Altair 18 Condominium v 42 W. 18th St. Realty Corp.
2020 NY Slip Op 30026(U)
January 6, 2020
Supreme Court, New York County
Docket Number: 155810/2016
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART IAS MOTION 12EFM

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ALTAIR 18 CONDOMINIUM,	INDEX NO. 155810/2016
Plaintiff,	MOTION DATE
- v -	MOTION SEQ. NO. 002
42 WEST 18TH STREET REALTY CORP.,	
Defendant.	**DECISION + ORDER ON MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 44-81 were read on this motion to extend *lis pendens*.

By order to show cause, plaintiff moves pursuant to CPLR 6513 for a three-year extension of the notice of pendency filed in this action against a parking lot operated by defendant's tenant at 38-42 West 18th Street in Manhattan. Defendant opposes and by notice of motion, cross-moves pursuant to CPLR 3212 for summary dismissal of the complaint, pursuant to CPLR 6514(a) for an order cancelling the notice of pendency, and pursuant to CPLR 6514(c) for an order granting it attorney fees and costs, and referring same for a determination of the amount.

I. UNDISPUTED BACKGROUND

Plaintiff condominium, located in the building at 32 West 18th Street, came into existence on April 19, 2007. Prior thereto, the building was owned by an entity which converted it to the condominium. Since 1999, defendant owns the commercial building at 42 West 18th Street, along with the adjoining lot, which is between the parties' buildings and extends from West 17th Street to West 18th Street. Defendant's tenant operates a parking lot there.

A small yard behind plaintiff's building houses mechanical equipment for plaintiff's

building. The yard is accessible through a gate that separates the yard from the lot. Pursuant to plaintiff's governing documents, emergency access to the yard may be obtained through a commercial unit on the first floor of its building.

Defendant recently obtained the approval of the New York City Department of City Planning to build a residential building on the lot.

On July 13, 2016, plaintiff commenced this action seeking a declaration pursuant to RPAPL 1501 *et seq*. that it is the sole "legal equitable" owner of an easement giving it a right of way across defendant's lot and seeking relief permanently enjoining defendant from engaging in conduct or acting in any manner to interfere unlawfully with its right to the peaceful and quiet use and enjoyment of the easement. (NYSCEF 52). It thereupon filed a notice of pendency. (NYSCEF 53). On January 16, 2018, defendant filed an answer asserting the following affirmative defenses: failure to state a claim, public use, permissive use, termination, and laches. (NYSCEF 54).

II. COMPLAINT (NYSCEF 52)

In its complaint, plaintiff alleges that for the past 66 years, it and its predecessors-in-interest, possessed, enjoyed, and used a right of way across defendant's lot, giving it "exclusive access" to and from its yard which is accessible from adjacent streets through a gate to which plaintiff has sole access. From the gate, which is reflected on property surveys since the early 1900s, access to the yard is obtained through a gap in a wall on plaintiff's property which abuts defendant's property. A survey from 1950 reflects the same gate which has been "openly and notoriously in place for not less than 66 years." Absent direct access to the yard from the residential portion of plaintiff's building, emergency access to four common elements of mechanical equipment which require regular maintenance is obtained through the commercial

unit, presently leased to a hair salon.

"To the best of Plaintiff's knowledge, none of Plaintiff, its staff, or its predecessors-in-interest have ever requested permission from Defendant (or Defendant's predecessors-in-interest) to use the Right of Way across [defendant's property] for purposes of egress and ingress to and from [plaintiff] rear yard via the [gate]." Plaintiff thus claims that its "hostile, open, notorious, and continuous use of the gate into the yard gives rise to a prescriptive easement over defendant's lot which defendant threatens by its proposed development of the lot."

Plaintiff sent repeated written cease-and-desist notices, the first of which was sent to defendant on or about December 15, 2014. By letter dated May 13, 2016, defendant denied that plaintiff has any right, title or interest in the easement, stating that it "typically permits public access to the [Development Property]" and "the general public has access to the right of way over which [Plaintiff] asserts an easement."

Plaintiff alleges that defendant has attempted to limit access to and use of the lot by the general public by posting prominent signs on the walls prohibiting trespassing, pedestrian traffic, bicycling, skateboarding, and rollerblading, and advising that violators will be prosecuted. Moreover, it alleges that a chain link fence bars the West 18th Street entrance, although it can be opened, and that at the south end of the lot, a rope-like chain extends across the lot when the tenant is not open for business. The chain stops vehicles from entering but permits limited pedestrian traffic to enter from West 17th Street.

III. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

As a decision on defendant's cross motion is determinative, it is addressed first.

A. Deposition of plaintiff's board president (NYSCEF 72)

According to the president of plaintiff's condominium board, plaintiff seeks a

prescriptive easement for people to walk, with and without equipment, or need be, for a fire truck, to traverse a portion of defendant's lot from 18th Street to plaintiff's door. The board president has lived in the building since 2007 and sees and has seen "all the time" members of the public freely cross the lot to get from street to street, although nightly since 2007 a chain blocks access from 17th Street and a gate blocks access from 18th Street. Notwithstanding the chain, she testified, members of the public occasionally enter the lot at night by walking under or over the chain. She too traverses the lot during the daytime, not only to access the yard with plaintiff's superintendent, porter, handyman, and contractors, but also to get from street to street. No-trespass signs, in place since 2007, have not kept people from crossing the lot.

Although the board president testified that plaintiff has not sought permission from defendant or the tenant to cross the lot, she was aware that the porter asks the lot attendant to move vehicles blocking plaintiff's gate to enable access to it without damaging any vehicles and that plaintiff's agents and employees had been asked to arrive early at the lot to afford them easy access to the gate. She also acknowledged that in an emergency, access to the yard may be obtained through the hair salon that has occupied the commercial unit since 2006. While she denied that plaintiff has a relationship with the salon such that it may freely pass through it to reach the yard, she referenced an arrangement with the salon whereby plaintiff's porter daily disposes of the garbage that the salon leaves in the yard.

Occasionally, drains on the roof and in the yard get clogged with debris which requires that plaintiff's employees access the yard to clear out the debris. Flooding occurred sometime between January and October 2016. Thus, plaintiff's handyman must check the roof vent no less than once every three or four months; access to fresh air louvers is required once or twice a year.

When asked whether plaintiff's use of the lot, exclusive of the gate, differs from the

public's use, the board president was unable to think of an answer.

B. Deposition of defendant's president (NYSCEF 57)

According to defendant's president, the lot has been operated as a parking lot since 1987. Upon purchasing the lot in or around 1999, defendant leased it to an entity which operates it. Between 1999 and 2004, the president had never been told of anyone crossing the lot and entering the gate.

In and around June 2004, plaintiff's building was sold to an entity which sought to convert it to residential condominiums. The president recalled no written agreements between defendant and the entity concerning a license or use of the lot during the conversion. While the entity never sought permission to use the lot for any purpose, the president testified that defendant never prevented anyone from using it for any purpose. Although he saw no one crossing the lot and entering the gate between 2004 and 2007, he was aware that a "few times over the years," a representative of plaintiff successfully sought permission from the parking lot operator to move vehicles to afford plaintiff access to the yard.

Since 2007, the president observes individuals crossing the lot and entering the gate and yard without impediment, and since 1999, the lot is kept open all day to enable members of the public to avoid having to go around the block. Some members of the public use the lot as a smoking area as well and no one has been prosecuted by defendant or any tenant of the lot for trespassing it. Nor has defendant prosecuted anyone for the graffiti on the walls of the buildings adjacent to the lot. The president denied that defendant posted any no-trespass signs on the wall adjacent to the lot, alleging that defendant's tenant posted a no-trespass sign. There are video surveillance cameras in the parking lot area that are controlled by a camera store for its own security.

C. Deposition of the salon director (NYSCEF 58)

The salon's director testified that he occasionally grants permission to plaintiff's board president for workers to walk through the salon, most recently some eight months earlier, and that he has denied such permission two or three times. He freely traverses the lot without impediment once a week and sees members of the general public crossing it. At his request, the parking lot attendant has moved vehicles to enable the removal to the street of the salon's garbage.

D. Defendant's contentions (NYSCEF 51-66)

Defendant observes that plaintiff's alleged hostile use of the lot commenced nine years before it commenced this action, short of the 10-year statutory period. Moreover, it argues, plaintiff's attempt to tack onto the nine years 66 years of alleged hostile use by its predecessors-in-interest is unsupported, as the 1950 survey relied on by plaintiff reflects no such use and plaintiff's title search company advised plaintiff by letter dated October 15, 2014, that none of the recorded instruments for the property reflects any such right of ingress or egress.

Additionally, defendant argues that plaintiff's right of access through the salon in its building is not restricted to emergencies, given section 16.3 of its condominium declaration affording each unit owner an easement for ingress and egress through the residential and commercial portions of the building. In section 16.4, it observes, access through the commercial space may be obtained on at least three business days' notice, with a one-day notice provided for in plaintiff's bylaws. Moreover, defendant notes, according to the salon director, the president of the condominium board requests access through the salon once every two to three months for nonemergent reasons.

Plaintiff identifies two of plaintiff's predecessors-in-interest as the condominium sponsor

and the prior owner which operated the building before the conversion since approximately December 1999 as a commercial building. Neither the sponsor nor the prior owner has been shown to have actually used the lot, defendant maintains, nor did either need to use it given the internal access to the yard through a first-floor door. Defendant also observes that the four contractors identified by plaintiff during the course of discovery as those who may have worked on the construction of plaintiff's building from 2004 to 2007 provided affidavits stating that they do not recall having used the lot to access the yard or having been told by the sponsor that it or anyone used the lot in that manner.

Defendant relies on the deposition of its president who testified that since defendant has owned the lot, plaintiff and the general public are permitted to cross it as a shortcut without interference from defendant or the tenant, who opens the West 18th Street gate and removes the West 17th Street chain each morning. It also observes that the salon director testified that he walks across the lot approximately once a week as do members of the public.

Notwithstanding the no-trespass sign, chain-link fence, and chain, defendant points out that plaintiff's board president concedes that there is pedestrian traffic on the lot. Moreover, although it is alleged in the complaint that the fence and chain do not preclude plaintiff's use of the lot, whereas the general public has been so precluded, defendant maintains that plaintiff's board president conceded that plaintiff's agents use the lot only during the day when the fence and chain are open, a time when the general public is not precluded. Nor has plaintiff's board president witnessed anyone being deterred from traversing the lot, defendant observes. In any event, the board president admitted that the public is not actually deterred from using the lot, even at night, and that plaintiff regularly and successfully seeks permission from the parking lot attendant to access the yard when a vehicle blocks the gate.

Defendant also relies on the failure of the contractors identified by plaintiff to support plaintiff's claim that its predecessors' use of the lot was hostile. Other evidence, defendant adds, reflects that defendant's tenant assists plaintiff in accessing the door to the yard, thereby demonstrating permissiveness.

For all of these reasons, defendant argues that as plaintiff's claimed use of the lot is the same as that of the general public, there is no easement by prescription as a matter of law, and that plaintiff's position that its use of the lot is unique and distinct from that of the general public fails. Nor may plaintiff raise an issue of fact that its alleged hostile use of the lot falls short of the requisite 10 years given defendant's letter to plaintiff memorializing the permission granted plaintiff to traverse the lot to reach its yard.

E. Plaintiff's contentions (NYSCEF 70)

In opposition, plaintiff complains that defendant improperly and mainly relies on its attorney's affirmation, most of which has no probative value, along with the deposition transcript of plaintiff's board president even though it is not annexed to the affirmation, and nonparty affidavits that were not produced during discovery in response to demands. It alleges that on April 15, 2019, approximately one month before discovery was to be completed, defendant subpoenaed the nonparty witnesses and was "uncooperative" in advising whether the depositions were proceeding and/or scheduling them to accommodate its ability to cross examine them. Moreover, it claims, defendant ultimately advised that the depositions were cancelled because the witnesses had no responsive testimony or documents, only to obtain their affidavits without affording plaintiff a chance to subpoena the witnesses before filing the note of issue on July 3, 2019. Plaintiff thus asks that defendant's motion be denied or a continuance ordered pursuant to CPLR 3212(f) to permit additional discovery or vacate the note of issue or stay the motion and

grant leave to depose the nonparty witnesses or pursuant to 22 NYCRR § 202.21(d), or pursuant to CPLR 3126 for an order striking defendant's answer for defendant's willful failure to disclose to it the affidavits.

Plaintiff also claims that defendant fails to demonstrate that the public's use of the lot as a shortcut between the two streets negates plaintiff's distinct use of it to access the yard through the gate, arguing that a use that is "separate and exclusive" from the public's use qualifies as a prescriptive easement if the plaintiff was the principal user and if the use is hostile. It maintains that the undisputed evidence shows that plaintiff is the sole user of the right of way across the lot for the purpose of accessing plaintiff's locked gate, and it relies for that proposition on the testimony of its board president.

Plaintiff also asserts that defendant's allegation that plaintiff's use of the lot was permitted as a matter of neighborly accommodation is unsupported absent evidence that plaintiff had sought defendant's permission to use the lot to access its door or that such permission had been granted during the prescriptive period, again relying on the testimony of the board president. Moreover, it observes, defendant's owner did not recall if defendant had given plaintiff or its predecessors permission.

That permission may be implied, plaintiff contends, constitutes a jury question absent "irrefutable proof of 'a history of cooperation and accommodation . . . ," evidence of which is too sparse without a showing of the frequency with which defendant accommodated plaintiff or that their interactions were regular or routine. Plaintiff cites the testimony of its board president as proof that plaintiff's employees were directed to cross the lot to the gate to avoid defendant or defendant's tenant and that generally, plaintiff's porter asked workers to arrive early at the lot to facilitate unhampered access to the gate. The board president also testified that having intended

solely to avoid damaging vehicles parked by the gate, plaintiff's requests that vehicles be moved does not constitute requests for permission to walk to the gate. Moreover, plaintiff maintains, permission from the tenant does not prove defendant's implied permission or neighborly accommodation or cooperation. In any event, it observes, defendant's owner testified that defendant had no direct interaction with plaintiff.

F. Defendant's reply contentions (NYSCEF 80)

Defendant claims to have demonstrated, *prima facie*, that given its proof that the lot was traversed by members of the general public, the presumption of hostility or adversity of plaintiff's alleged use of the lot is unwarranted. It denies plaintiff's assertion that its use of the lot is distinguishable from that of the public as the claim that plaintiff's agents exclusively and solely used the lot to gain access to the gate is immaterial as the gate is located on plaintiff's property, which is not part of the alleged easement. Consequently, plaintiff's agents and members of the public traverse the same lot in the same manner. Defendant also asserts that its tenant, the operator of the lot, and not plaintiff, is the principal user of the lot.

G. Analysis

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the "light most favorable to the

opponent of the motion and [the court] must give that party the benefit of every favorable inference." (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

To establish a claim for a prescriptive easement, it must be shown that that the use of the property in question was hostile or adverse, open and notorious, and continuous and uninterrupted for the prescriptive period (*Colin Realty Co., LLC v Manhasset Pizza, LLC*, 137 AD3d 838, 839 [2d Dept 2016], *lv denied* 27 NY3d 908 [2016]; *315 Main Street Poughkeepsie, LLC v WA 319 Main,* LLC, 62 AD3d 690, 690 [2d Dept 2009]; *Martin v New York Hosp. Med. Ctr. of Queens*, 34 AD3d 650 [2d Dept 2006]), which is 10 years (RPAPL 501, CPLR 212). Where the use of a property is shown by clear and convincing evidence to be open, notorious, continuous, and undisputed, a presumption of hostility arises, thereby shifting to the opposing party the burden of showing that the use was permitted. (*Duckworth v Nin Fun Chiu*, 33 AD3d 583, 583 [2d Dept 2006]).

A presumption of hostility does not, however, arise when the claimant's use of the property is not exclusive (*Susquehanna Realty Corp. v Barth,* 108 AD2d 909, 909 [2d Dept 1985]) or when the use of the property is permissive, which may be inferred "when the parties' relationship was one of neighborly cooperation or accommodation" (*Taverni v Broderick*, 111 AD3d 1197, 1198 [3d Dept 2013]; *Colin Realty*, 137 AD3d 838, 839). Moreover, unless the owner of the servient property is "made aware of the assertion of a hostile right," an adverse use is not established. (*Susquehanna*, 108 AD2d at 909).

Here, as defendant frames the issues presented as whether it demonstrates, *prima facie*, that the prescriptive period is less than 10 years, and/or that plaintiff's use of the lot was not exclusive or that it was permitted, and if so, that plaintiff raises no issues of fact in response.

1. Procedural issues

Although defendant did not annex to its cross motion a copy of the transcript of the deposition of plaintiff's board president, as plaintiff cites to and annexes the transcript in support of its arguments, it cannot claim that it is prejudiced. (*See e.g., Lombardi v Lombardi*, 127 AD3d 1038 [2d Dept 2015] [as opposing party submitted missing exhibit, party not prejudiced by defendants' failure to submit it]; *see also Wade v Knight Transp., Inc.*, 151 AD3d 1107 [2d Dept 2017] [opposing parties did not argue they were prejudiced by movant's failure to submit copies of pleadings on motion for summary judgment]). For the same reason, defendant's failure to annex a copy of the May 13, 2016 letter does not warrant that it be precluded from relying on it as plaintiff cites it in its complaint. As plaintiff was the source of defendant's knowledge of the existence of the four affiant-contractors, plaintiff was not foreclosed from independently contacting them, a circumstance that plaintiff unjustifiably fails to acknowledge. (*See Kropp v Town of Shandaken*, 91 AD3d 1087 [3d Dept 2012] [court properly considered affidavit of non-party witness and denied defendant's motion to vacate note of issue in order to depose witness, as defendant was aware of witness's identity during discovery and thus inclusion of witness's affidavit in plaintiff's summary judgment motion was not defendant's first notice that witness had pertinent knowledge]). In any event, there is no requirement that defendant disclose non-notice witnesses. (*See Awai v Benchmark Constr. Svce., Inc.*, 172 AD3d 978 [2d Dept 2019] [while court should not consider affidavit of notice witness submitted in opposition to motion where witness not previously disclosed absent valid excuse for failure to disclose, nonparty witness was not notice witness]).

Consequently, plaintiff's request for various forms of relief relating to these alleged failures is denied.

2. The prescriptive period

It is undisputed that defendant advised plaintiff in its May 13, 2016 letter that until construction on the lot commences, it "will probably continue to permit public access [through the lot], including by persons affiliated with [plaintiff]." This evidence demonstrates, *prima facie*, that as of May 13, 2016, less than 10 years after plaintiff was formed, it was expressly granted permission to use the lot.

That salon staff had crossed the lot to access the gate since approximately October 2006, when the lot was owned by plaintiff's predecessor-in-interest, raises no material issue of fact absent evidence that members of the public did not also use the lot during those years. In any event, the May 2016 letter was sent several months before October 2016 when the prescriptive easement would have ripened under that scenario.

3. Exclusivity

It is undisputed that plaintiff's agents crossed the lot to reach the gate located on plaintiff's premises and that members of the public crossed the lot to reach 17th Street or 18th Street, thereby demonstrating, *prima facie*, that plaintiff's use of the lot was not exclusive. Even assuming that plaintiff offers evidence of a clear demarcation of its alleged right of way, the alleged distinction among the destinations of plaintiff's agents and members of the public is immaterial especially where, as here, plaintiff offers no evidence that members of the public did not walk on the portion of the lot leading to the gate. Plaintiff's allegation that its usage of the lot is distinct from the public's is also unsupported absent any dispute that plaintiff's agents used the lot by walking on it, as did members of the public.

To the extent that a claimant's principal use of property would be sufficient to establish a prescriptive easement, it is undisputed that defendant's tenant is the principal user not only of the

lot but of plaintiff's allegedly unique path thereon, and plaintiff offers no evidence that its agents used the lot or the alleged path to the gate more frequently than did members of the public. That plaintiff has exclusive access to the gate is likewise immaterial as the gate is on plaintiff's property and thus, its use by plaintiff cannot be hostile, and the longstanding presence of the gate itself is immaterial for the same reason.

For all of these reasons, plaintiff fails to raise an issue of fact as to the lack of exclusivity of its use. The authority on which plaintiff relies is either distinguishable or is not persuasive.

Absent a presumption of hostility, the testimony of defendant's president demonstrates, *prima facie*, that defendant was not made aware of plaintiff's alleged assertion of a hostile right to the easement until plaintiff's cease-and-desist notices, after which defendant sent the May 2016 letter, a proposition plaintiff does not dispute. Reliance on the no-trespassing sign as proof that plaintiff's use of the lot was hostile fails as the photographs offered reflect that the sign belongs to the parking lot operator, not to defendant.

As defendant thereby establishes that plaintiff has no right to possession of defendant's property, the notice of pendency must be cancelled. (CPLR 6514; CPLR 6501 [notice of pendency may be filed in action in which judgment demanded would affect title to or possession, use or enjoyment of real property]; *Gallagher Removal Svce., Inc. v Duchnowski*, 179 AD2d 622 [2d Dept 1992] [as court granted summary judgment in favor of defendant landowner, court properly cancelled notice of pendency filed by plaintiff]; *see also Sorenson v 257/117 Realty, LLC*, 62 AD3d 618 [1st Dept 2009], *lv dismissed* 13 NY3d 935 [2010] [notice of pendency properly cancelled after court determined that plaintiff's claims were baseless]).

IV. CONCLUSION

Given this result, there is no need to address whether plaintiff's use of the lot was

permissive. Nor is there a need to address plaintiff's motion for an extension of its notice of pendency. Accordingly, it is hereby

ORDERED, that plaintiff's motion for an order extending the notice of pendency is denied; it is further

ORDERED, that defendant's cross motion for summary judgment is granted in its entirety, and the complaint is dismissed, and the clerk is directed to enter judgment accordingly; it is further

ORDERED, that the notice of pendency is hereby cancelled, and the County Clerk of New York County shall, upon service upon him of a copy of this order with notice of entry, cancel the aforesaid notice of pendency filed on July 13, 2016 (NYSCEF 9); it is further

ORDERED, that pursuant to CPLR 6514(c), given the dismissal of plaintiff's action against defendant, defendant is granted any costs and expenses occasioned by the filing and cancellation of the notice of pendency, including reasonable attorney fees incurred in defending the action on its merits. The amount of defendant's costs and expenses are referred to a Special Referee to hear and report; it is further

ORDERED, that counsel for defendant shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,[1] upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED, that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on

[1] Available on the Court's website at www.nycourts.gov/supctmanh under the "References" link on the navigation bar.

Courthouse and County Clerk Procedures For Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

1/6/2020	BARBARA JAFFE, J.S.C.
DATE	

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