

<b>Camara v Costco Wholesale Corp.</b>
2020 NY Slip Op 30977(U)
April 21, 2020
Supreme Court, New York County
Docket Number: 152399/2017
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 2EFM**

*Justice*

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**INDEX NO.** 152399/2017

ASTAN CAMARA,

Plaintiff,

**MOTION SEQ. NO.** 001 and 002

- v -

COSTCO WHOLESALE CORPORATION and TIAGO HOLDINGS, LLC,

Defendants.

**DECISION + ORDER ON MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 45, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 76

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 46, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75

were read on this motion to/for SUMMARY JUDGMENT.

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

In this personal injury action commenced by plaintiff Astan Camara, defendant Costco Wholesale Corporation (“Costco”) moves, pursuant to CPLR 3212 (motion sequence 001), for summary judgment dismissing the complaint and all cross claims asserted against it.

Defendant Tiago Holdings LLC (“Tiago”) moves, pursuant to CPLR 3212 (motion sequence 002), for summary judgment dismissing all claims and cross claims asserted against it.

Plaintiff opposes defendants’ motions and moves (motion sequence numbers 001 and 002), pursuant to CPLR 3212, for summary judgment on liability as against Costco and Tiago, as

well as to strike defendants' answers pursuant to CPLR 3126 due to their failure to provide discovery.<sup>1</sup>

#### **FACTUAL AND PROCEDURAL BACKGROUND:**

On January 8, 2017, plaintiff was allegedly injured at a Costco Store ("the store") located at 517 East 117<sup>th</sup> Street in Manhattan. Doc. 1. She thereafter commenced the captioned action against Tiago and Costco, which allegedly owned and leased the premises, respectively. Doc. 1. In her verified complaint filed March 14, 2017, plaintiff alleged that she fell due to a "broken, defective and cracked floor" and, as a first cause of action, alleged that both defendants were negligent, inter alia, in failing to keep the store in good repair. Doc. 1 at pars. 12-13. As a second cause of action, plaintiff alleged that Costco violated Labor Law section 376 by failing to properly maintain the floor of its "mercantile establishment." Doc. 1 at pars. 18-20.

Costco joined issue by its verified answer filed April 13, 2017. Doc. 4. Costco denied all substantive allegations of wrongdoing, asserted several affirmative defenses, and cross-claimed against Tiago for contribution and common-law and contractual indemnification. Doc. 4.

Tiago joined issue by its verified answer filed May 15, 2017. Doc. 22. Tiago denied all substantive allegations of wrongdoing, asserted several affirmative defenses, and cross-claimed against Costco for contribution, common-law and contractual indemnification, and breach of contract for failure to procure insurance. Docs. 16, 22.

Costco thereafter answered Tiago's cross claims, denying all substantive allegations of wrongdoing. Doc. 29.

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<sup>1</sup> This Court notes that: 1) although plaintiff's motions were labeled as cross motions in NYSCEF, neither motion was accompanied by a notice of cross motion or contains any reference to the fact that it is a cross motion; and 2) plaintiff's motions are duplicative insofar as they seek the same relief.

In her verified bill of particulars as to Tiago dated June 5, 2017, plaintiff alleged that, due to said defendant's negligence, "she was caused to trip and fall on a broken, defective and cracked floor." Doc. 35 at pars. 8, 23. She further alleged that defendants created the allegedly dangerous condition or had actual and/or constructive notice of the same. Doc. 35 at pars. 11-12. Additionally, she claimed that Tiago violated Labor Law section 376 by failing to maintain the premises. Doc. 35 at par. 21.

In her supplemental verified bill of particulars as to Tiago, she claimed that she was injured due, inter alia, to "an uneven surface." Doc. 35, Supp. Bill of Particulars, at par. 11.

A preliminary conference was held on September 7, 2017. Doc. 10. Subsequent discovery conferences were thereafter held on January 16, May 22, September 4, and December 18, 2018, and May 7, 2019. Docs. 10-14, 17. The May 7, 2019 status conference order set a June 21, 2019 note of issue filing deadline and directed that "if parties need a further [compliance conference they are] to contact part before 6/21/19." Doc. 17.

Plaintiff was deposed on November 14, 2017. Doc. 24. At her deposition, she testified that she visited the store once every month. Doc. 24 at 128. On the date of the incident, January 8, 2017, a cold, dry day, she entered the store with her husband, Alassane, and his friend Modibo Diakite. Doc. 24 at 70, 128-129, 131, 133. As she walked about two feet behind her husband and Diakite, she tripped on a "hole" and fell to the ground. Doc. 24 at 143-144. She had been in that part of the store on prior occasions but never saw the hole or complained to anyone about the condition of the floor in that area. Doc. 24 at 142-144. She did not know where she was looking when she tripped or whether anything was blocking her view. Doc. 24 at 145-146. She did not remember whether her foot or toe caused her to trip. Doc. 24 at 147. Nor was she aware of any witnesses to the incident. Doc. 24 at 148-149.

After plaintiff fell, the manager of the store asked her to fill out an incident report. Doc. 24 at 153-156. In the accident report, she wrote that “[she] fell on the floor and injured [her]wrist.” Doc. 24 at 158; Doc. 42.

At her deposition, plaintiff was asked to identify photographs she took at the store after the incident and testified that one of the same depicted the area in which she fell, which area she circled on the photograph. Doc. 24 at 139-140, 159-162; Doc. 25.

Patrick Giammalvo, an Assistant General Manager for Costco, testified on behalf of said defendant. Doc. 27 at 7-8. He stated that Costco performed floor walks every hour looking for spills or any other unsafe conditions. Doc. 27 at 28-31, 33-34. Any problems observed during the floor walk would be recorded in a log and a manager would need to sign off on the correction of the condition. Doc. 27 at 34-35. At his deposition, Giammalvo identified the safety inspection log from the day of the incident, which did not reflect any problems with the floor in the store. Doc. 27 at 53; Doc. 43.

Giammalvo was shown the photograph identified by plaintiff depicting the scene of the accident. Although he admitted that there “could be a crack” in that area, he inspected the area after plaintiff fell to see what she could have tripped on and “didn’t notice anything out of the ordinary.” Doc. 27 at 75-80. He maintained that the area looked the same as it did in 2012, when he began working at the store. Doc. 27 at 79, 97.

Giammalvo believed that the store was owned by Bloomenfeld [sic] Development Group, that Tiago was a division of that company, and that Costco was the lessee of the premises. Doc. 27 at 46-47. He was not aware of any complaints by Costco to Tiago regarding the area of the floor of the store in the photograph marked by plaintiff at her deposition. Doc. 27 at 97-98.

Mike Classi, Director of Property Management for Blumenfeld Development Group (“Blumenfeld”), a developer, property owner, and management company, testified on behalf of Tiago, which, he stated, was an entity “held by Blumenfeld”. Doc. 38 at 6. Classi testified that Tiago owned and developed the property where the store was located, which building came into service in 2009. Doc. 38 at 9-10. Classi did a bi-weekly general inspection of the mall where the store was located but did not specifically inspect the tenant stores. Doc. 38 at 15-17, 28. Classi identified the lease for the store between Tiago and Costco, which provided, inter alia, that Costco was permitted to make structural alterations to the store provided Tiago approved the plans for such work. Doc. 38 at 20; Doc. 40 at par. 10.4(c).

According to Classi, if Costco wanted to make a structural change to the store, it had to obtain Tiago’s permission. Doc. 38 at 30. He believed that Costco requested permission to drill through the cement slab in order to run power conduits to an eye examination lab near the store entrance, which was near the area where plaintiff fell. Doc. 38 at 31-32.

Classi admitted that, if a structural element of the premises needed repair, it was Tiago’s duty to perform it. Doc. 38 at 37, 43. However, Tiago never made any structural repairs in the store. Doc. 38 at 37-38. Further, Classi said that patching the floor would not have constituted a structural repair. Doc. 38 at 43-44. He then stated, however, that the lease required Tiago to maintain structural elements, including floor slabs. Doc. 38 at 47-49.

When asked to describe what was depicted in the photograph marked by plaintiff, he responded that it “seems like some shoddy patch that somebody tried to do to cover something up.” Doc. 38 at 50. He insisted that it was a “form of a repair that was unauthorized by ownership and would have been ill-advised had we known about it.” Doc. 38 at 50. He maintained that there was never a complaint made to Tiago about that area of the floor. Doc. 38

at 51. He could not state for certain from the photograph whether the area depicted was hazardous or when the patchwork depicted by the photograph was performed. Doc. 38 at 54-55.

On June 20, 2019, plaintiff's counsel filed a note of issue and certificate of readiness for trial representing, inter alia, that "[d]iscovery proceedings now known to be necessary [were] completed", there had been "a reasonable opportunity to complete [discovery]", and that "[t]here has been compliance with any order issued pursuant to the Precalendar Rules (22 NYCRR 202.12)". However, plaintiff's counsel also stated that "[p]laintiff does not waive any outstanding discovery." Doc. 18.

By notice of motion dated July 8, 2019, Costco now moves, pursuant to CPLR 3212 (motion sequence 001), for summary judgment dismissing the complaint and all cross claims against it. In support of the motion, Costco submits, inter alia, an attorney affirmation; the pleadings; the note of issue; the deposition transcripts of plaintiff and Giammalvo; a photograph of the site of the incident; an incident report; and the affidavit of its expert engineer, James Fordham, P.E. Docs. 19-29. Costco argues that it is entitled to summary judgment dismissing the complaint against it because plaintiff was injured by a nonactionable trivial defect.

In his affidavit, Fordham states that he is a professional engineer licensed in New York and that he performed an inspection of the alleged accident site on April 12, 2019. Doc. 44. In the area of the accident, there was a cement patch measuring 8 feet by 1 foot which had a crack within it. Doc. 44. The cement patch was spalled in certain areas. Doc. 44. Fordham represented that he used a digital micrometer to measure the spalled areas of the patching and that "the maximum height differential along the spalled area of concrete was measured to be 0.1350 inches (less than 9/64 of an inch)" and did not violate the New York City Building Code. Doc. 28. He further opined that the "minor spalling and cracking observed along the floor that

was allegedly involved in the incident was negligible, did not constitute a trip hazard and violated no known code or standard.” Doc. 28.

By notice of motion filed July 31, 2019, Tiago moves, pursuant to CPLR 3212 (motion sequence 002), for summary judgment dismissing the complaint and all cross claims against it. Doc. 30. In support of the motion, Tiago submits, inter alia, an attorney affirmation; the pleadings; the bill of particulars; the deposition transcripts of plaintiff, Giammalvo, and Classi; the lease between Tiago, as owner, and Costco, as lessee; and a “Daily Floor-[W]alk/Safety Inspection” log dated January 8, 2017. Docs. 30-44. Tiago, relying on Fordham’s affidavit, argues that the allegedly dangerous condition was a nonactionable trivial defect. Doc. 31.

By notice of motion filed September 25, 2019 (motion sequence 001), plaintiff moves: a) pursuant to CPLR 3212, for summary judgment as to liability against Costco and Tiago, and setting this matter down for an immediate trial as to damages; b) pursuant to CPLR 3126, striking defendants’ answers based on their willful refusal to provide discovery; and c) for such other and further relief as this Court deems just and proper. Doc. 47. In support of the motion, and in opposition to defendants’ motions, plaintiff submits, inter alia, an attorney affirmation; the discovery orders issued by this Court; as well as the affidavit of its expert Richard Robbins. Docs. 47-57.

By notice of motion filed September 25, 2019 (motion sequence 002), plaintiff moves: a) pursuant to CPLR 3212, for summary judgment as to liability against Costco and Tiago, and setting this matter down for an immediate trial as to damages; b) pursuant to CPLR 3126, striking defendants’ answers based on their willful refusal to provide discovery; and c) for such other and further relief as this Court deems just and proper. Doc. 58. In support of the motion, and in opposition to defendants’ motions, plaintiff submits, inter alia, an attorney affirmation; the

discovery orders issued by this Court; as well as the affidavit of its expert Richard Robbins. Docs. 58-68.

Although plaintiff's motions seek summary judgment against Costco and Tiago on liability, her focus is primarily on arguing that defendants' motions for summary judgment must be denied because the determination of whether a condition constitutes a trivial defect is usually a question of fact for a jury.<sup>2</sup> Plaintiff also argues that defendants' answers must be stricken based on their repeated failure to comply with this Court's discovery orders.

In a reply affirmation in further support of its motion for summary judgment and in opposition to plaintiff's motions against it (Doc. 69), Tiago asserts that, on October 2, 2019, plaintiff withdrew that branch of its cross motion seeking discovery from it. Doc. 75. Thus, urges Tiago, that branch of plaintiff's cross motion seeking discovery from it must be denied as moot. Tiago further asserts the branch of plaintiff's motion seeking summary judgment must be denied as untimely, as well as on the ground that, although denominated as a cross motion in NYSCEF, the application is not a cross motion and was not made returnable on the same date as Tiago's main motion. Doc. 69.

In a reply affirmation in further support of its motion for summary judgment and in opposition to plaintiff's motion against it, Costco argues that plaintiff's motion seeking discovery must be denied since plaintiff never sought permission from this Court to make the motion, because plaintiff waived any further discovery by filing the note of issue, and because any remaining discovery was stayed by Costco's motion for summary judgment. Doc. 76.

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<sup>2</sup> Plaintiff's argues that she is entitled to summary judgment on liability because defendants failed to establish that the alleged condition was a trivial defect as a matter of law. This contention is somewhat ironic given her assertion that this issue is generally one for a jury. To the extent that plaintiff seeks to rely on the affidavit of her expert architect, Richard Robbins (Docs. 57, 68), to impose liability, such effort is misguided. Although Robbins opines, inter alia, that plaintiff's accident was caused by a change in the friction coefficient on the floor, he did not inspect the premises and thus had no basis upon which to render such an opinion. *See Braswell v Union Sq. Hospitality Group*, 2016 NY Slip Op 31594(U) (Sup Ct New York County 2016).

Costco further asserts that the branch of plaintiff's motion seeking summary judgment must be denied as untimely, having been filed 97 days after the filing of the note of issue. Further, asserts Costco, the purported cross motion must be denied since it was not made returnable on the same date as Costco's motion. Doc. 76.

## LEGAL CONCLUSIONS:

### A. Defendants' Motions For Summary Judgment

A party moving for summary judgment must establish its prima facie entitlement to judgment as a matter of law, through admissible evidence sufficient to eliminate material issues of fact. See CPLR 3212(b); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). The movant's burden is "heavy," and "on a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party." *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 (2013) (internal quotation marks and citation omitted). If such a showing is not made, "the motion must be denied, regardless of the sufficiency of the opposing papers." *Genesis Merchant Partners, L.P. v Gilbride, Tusa, Last & Spellane, LLC*, 157 AD3d 479, 479 (1st Dept 2018); *see also Winegrad*, 64 NY2d at 853.

When moving for summary judgment [on the ground that plaintiff was injured by a trivial defect], a defendant must make "a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 79 [2015]). "[T]here is no ... per se rule that a defect must be of a certain minimum height or depth in order to be actionable" (*id.* at 77 [internal quotation marks omitted], citing *Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]). A finding that a condition is a trivial defect must "be based on all the specific facts and circumstances of the

case, not size alone" (*Hutchinson*, 26 NY3d at 77). The issue is generally a jury question because it is a fact-intensive inquiry (*id.*).

*McCabe v Avalon Bay Communities, Inc.*, 177 AD3d 487, 488-489 (1st Dept 2019).

Although defendants, relying on Fordham's affidavit, maintain that the condition which caused plaintiff to fall was a nonactionable trivial defect, "even a trivial defect can sometimes have the characteristics of a snare or a trap [internal quotation marks and citation omitted]."

*Abreu v NYCHA*, 61 AD3d 420, 421 (1st Dept 2009) (lengthy irregularity in cement might have been capable of catching plaintiff's sandal). While Fordham sets forth the measurements of the spalled areas of the patching and concludes that "the maximum height differential along the spalled area of concrete was measured to be 0.1350 inches (less than 9/64 of an inch)" and did not violate the New York City Building Code (Doc. 28), this does not, in and of itself, entitle defendants to summary judgment. Rather, Fordham's opinion that the "minor spalling and cracking observed along the floor that was allegedly involved in the incident was negligible, did not constitute a trip hazard and violated no known code or standard" (Doc. 28) is conclusory.

*See Calderon v 88-16 N. Blvd., LLC*, 135 AD3d 681, 683 (2d Dept 2016).

Fordham submitted extremely specific measurements regarding the height of the spalling but, despite inspecting the accident site, did not measure the jagged crack which is clearly visible in the photograph marked by plaintiff at her deposition. Doc. 25. Defendants do not deny that the crack existed at the time of the incident. "When the 'width, depth, elevation, irregularity and appearance of the defect' are considered (*Trincere*, 90 NY2d at 978), an issue of fact remains as to whether the [crack] may be characterized as a trap or a snare such as could, without warning, snag a passerby's shoe." *Hutchinson*, 110 AD3d at 556; *cf.*, *McCullough v Riverbay Corp.*, 150 AD3d 624 (1<sup>st</sup> Dept 2017) (defendant granted summary judgment where it demonstrated that

defect was trivial as a matter of law and “photographs did not depict any jagged edges or any rough, irregular surface”). Here, the photograph marked by plaintiff alone presents an issue of fact as to whether the defect is trivial. *See Johnson v NY City Hous. Auth.*, 26 Misc 3d 1235(A), 1235A, 2010 NY Slip Op 50400(U), \*2-4 (Sup Ct, NY County 2010). Thus, defendants’ motions for summary judgment dismissing all claims and cross claims against them are denied.

### **B. Plaintiff’s Motions For Summary Judgment**

As Costco and Tiago assert, those branches of plaintiff’s motions seeking summary judgment (motion sequence numbers 001 and 002) must be denied as untimely. Docs. 69 and 76. The preliminary conference order directed that all motions for summary judgment be filed within 60 days after the filing of the note of issue. Doc. 10. Although the note of issue was filed on June 20, 2019 (Doc. 18), plaintiff’s motions were not filed until September 25, 2019, 37 days after the filing of the note of issue. Docs. 47 and 58.

Although an untimely cross motion may be considered by a court where the issues involved are the same as those raised in a timely initial motion (*see, e.g., Jarama v 902 Liberty Ave. Hous. Dev. Fund Corp.*, 161 AD3d 691, 691-692 (1<sup>st</sup> Dept 2018)), it is evident that plaintiff’s motions are not cross motions. Although plaintiff’s applications are each filed on NYSCEF as a “notice of cross-motion”, they do not contain a notice of cross motion or otherwise reflect that they are cross motions, and were not made returnable on the same date as defendants’ motions. See CPLR 2215. Docs. 45, 47, and 58.

Even assuming, arguendo, that the motions were not denied on procedural grounds, plaintiff would still not be entitled to summary judgment against Costco or Tiago on liability since a

question of fact exists regarding whether the condition which allegedly caused plaintiff's injuries was a nonactionable trivial defect.

### C. Plaintiff's Motions For Discovery Sanctions

The branches of plaintiff's motions seeking discovery sanctions as against Tiago (motion sequence numbers 001 and 002) are denied as moot since, as set forth above, plaintiff's counsel agreed to withdraw said branch of the applications. Doc. 75.

The branches of plaintiff's motions seeking discovery sanctions as against Costco (motion sequence numbers 001 and 002) are also denied. Initially, plaintiff failed to comply with the Part 2 Rules, which require, inter alia, that when a discovery dispute arises, a conference must be held with this Court and, if such conference fails to resolve the dispute, this Court must give the movant permission to file the motion. Moreover, as noted above, the May 7, 2019 status conference order set a June 21, 2019 note of issue filing deadline and directed that "if parties need a further [compliance conference they are] to contact part before 6/21/19." Doc. 17. However, the motion papers are devoid of any indication that such a conference was conducted or that this Court granted plaintiff permission to file a discovery motion.

Additionally, "[b]y filing the note of issue and certificate of readiness prior to moving pursuant to CPLR 3126 for the imposition of a discovery sanction, [plaintiff] waived any objection to [Costco's alleged] failure to meet [its] disclosure obligations (citations omitted). *J.H. v City of New York*, 170 AD3d 816, 818 (2d Dept 2019); see also *Marte v City of New York*, 102 AD3d 557, 558 (1<sup>st</sup> Dept 2013). The representation by plaintiff's counsel on the certificate of readiness that "[p]laintiff does not waive any outstanding discovery" is of no legal effect, and is indeed illogical, given his simultaneous representations that, among other things, "[t]here has

been a reasonable opportunity to complete [discovery]”, all discovery was complete, and that there had been compliance with all court orders relating to discovery. Doc. 18.

The remaining contentions are either without merit or need not be addressed by this Court given the foregoing findings.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendant Costco Wholesale Corporation seeking summary judgment dismissing the complaint and all cross claims against it pursuant to CPLR 3212 (motion sequence 001) is denied; and it is further

ORDERED that the motion by defendant Tiago Holdings LLC seeking summary judgment dismissing the complaint and all cross claims against it pursuant to CPLR 3212 (motion sequence 002) is denied; and it is further

ORDERED that the branch of the motion by plaintiff Astan Camara seeking summary judgment on liability as against defendants Costco Wholesale Corporation and Tiago Holdings LLC pursuant to CPLR 3212 (motion sequence 001 is denied); and it is further

ORDERED that the branch of the motion by plaintiff Astan Camara seeking summary judgment on liability as against defendants Costco Wholesale Corporation and Tiago Holdings LLC pursuant to CPLR 3212 (motion sequence 002 is denied); and it is further

ORDERED that the branches of the motions by plaintiff Astan Camara seeking discovery sanctions as against defendant Tiago Holdings LLC pursuant to CPLR 3126 (motion sequence numbers 001 and 002) are denied as moot; and it is further

ORDERED that the branches of the motions by plaintiff Astan Camara seeking discovery sanctions as against defendant Costco Wholesale Corporation pursuant to CPLR 3126 (motion sequences 001 and 002) are denied; and it is further

ORDERED that the parties are directed to appear for an early settlement conference before Mediator Miles Vigilante upon notice by Mediator Vigilante, at 80 Centre Street, Room 103; and it is further

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

4/21/2020  
DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE