "[n]o snow or ice was present on the ground prior to the onset of a powerful winter storm that moved over the incident location from January 21, 2014 into January 22, 2014." (Altschule Aff. ¶ 20.) Mr. Altschule further opines that said storm caused "mostly continuous periods of light to moderate and occasionally heavy snow to fall from approximately 8:12 a.m. through and beyond 11:59 p.m. on January 21, 2014 and approximately 10.8" of new snow accumulated." (Id. ¶ 20.) Mr. Altschule further opines:

> "At 2:40 p.m. on January 21, 2014, moderate to heavy snow was falling and actively accumulating as a result of the winter storm that was still in progress and the air temperature was 16 degrees Fahrenheit. Approximately 3.5"-4.5" of new snow and very slippery conditions were present on exposed, untreated and undisturbed surfaces. Snow was actively falling and accumulating before, during and after the time of the incident a result of the powerful winter storm that was still in progress."

(Id.)

NYCHA also attaches data from the Central Park observatory that indicates that 11 inches of snow fell on January 21, 2014. (Affirm in Supp., Ex. L.) The temperature high-low points (in Fahrenheit) recorded at the Central Park observatory from January 11 to January 20, 2014 are as follows: 58-37, 54-38, 51-37, 52-44, 47-39, 42-36, 44-33, 41-29, 38-24, 46-31. According to the Central Park observatory, the most recent precipitation prior to the subject snow storm was trace snowfall, recording a total liquid content (TLC) of 0.07 inches, on January 18, 2014. The Central Park observatory records further state that the "snow

depth"—the "[d]aily reading of snow on ground (in whole inches)"—was 0.0 inches on the day before the accident.

Defendant appears to admit that "[o]n January 20, 2014, the day before the accident, the certified weather records establish that 'trace' amounts of snow fell." (Affirm in Reply ¶ 15.) This comports with the observations from LaGuardia and Teterboro Airports that list trace amounts for January 20, 2014—but the Central Park observatory listed no precipitation.

IV. NYCHA's Snow Removal Records

NYCHA produced Caretaker Brenda Perez for a deposition on June 9, 2016. Ms. Perez testified that she was presently employed as "Caretaker X" for NYCHA and that snow removal was among her various duties. (Affirm. in Supp., Ex. V [Perez EBT] at 6:06-7:06.) Ms. Perez further testified that on the date of the accident, her responsibility was to remove snow, and that her supervisor was Gerardo Rivera that day.

Regarding procedures for removing snow, Ms. Perez stated, "If it is snowing periodically throughout the day then we work -- we clear the perimeter and work our way inside to the walkways. Then we will go to the other side and clear that and we will go back and forth." (Id. at 14:12-18.) Ms. Perez further stated that snow removal operations will usually start around 8 AM, and NYCHA staff come in at 7 AM if it is already snowing, and 6 AM at the earliest. (Id. at 14:19-15:20.) Ms. Perez testified that if it begins snowing after the staff starts their operations for the day, then they will usually allow the snow to pile up for about an inch before they begin removing it. (Id.) Ms. Perez stated that they never treat the walkways prior to the snowfall. (Id.)

Ms. Perez was provided with an exhibit referred to as the Supervisor of Caretakers Logbook, and was directed to review the entry for the day of the accident, which states in the relevant part:

> "Snowfall expected at 10:00 AM to last throughout the day & into tomorrow morning. (See SOG logbook). All caretakers were assigned to go to their buildings & begin snow removal operations. . . . A. Morales was instructed of Bobcat [sic] to address all interior walkway at Section 1 and I did all of the Section 2 walkway with 4120 Tractor. B. Perez with X700 remained at perimeter. Snow removal continued until 8:00 PM. All staff received instructions to come in at 7:00 AM, unless snow removal crew at 6:00 AM."

(Affirm. in Supp., Ex. W [Supervisor Logbook].)

NYCHA also submits a January 2014 "Snow Removal and Sanding Log" which contains rows of dates for the following columns that this Court reproduces below in relevant part for the January 21, 2014 entries:

8:00 AM Check

Icy Conditions YES/NO	Sanding Completed	No. of People Sanding
Yes	No	19

4:00 PM Check

Icy Conditions YES/NO	Sanding Completed	No. of People Sanding
Yes	No	19

(Affirm. in Supp., Ex. X [Snow Removal Log].)

The Snow Removal Log notes that the "3 PM Weather Forecast" for the day of the accident was "36 – Snow." The last time that this log listed "Snow" prior to the date of the accident was January 10, 2014, and the respective 3 PM temperatures in Fahrenheit listed from January 11 to January 20 are: 56, 45, 54, 51, 46, 41, 45, 44, 36, 45.

ARGUMENTS

NYCHA argues that it is entitled to summary judgment, dismissing the complaint, because: (1) it had no duty to continually remove snow or ice while the subject storm was in progress; (2) there is no evidence that its snow and ice removal efforts exacerbated the conditions caused by the storm in progress; and (3) it lacked notice of any icy condition that might have existed before the storm in progress.

Plaintiff opposes the instant motion arguing, in sum and substance, that there is a material issue of fact as to whether the ice that Plaintiff allegedly slipped on existed prior to the alleged storm in progress. In support of this argument, Plaintiff argues that the 8 AM check in NYCHA's "Snow Removal and Sanding Log" lists "Yes" for the "Icy Conditions?" column, and that the affidavit by Mr. Altschule states "that snow fall started at 8:12 a.m., which would have been 12 minutes after the 8:00 a.m. inspection." (Affirm. in Opp. ¶ 11.)

In addition, Plaintiff contends that her deposition testimony that it was not snowing from between 12 PM to 3 PM when her accident occurred "directly conflicts with defendant's evidence that a snowstorm was in progress, thus raising an issue of fact as to the applicability of the storm in progress doctrine." (Id. ¶ 25.)

Finally, Plaintiff argues that NYCHA has not made "a prima facie showing that the snow removal efforts it undertook did not create or exacerbate the hazardous condition upon which the plaintiff fell." (Affirm. in Opp. ¶ 19.)

In reply, NYCHA argues that it has submitted extensive meteorological records and the "expert report" of Howard Altschule—a Certified Consulting Meteorologist by the America Meteorological Society—establishing that there was a powerful snow storm in progress at the time of Plaintiff's accident; and that Plaintiff's "self-serving testimony, which is contrary to the certified weather records that the snow had stopped falling prior to her accident[,] does not establish liability on behalf of NYCHA." (Affirm. in Reply ¶ 9.)

In addition, NCYHA notes that the "Snow Removal and Sanding Log" recorded above-freezing temperatures for the ten days prior to the accident and that "[c]learly, the icy condition being prepared for was from the storm that was immediately imminent"—and it could not have been referring to an icy condition that existed in the days prior to the storm when the temperatures were above freezing. (Id. ¶ 12.)

Further, NYCHA argues that Plaintiff's testimony that "the walkway was covered with 'transparent' ice, belies any claim that NYCHA's activities created an icy condition or that its activities caused a condition that was more dangerous tha[n] the natural accumulation of snow." (Id. ¶ 10.) Rather, NYCHA argues that this description of the walkway "comports with the weather data showing that snow continued to steadily accumulate as the day and snow storm progressed." (Id.)

Lastly, NYCHA argues that Ms. Perez's testimony paired with the entries in the Supervisor of Caretakers Logbook establishes that NYCHA lacked notice of any dangerous condition on the walkway and that "there is no evidence no evidence to establish that Plaintiff slipped on anything other than an icy condition connected to the storm in progress." (Id. ¶ 13.)

DISCUSSION

"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. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Santiago v Filstein*, 35 AD3d 184, 185-86 [1st Dept 2006], quoting *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003].) "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002].)

I. NYCHA Is Not Liable for Plaintiff's Fall that Occurred While a Storm Was In Progress.

"Although a landowner owes a duty of care to keep his or her property in a reasonably safe condition, he 'will not be held liable in negligence for a plaintiff's injuries sustained as the result of an icy condition occurring during an ongoing storm or for a reasonable time thereafter.'" (*Sherman v New York State Thruway Auth.*, 27 NY3d 1019, 1020-21 [2016], quoting *Solazzo v New York City Tr. Auth.*, 6 NY3d 734, 735 [2005].)

> "The 'storm in progress' defense is based on the principle that there is no liability for injuries related to falling on accumulated snow and ice until after the storm has ceased, in order to allow workers a reasonable period of time to clean the walkways. The rule is designed to relieve the worker(s) of any obligation to shovel snow while continuing precipitation or high winds are simply re-covering the walkways as fast as they are cleaned, thus rendering the effort fruitless."

(*Powell v MLG Hillside Assoc., L.P.*, 290 AD2d 345 [1st Dept 2002] [internal citations omitted].) Thus, where the evidence is clear that the accident occurred while the storm was in progress, the doctrine may be applied as a matter of law.

(Id.) However, "[o]nce there is a period of inactivity after cessation of the storm, it becomes a question of fact as to whether the delay in commencing the cleanup was reasonable." (Id. at 346.)

In determining the application of the storm in progress doctrine, the Appellate Division, First Department has instructed that rather than focusing on "what was happening at the very moment of the accident," it is better practice to focus on "what was happening during the period immediately preceding the accident. If only trace amounts fell during the two to three hours prior to plaintiff's accident and defendants' custodian was present, then it is reasonable to ask whether the custodian should have been shoveling the accumulated snow." (Id.)

Here, Defendant has presented meteorological evidence from various observation points located nearby where the accident occurred, and Defendant has further provided the affidavit from Mr. Altschule – a Certified Consulting Meteorologist by the America Meteorological Society – opining that:

> "**At 2:40 p.m. on January 21, 2014, moderate to heavy snow was falling and actively accumulating as a result of the winter storm that was still in progress and the air temperature was 16 degrees Fahrenheit. Approximately 3.5"-4.5" of new snow and very slippery conditions were present on exposed, untreated and undisturbed surfaces.** Snow was actively falling and accumulating before, during and after the time of the incident a result of the powerful winter storm that was still in progress."

(Id. [emphasis added].)

In response, Plaintiff fails to put forward any scientific evidence or expert opinion testimony to counter Defendant's description of the meteorological events that took place on the date of Plaintiff's accident. Rather, Plaintiff puts forward her own testimony that the snow had stopped when she left her home to pick her children up at school. Even if there was some lull in the storm as Plaintiff contends, Plaintiff points to no climatological evidence to support that the lull was of a sufficiently long period to impose a duty on Defendant to undertake snow removal efforts. (*Wexler v Ogden Cap Properties, LLC*, 154 AD3d 640, 640 [1st Dept 2017] ["Although plaintiff testified that there was no precipitation at the time of his fall, even if there was a lull in the storm around the time of plaintiff's fall, this does not establish that defendants had a reasonable time to correct the ice-related conditions."], *lv to appeal denied*, 31 N.Y.3d 909 [2018]; *Clement v New York City Tr. Auth.*, 122 AD3d 448, 449 [1st Dept 2014] [affirming summary

judgment in favor of the defendant where the plaintiff's fall that occurred two to three hours after the cessation of the storm].)

Moreover, regardless of how long Plaintiff may contend that the lull in the storm was, the storm that was in progress was forecast to and did in fact continue to produce snowfall until the end of the night on the day Plaintiff fell, eventually producing a full snowfall of 10.8 inches, according to the unrebutted findings of Defendant's meteorologist. For this Court to impose a duty on NYCHA to remove the snow and eliminate all slippery conditions here would cut against the rationale of the storm in progress doctrine, which is "designed to relieve the worker(s) of any obligation to shovel snow while continuing precipitation or high winds are simply re-covering the walkways as fast as they are cleaned, thus rendering the effort fruitless." (*Powell*, 290 AD2d 345.)

II. Plaintiff's Theory That She Slipped on Pre-Existing Ice Is Speculative.

Plaintiff argues that there is an issue of fact as to whether the ice that Plaintiff allegedly slipped on existed prior to the alleged storm in progress. In support of this argument, Plaintiff argues that the 8 AM check in NYCHA's "Snow Removal and Sanding Log" lists "Yes" for the "Icy Conditions?" column, and that the affidavit by Mr. Altschule states "that snow fall started at 8:12 a.m., which would have been 12 minutes after the 8:00 a.m. inspection." (Affirm. in Opp. ¶ 11.)

This Court finds that Plaintiff's theory that she fell on pre-storm ice is speculative. (*Rand v Cornell Univ.*, 91 AD3d 542, 543 [1st Dept 2012] ["[T]he conclusion of plaintiff's expert that the melting and refreezing of accumulated snow caused plaintiff's fall is speculative and fails to raise an issue of fact as to whether plaintiff slipped on 'old ice.'"].) Plaintiff points to no evidence to support her conclusory assertion that she slipped on pre-existing ice, and the overwhelming meteorological evidence indicates that there was no pre-existing ice for her to slip on.

Moreover, Plaintiff's own 50-H testimony completely disposes of this theory that pre-existing ice caused her fall:

> "Q. When you saw the area where the accident happened in the morning when you took your kids to school, was there any ice at all on the pathway where the accident later happened?

A. No."

(Affirm. in Supp., Ex. B [50-H Hearing] at 40:04-08.)

III. Plaintiff Fails to Establish a Question of Fact as to Whether NYCHA Caused and Created the Icy Condition.

A landowner who undertakes snow removal on a city street must do so carefully so as not to create a dangerous condition or exacerbate a naturally occurring condition. (*See Nadel v Cucinella*, 299 AD2d 250, 251 [1st Dept 2002].) However, "the facts still must permit an inference that defendant's snow removal efforts caused the plaintiff's injury." (Id.)

On a motion for summary judgment, a defendant may establish prima facie that it did not create a dangerous condition or exacerbate a naturally occurring condition in the absence of "evidence as to when the defendant last shoveled snow from the sidewalk prior to plaintiff's accident." (*Rios v Acosta*, 8 AD3d 183, 184 [1st Dept 2004].) In addition, a defendant may establish prima facie that it did not create a dangerous condition or exacerbate a naturally occurring condition even where "defendant failed to remove all of the snow that was on the sidewalk," yet "most of the sidewalk was clear." (*Joseph v Pitkin Carpet, Inc.*, 44 AD3d 462, 463-64 [1st Dept 2007].) "The failure to remove all of the snow and ice from the sidewalk does not constitute negligence." (*Cruz v Nassau County*, 56 AD3d 513, 524-25 [2d Dept 2008].)

Here, Plaintiff merely argues that NYCHA "did not make a prima facie showing that the snow removal efforts it undertook did not create or exacerbate the hazardous condition upon which the plaintiff fell." (Affirm. in Opp. ¶ 19.) Plaintiff does not point to anything in the Ms. Perez's testimony or the Supervisor of Caretakers Logbook, detailing the snow remediation efforts, that would suggest that such efforts exacerbated the snow and ice conditions caused by the winter storm. Moreover, Plaintiff's own description of NYCHA's snow remediation efforts—stating that, at the time of the accident, it appeared that some snow had been removed "[t]oward the side maybe" (50-H Hearing at 40:09-41:04)—fails to indicate how such efforts might have exacerbated the snow conditions caused by the storm.[2]

[2] In contrast, Plaintiff subsequently stated, at her deposition, that it did not appear that anyone had undertaken any snow removal efforts and that "[n]ot even a small pathway had been created, sometimes they do that where they throw some to the sides, but nothing was done." (Plaintiff EBT at 48:25-50:25.)

There is simply no evidence to suggest that NYCHA's efforts exacerbated the snow and ice conditions produced by the storm in progress at the time of Plaintiff's fall. (*See Bonfrisco v Marlib Corp.*, 30 AD2d 655, 655 [1st Dept 1968] [holding that liability may not be found "by the mere showing that an isolated thin patch of ice was present some hours after snow removal"], *affd* 24 N.Y.2d 817 [1969]; *cf. Santiago v New York City Hous. Auth.*, 274 AD2d 335, 335 [1st Dept 2000] [holding that there was a genuine issue of material fact as to "whether the ice on which plaintiff allegedly slipped was formed as a result of the piles of snow on either side of the pathway, created by defendant's grounds keepers in removing almost two feet of snow that had fallen within a week of the accident, melting and refreezing"].)

As such, this Court finds that NYCHA is entitled to summary judgment in its favor, dismissing the complaint.

CONCLUSION

Accordingly, it is hereby

ORDERED that Defendant New York City Housing Authority's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

The foregoing constitutes the decision and order of the Court.

9/26/2018
DATE

HON. ROBERT D. KALISH J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE