Mountain Valley Indem. Co. v Tornabene
2018 NY Slip Op 32796(U)
October 30, 2018
Supreme Court, New York County
Docket Number: 150580/2017
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** **IAS MOTION 2**

Justice

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INDEX NO. 150580/2017

MOUNTAIN VALLEY INDEMNITY COMPANY,

Plaintiff,

MOTION SEQ. NO. 001

- v -

ALFONSO TORNABENE and BERNICE GRACIA,

Defendants.

DECISION, ORDER, and JUDGMENT

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 32

were read on this motion to/for DEFAULT JUDGMENT

Upon the foregoing documents, it is ordered that the motion is **granted**.

In this declaratory judgment action, plaintiff Mountain Valley Indemnity Company ("MVIC") moves, pursuant to CPLR 3215, for a default judgment against defendant Alfonso Tornabene ("Tornabene"). MVIC further moves, pursuant to CPLR 3212, for summary judgment against defendant Bernice Gracia ("Gracia") on counts two and three of its complaint. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motion is **granted**.

FACTUAL AND PROCEDURAL BACKGROUND:

On June 8, 2015, plaintiff MVIC issued defendant Tornabene a homeowners insurance policy, under policy number HOS1361337, for a one-year period commencing on August 2, 2015 and ending on August 2, 2016. (Doc. 19 at 2.) According to the declarations page,

Tornabene's "residence premises" were to be insured by the policy subject to certain terms, conditions, limitations, and exclusions. (Docs. 10 at 3; 22 at 4.) The policy provided the following definitions for what constitutes a residence premises for coverage:

DEFINITIONS (Doc. 19 at 16).

* * *

4. "Insured location" means:
a. The "residence premises";
b. The part of other premises, other structures and grounds used by you as a residence and:
(1) Which is shown in the Declarations; or
(2) Which is acquired by you during the policy period for your use as a residence;
c. Any premises used by you in connection with a premises in **4.a.** and **4.b.** above;
d. Any part of a premises:
(1) Not owned by an "insured"; and
(2) Where an "insured" is temporarily residing;
e. Vacant land, other than farm land, owned by or rented to an "insured";
f. Land owned by or rented to an "insured" on which a one or two family dwelling is being built as a residence for an "insured";
g. Individual or family cemetery plots or burial vaults of an "insured"; or
h. Any part of a premises occasionally rented to an "insured" for other than "business" use. (*Id.*)

* * *

8. "Residence premises" means:
a. The one family dwelling, other structures, and grounds; or
b. That part of any other building;
where you reside and which is shown as the "residence premises" in the Declarations.

"Residence premises" also means a two family dwelling where you reside in at least one of the family units and which is shown as the "residence premises" in the Declarations. (*Id.*)

The policy also contained the below provisions for personal liability coverage:

SECTION II — LIABILITY COVERAGES (*Id.* at 27).

* * *

COVERAGE E — Personal Liability

If a claim is made or a suit is brought against an "insured" for damages because of "bodily injury" or "property damage" caused by an "occurrence" to which this coverage applies, we will:

1. Pay up to our limit of liability for the damages for which the "insured" is legally liable. Damages include prejudgment interest awarded against the "insured"; and (*id.*).

* * *

COVERAGE F — Medical Payments To Others

We will pay the necessary medical expenses that are incurred or medically ascertained within three years from the date of an accident causing "bodily injury." Medical expenses means reasonable charges for medical, surgical, x-ray, dental, ambulance, hospital, professional nursing, prosthetic devices and funeral services. This coverage does not apply to you or regular residents of your household except "residence employees." As to others, this coverage applies only: (*id*).

* * *

However, the policy issued to Tornabene included the following exclusions to coverage:

SECTION II — EXCLUSIONS (*id.*).

1. **Coverage E — Personal Liability and Coverage F — Medical Payments to Others** do not apply to "bodily injury" or "property damage":

* * *

b. Arising out of or in connection with a "business" engaged in by an "insured." This exclusion applies but is not limited to an act or omission, regardless of its nature or circumstance, involving a service or duty rendered, promised, owed, or implied to be provided because of the nature of the "business"; (*id.*).

c. Arising out of the rental or holding for rental of any part of

any premises by an "insured." This exclusion does not apply to the rental or holding for rental of an "insured location";

(1) On an occasional basis if used only as a residence;
(2) In part for use only as a residence, unless a single family unit is intended for use by the occupying family to lodge more than two roomers or boarders; or
(3) In part, as an office, school, studio or private garage; (Doc. 19 at 28).

* * *

e. Arising out of a premises:
(1) Owned by an "insured";
(2) Rented to an "insured"; or
(3) Rented to others by an "insured";
that is not an "insured location"; (*id.*).

The policy has a "Personal Liability" coverage limit of $500,000 (Docs. 12 at 2; 19 at 2) and a "Medical Payments to Others" ("MPO") coverage limit of $5,000 (Docs. 12 at 2; 19 at 2).

At the time MVIC issued the policy, Tornabene was residing at 207 Nicholas Avenue in Staten Island ("the premises") (Doc. 10 at 3), and that was the address that was listed as the "residence premises covered by [the] policy" (Doc. 19 at 2). On August 16, 2016, MVIC received notice of an incident that had occurred on the premises on May 4, 2016. (Doc. 10 at 6.) The incident involved defendant Gracia, a police officer, who allegedly injured her finger when she attempted to open a door at the premises while responding to a call.[1] (*Id.* at 6–7.)

Gracia then commenced an action styled *Gracia v Tornabene*, Supreme Court, Richmond County Index Number 151013/2016 ("the underlying action") on August 9, 2016. (Doc. 13 at

[1] One document submitted on this motion states that Gracia was injured "as a result of a slip and fall at the premises . . . ." (Doc. 22 at 2.) However, this Court will disregard this inconsistency as a mere typographical error because other descriptions of the incident allege that Gracia was injured, not due to a slip and fall accident, but rather because a padlock on a door at the premises wedged one of her fingers between two bolts. (*See, e.g.*, Docs. 10 at 6–7; 13 at 18; 21 at 1.) Defendant Gracia's complaint in the underlying action states as much; this complaint can be found in Document 1 filed with NYSCEF in *Gracia v Tornabene* (151013/2016).

17.) In the underlying action, Gracia alleges that Tornabene failed to keep the property in a reasonably safe and proper condition, that the premises' dangerous conditions were in violation of New York's Real Property Law and Multiple Dwelling Law, that Tornabene negligently permitted criminal and illicit activity to occur on the premises, and that Gracia suffered severe injuries as a result of Tornabene's negligence. (Doc. 13 at 17–23.)

MVIC thereafter began an investigation of the incident, under claim number 2520536, and of Gracia's claims against Tornabene. (Doc. 12 at 5.) MVIC assigned Bauer Trial Preparation, Inc. ("Bauer") to the investigation. (Doc. 11 at 2.) On November 28, 2016, Jesse Corcoran ("Corcoran"), an investigator employed by Bauer, met with and interviewed Tornabene at the premises. (*Id.* at 1–2.) During the meeting, Tornabene purportedly informed Corcoran that he did not reside at 207 Nicholas Avenue on the date of Gracia's injury, but was instead residing with his girlfriend at a different address. (*Id.* at 2.) According to Corcoran, Tornabene further stated that he had owned the premises since 2011, that he resided there from 2011 until January of 2016 when he decided to live with his girlfriend at 852 Manor Road in Staten Island, that he has rented the premises to a friend since moving in with his girlfriend, and that he currently visits the premises only once a month and was therefore not present on the premises when Gracia's accident occurred. (*Id.*)

Afterward, Corcoran reduced Tornabene's statements to writing, which Tornabene signed and confirmed that the writing was an accurate account of what Tornabene had said to Corcoran. (*Id.* at 2–3.) The statement reads:

> My name is Alfonso Tornabene. . . . I currently reside at 852 Manor Road in Staten Island, NY. I have owned the subject property since 2011. I resided at the home from the date of purchase up until January 2016. I moved to my current address with my girlfriend in January of 2016. Since I have moved out of the property, I have been renting both the home and lot adjacent to a friend of mine . . . . I was

> not at the subject location on the date of loss because I come to the property once a month. . . . I attest to the above written statement it [sic] has been drafted to my best memory and knowledge. (Doc. 18.)

On December 12, 2016, MVIC sent Tornabene a letter stating that MVIC would not defend or indemnify him for any damages that Gracia was claiming in the underlying action because, *inter alia*, the premises did not qualify as an "insured location" or as a "residence premises" as defined by the policy because Tornabene was not residing there at the time of Gracia's accident. (Doc. 21.) MVIC's letter also informed Tornabene that MVIC would

> defend you in [the underlying] lawsuit . . . subject to resolution of a declaratory-judgment action that we will commence against you to confirm the propriety of our disclaimer. If the court confirms that we have no duty to defend or indemnify you, then counsel will be asked to withdraw and you will be obligated to obtain your own defense counsel. (*Id.* at 1.)

On January 18, 2017, MVIC commenced the instant declaratory judgment action by filing a summons and verified complaint against Tornabene and Gracia. (Doc. 13 at 4–12.) The complaint alleged three causes of action: (1) that MVIC has no duty to defend or indemnify Tornabene in the underlying action because Gracia's injuries did not involve a "bodily injury" caused by an "occurrence" under the policy (*id.* at 8); (2) that MVIC has no duty to defend or indemnify Tornabene, or otherwise provide coverage for the claims made in the underlying action because the accident location did not qualify as either a "residence premises" or an "insured location" pursuant to the policy when Gracia was injured (*id.* at 9); and (3) that MVIC has no duty to defend, indemnify, or otherwise pay personal liability coverage to Tornabene for the claims made in the underlying action because the accident location was not an "insured location" or "residence premises" under the policy, since Tornabene had been renting out the premises to a friend (*id.* at 9–10).

On March 10, 2017, defendant Gracia filed an answer with three affirmative defenses: (1) that she is a covered person under the insurance policy (Doc. 14 at 2); (2) that MVIC is misinterpreting defendant Tornabene's policy (*id.*); and (3) that she is entitled to recovery for the personal injuries she sustained (*id.*). Tornabene has not answered MVIC's complaint, despite MVIC having sent him a letter on March 1, 2017 advising of the instant action. (Doc. 16.)

MVIC now moves, pursuant to CPLR 3215, for a default judgment against defendant Tornabene. MVIC further moves, pursuant to CPLR 3212, for summary judgment against defendant Gracia on counts two and three of its complaint, declaring that MVIC has no duty to defend or indemnify Tornabene or to provide MPO coverage to Gracia in the underlying action. (Doc. 9.)

POSITIONS OF THE PARTIES:

MVIC first argues that it is entitled to summary judgment against Gracia and a declaration that it is not obligated to defend and indemnify Tornabene for any claims asserted against him in the underlying action, and also that MVIC is not obligated to provide MPO coverage to Gracia. (Doc. 22 at 11.) MVIC asserts that Tornabene's policy does not provide coverage for the personal liability of an insured for bodily injuries arising out of a premises that is not an "insured location" (*id.* at 12), which the policy defines, in relevant part, as a "residence premises" (*id.*; Doc. 19 at 16). In turn, the phrase "residence premises" is defined by the policy as a "one family dwelling . . . where you reside and which is shown as the 'residence premises' in the Declarations." (Docs. 22 at 12; 19 at 16.)

According to MVIC, summary judgment should be granted because the location where Gracia was injured, i.e., 207 Nicholas Avenue, did not meet the definition of a "residence

premises" under the policy since Tornabene was not residing there at the time. (Doc. 22 at 12.) In support, MVIC references the written statement that Tornabene signed after he was interviewed by Corcoran, wherein Tornabene said that he currently resides at 852 Manor Road with his girlfriend. (*Id.* at 12–13.) Moreover, MVIC asserts that the premises were not Tornabene's residence because he was renting it out to a friend and, thus, the coverage exclusion for an "insured location" applies. (*Id.* at 12–13.) Therefore, MVIC argues, 207 Nicholas Avenue was not an "insured location" as defined by the policy and there is no coverage for any of the claims asserted by Gracia against Tornabene in the underlying action. (*Id.* at 13.)

MVIC further argues that it is entitled to a default judgment against defendant Tornabene because he has defaulted and MVIC has established the facts constituting its claims for relief. (*Id.* at 14–15.)

In opposition, defendant Tornabene states that MVIC's summary judgment motion should be denied because questions of material fact exist. (Doc. 27 at 4.) Specifically, Tornabene asserts that there is a question of fact as to what the word "reside" means because his insurance contract did not provide a definition. (*Id.*) "Where the insurer fails to define the term 'reside' in the policy," Tornabene argues, "the term 'residence premises' is ambiguous [and] precludes summary judgment." (*Id.*)

Even if the word "reside" is unambiguous, Tornabene argues that the premises at 207 Nicholas Avenue constituted his residence at the time of Gracia's injury. (*Id.* at 5.) In support of this claim, defendant submits an affidavit stating that he still has a key to the premises, receives mail there, maintains the premises and still has a room there with his personal property, and does not consider living with his girlfriend a permanent arrangement. (*Id.* at 5–6.) The affidavit also claims that, contrary to MVIC's assertion that he visits the property only once a month, he

returns to the premises every week on the days that he is not staying with his girlfriend. (*Id.* at 9.) Further, he maintains that he simply has two residences and should not be denied coverage under his insurance policy. (*Id.* at 10.) Therefore, he says, MVIC should provide coverage for Gracia's claims because the premises were his residence and thus constituted an "insured location." (*Id.* at 5–6.)

With respect to the branch of MVIC's motion which requests a default judgment against him, Tornabene argues that a default judgment is not appropriate in an action for a declaratory judgment because "New York courts 'rarely, if ever' grant declaratory judgments on default 'with no inquiry by the courts as to the merits.'" (*Id.* at 6.)

In an affirmation opposing MVIC's motion, defendant Gracia indicated that she was merely adopting every argument raised by Tornabene in opposition to MVIC's motion. (Doc. 30.)

In reply, MVIC argues that, as an initial matter, defendant Tornabene's opposition papers cannot be considered by this Court because he is in default and has not taken any steps to extend his time for answering the complaint. (Doc. 32 at 2.) MVIC thus states that it should be awarded a default judgment against Tornabene because it has established service of the summons and complaint, his default, and the facts constituting its meritorious claim for relief. (*Id.* at 11–13.)

Substantively, MVIC reiterates that Tornabene signed a written statement admitting that he had moved out of the premises and was not present when Gracia was injured. (*Id.* at 4.) "Now, after signing a statement . . . that he did not reside at the Premises on the Date of Loss, and after defaulting in this action . . . Tornabene is submitting . . . a sham Affidavit . . . to create a *faux*-issue of fact in attempt to defeat this motion." (*Id.*)

Contrary to Tornabene's argument that the insurance policy left the word "reside" undefined and that it is therefore ambiguous, MVIC asserts that courts have interpreted "reside" to mean "living in a particular locality." (*Id.* at 5.) And, MVIC argues, when courts have construed policies containing the terms "residence premises" or "insured location," they have consistently required the insured to reside at the premises indicated on the declarations page on the applicable date of loss in order for coverage to be afforded. (*Id.* at 6.) MVIC thus asserts that Tornabene's receipt of mail and storage of personal belongings at the premises do not rise to the level of having resided there on the date of Gracia's accident. (*Id.*) Finally, MVIC argues that it is entitled to summary judgment against defendant Gracia because the premises were not Tornabene's residence under the policy at the time of the incident and therefore her claims are not subject to coverage. (*Id.* at 13.)

LEGAL CONCLUSIONS:

Because Gracia, the plaintiff in the underlying action, can only obtain insurance coverage if the insured, Tornabene, is entitled to such coverage under the policy, this Court will first consider whether MVIC is entitled to a default judgment against Tornabene.

a. Is MVIC Entitled to a Default Judgment Against Defendant Tornabene?

CPLR 3215(a) provides, in pertinent part, that "[w]hen a defendant has failed to appear, plead or proceed to trial . . . , the plaintiff may seek a default judgment against him." It is well settled that "[o]n a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing."

(*Atl. Cas. Ins. Co. v RJNJ Servs., Inc.*, 89 AD3d 649, 651 [2d Dept 2011].) Moreover, a default in answering the complaint is deemed to be an admission of all factual statements contained in the complaint and all reasonable inferences that flow therefrom. (*See Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003].) This Court will address each of the elements required for a default judgment.

First, MVIC has furnished proof of proper service. CPLR 308(2) permits service of process to be made "by delivering the summons within the state to a person of suitable age and discretion at the . . . dwelling place or usual place of abode of the person to be served and by . . . mailing the summons to the person to be served at his or her last known residence . . . ." On January 24, 2017, MVIC served Tornabene by leaving the summons and complaint on a person of suitable age at 852 Manor Road in Staten Island (Doc. 5), which Tornabene indicated in his handwritten statement as being the address of his current residence (Doc. 18). On February 7, 2017, MVIC completed process by mailing a copy of the summons and complaint to the same address. (Doc. 5.) MVIC's manner of service thus comported with the requirements of CPLR 308(2).

Second, MVIC has submitted proof of the facts constituting its claims. Specifically, MVIC has submitted Tornabene's own handwritten statement in which he admits that he was no longer residing at 207 Nicholas Avenue, which is the address listed on his insurance policy (Docs. 10 at 3; 19 at 2), on the date when Gracia was injured. (Doc. 18.)

Third, this Court determines that MVIC has established proof of defendant Tornabene's default in answering or appearing. CPLR 320 governs how a defendant may appear: "The defendant appears by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer." (CPLR 320[a].) The appearance "shall be made

within twenty days after service of the summons, except that if the summons was served on the defendant by delivering it to an official of the state authorized to receive service in his behalf . . . the appearance shall be made within thirty days after service is complete." (*Id.*)

Although Tornabene's counsel filed a notice of appearance on his behalf (Doc. 26), this Court finds that Tornabene's notice of appearance was procedurally defective. This action was commenced by the filing of the summons and complaint on January 18, 2017 (Doc. 1), and service of process via mail occurred on February 7, 2017 (Doc. 5). Tornabene had until the timelines set forth in CPLR 320(a)—i.e., thirty days after service in this instance—to appear in the matter, and he could have done so in one of 3 ways.

To date, defendant Tornabene has neither served an answer nor made a motion seeking an extension of time to answer. Indeed, Tornabene's notice of appearance is dated November 10, 2017 (Doc. 26)—over nine months from service of the summons and complaint—and, in the opposition papers that Tornabene submitted in response to MVIC's motion (Doc. 27), he did not even give this Court any reasonable excuse for the delay. (*See Alexandre v. Martinez*, 161 AD3d 633, 633 [1st Dept 2018] (defendant may argue against a default judgment by establishing a reasonable excuse for the delay in appearing in the action as well as a meritorious defense).) This Court will therefore decline to consider Tornabene's opposition papers in deciding the instant motion. This Court thus finds that MVIC is entitled to a default judgment against defendant Tornabene.

b. Is MVIC Entitled to Summary Judgment on Counts Two and Three of the Complaint?

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. (*See Winegrad v New York Univ. Med.*

Ctr., 64 NY2d 851, 853 [1985].) The movant must produce sufficient evidence to eliminate any issues of material fact. (*Id.*) If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. (*See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006].) If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then summary judgment will be denied. (*See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978].)

Here, MVIC, as the moving party, has made a prima facie showing of entitlement to judgment as a matter of law. The insurance policy that was in effect when Gracia was injured listed 207 Nicholas Avenue in Staten Island as the "residence premises" and as the "insured address." (Doc. 19 at 2.) Importantly, MVIC's internal investigation of the matter reveals that Tornabene was not residing at the premises at the time. (Doc. 11.) When Tornabene met with Corcoran, he signed a written statement that he moved to a different address with his girlfriend in January of 2016. (Doc. 18.) He further represented that he has since "moved out of the property" (*id.*) and that he has been renting the home to a friend (*id.*). Based on the foregoing, this Court determines that MVIC has established its prima facie showing of entitlement to judgment as a matter of law. (*See Tower Ins. Co. of New York v Brown*, 130 AD3d 545, 546 [1st Dept 2015] (prima facie showing of entitlement to summary judgment was found where the insured person admitted that he did not reside in the insured premises when the underlying accident occurred); *see also Tower Ins. Co. of New York v Zaroom*, 145 AD3d 556, 557 [1st Dept 2016] (same)).

Once MVIC established its prima facia case for summary judgment, the burden then shifted to Gracia to raise a triable issue of fact. (*See Mazurek*, 27 AD3d at 228.) While it is true

that a person "can have more than one residence for insurance coverage purposes," (*Allstate Ins. Co. v Rapp*, 7 AD3d 302, 303 [1st Dept 2004]), the issue of Tornabene having more than one residence at the time of Gracia's injury was raised in Tornabene's opposition papers to MVIC's motion (Doc. 27 at 4–6). Gracia's own opposition papers were merely an adoption and incorporation "by reference" of Tornabene's arguments (Doc. 30 at 2), which, as explained in the preceding section, this Court has declined to entertain. And, although Tornabene—and Gracia by way of "reference" to his arguments (*id.*)—asserts that the policy is ambiguous because it does not define the term "reside," (*see Dean v Tower Ins. Co. of New York*, 19 NY3d 704, 709 [2012] (the phrase "residence premises" is ambiguous when the term "reside" is undefined in an insurance contract)), that issue is inapposite to the present analysis because Tornabene admitted that he no longer resides at the premises. (Doc. 18.) Gracia has thus failed to raise a genuine issue of fact in response to MVIC's prima facie showing. This Court thus finds that MVIC has no obligation to defend or indemnify defendant Tornabene or to provide MPO coverage to defendant Gracia in the underlying action.

In accordance with the foregoing, it is hereby:

ORDERED that plaintiff Mountain Valley Indemnity Company's motion for a default judgment against defendant Alfonso Tornabene is granted; and it is further

ORDERED that plaintiff's motion seeking summary judgment on its second and third causes of action seeking a declaratory judgment as against defendant Bernice Gracia is granted; and it is further

ORDERED AND ADJUDGED that plaintiff has no duty to defend or indemnify Tornabene, or otherwise provide coverage for the claims made in the action styled *Gracia v Tornabene*, Supreme Court, Richmond County Index Number 151013/2016, because the accident location did not qualify as either a "residence premises" or an "insured location" pursuant to policy number HOS1361337 issued by plaintiff; and it is further

ORDERED that the action shall continue on plaintiff's remaining claim (first cause of action); and it is further

ORDERED that, within 30 days after this order is filed with NYSCEF, plaintiff's counsel is to serve a copy of this order with notice of entry on defendants and on the General Clerk's Office at 60 Centre Street, Room 119; and it is further

ORDERED that the parties are to appear for a preliminary discovery conference on January 29, 2019 at 2:15 PM in Room 280 at 80 Centre Street with respect to the remaining cause of action; and it is further

ORDERED that this constitutes the decision, order, and judgment of this Court.

10/30/2018
DATE

KATHRYN E. FREED, J.S.C.

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