

RRES Rest. Group, LLC v Anguard Ins. Co.
2020 NY Slip Op 31800(U)
June 10, 2020
Supreme Court, New York County
Docket Number: 650164/2015
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 53EFM

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RRES RESTAURANT GROUP, LLC D/B/A DESTINO RESTAURANT,

Plaintiff,

- v -

AMGUARD INSURANCE COMPANY,

Defendant.

Table with 2 columns: Field Name, Value. Rows: INDEX NO. 650164/2015, MOTION DATE 05/28/2020, MOTION SEQ. NO. 002 002

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RRES RESTAURANT GROUP, LLC,

Plaintiff,

-against-

EFFECTIVE PLUMBING CORP.,

Defendant.

INDEX NO. 155485/2016

MOTION DATE 05/28/2020

MOTION SEQ. NO. 003 004 006

-----X

EFFECTIVE PLUMBING CORP.,

Third-Party Plaintiff,

-against-

ALL COUNTY SEWER & DRAIN, INC.,

Third-Party Defendant.

DECISION + ORDER ON MOTION

-----X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER

The dispositive issues are (i) whether RRES Restaurant Group, LLC (**RRES**) failed to comply with the terms of its insurance policy by settling a lawsuit with its landlord and releasing all claims against third parties without notifying Amguard Insurance Company (**Amguard**) and (ii) whether RRES's release of Effective Plumbing Corp. (**Effective Plumbing**) for the very claims at issue is a bar to bringing this lawsuit. Because the court answers both questions in the affirmative, (i) Amguard's motion (Mtn. Seq. No. 002) for an order pursuant to CPLR § 3212 granting summary judgment dismissing the complaint and a declaratory judgment that Amguard is not obligated to pay any more monies to RRES, is granted, (ii) Effective Plumbing's motion (Mtn. Seq. No. 003) for an order pursuant to CPLR § 3212 granting summary judgment (a) dismissing the complaint of RRES, (b) on its third-party complaint against All County Sewer & Drain, Inc. (**All County**), (c) dismissing All County's counterclaim, and (d) awarding costs and sanctions pursuant to CPLR § 8303-a and 22 NYCRR § 130.1-1 against RRES, its members, or its attorneys is granted in part as set forth below and (iii) All County's motion for an order pursuant to CPLR § 3212 granting summary judgment dismissing the complaint of RRES and dismissing the third-party complaint of Effective Plumbing is granted.

I. The Relevant Facts and Circumstances

RRES was the commercial tenant of the premises located at 891 First Avenue, New York, New York, consisting of the ground floor, mezzanine, and basement of the subject building (the **Premises**), in which RRES operated a restaurant known as Destino from February 2006 to November 2013. RRES obtained a policy of insurance from Amguard under Businessowner's Policy # RRB404050, for the policy period from January 20, 2013 to January 20, 2014 (the **2013 Amguard Policy**).

The 2013 Amguard Policy provides coverage for “direct physical loss of or damage to Covered Property at the premises . . . caused by or resulting from any Covered Cause of Loss” (650164/2015, NYSCEF Doc. No. 94, § I.A). Covered Property includes buildings and certain property (*id.*, § I.A.1). The 2013 Amguard Policy also provides coverage for “the actual loss of business income . . . sustain[ed] due to the necessary suspension of . . . “operations” during the “period of restoration” (*id.*, § I.A.5.f). The 2013 Amguard Policy expressly excludes coverage for, among other things, losses occurring as a result of an ordinance or law, governmental action, weather conditions, or negligent work performed on or off of the Premises (*id.*, §§ I.B.1 [a], [c], II.B.3). Section I.B the 2013 Amguard Policy further provides that Amguard will not pay for either (i) neglect of an insured to use all reasonable means to save and preserve property from further damage at and after the time of loss or (ii) continuous or repeated seepage or leakage of water, or the presence or condensation of humidity, moisture or vapor, that occurs over a period of 14 days or more (*id.*, §§ I.B.2. [k], [p]). Significantly, Section III.K.1. of the 2013 Amguard Policy provides:

K. Transfer Of Rights Of Recovery Against Others To Us.

1. Applicable to Businessowners Property Coverage:

If any person or organization to or for whom we make payment under this policy has rights to recover damages from another, those rights are transferred to us to the extent of our payment. ***That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them.*** But you may waive your rights against another party in writing.

(*id.*, ¶¶ III.K.1. [emphasis added]).

On March 29, 2010, the premises sustained significant damage in a flood caused by a PVC pipe failure and an improper plug (the **2010 Flood**). The premises had to undergo substantial

alterations as a result of the 2010 Flood, which caused the restaurant to close for approximately eight months. RRES filed a claim for its losses in connection with the 2010 Flood under its insurance policy with its prior insurance carrier, Argo Insurance, and ultimately settled the claim for approximately \$400,000. A second flood occurred in the Premises in January 2013 (the **January 2013 Flood**), which caused damage to the vestibule area and necessitated a three-day closure of the restaurant to repair the damage. Accordingly, RRES filed a claim with Amguard and the parties settled the claim. A third flood occurred in the Premises on July 5, 2013 (the **July 5, 2013 Flood**) caused by a failed rising pipe and sewage line, which emptied sewage into the bar, mezzanine, and vestibule areas of the Premises. Following a cleanup of the Premises, the restaurant was able to re-open later that day. A fourth flood occurred later in July 2013 (the **Second July 2013 Flood**). According to Rebekah Altieri, one of the principals of RRES, the Second July 2013 Flood was caused by workers from Effective Plumbing, the plumbing company hired by the landlord to perform plumbing services on the dental office located on the floor directly above the restaurant, when they were cutting pipes on the day of the Second July 2013 Flood. On August 26, 2013, the restaurant closed to conduct repairs and renovations. RRES received monetary disbursements from Amguard for the July 5, 2013 Flood totaling \$136,637.96 for business interruption and repairs. Ultimately, after the renovations were complete, and during the restaurant's "soft re-opening," on November 24, 2013, a pipe fell from the ceiling in the basement and struck the restaurant's chef on the head (the **November 2013 Incident**). Following the November 2013 Incident, the restaurant closed and never reopened.

RRES filed a claim with Amguard in connection with the July 5, 2013 Flood. After conducting an investigation and review of the claim, Amguard made payments to RRES on the claim

totaling \$136,637.96 for loss of business and property damage. Subsequently, RRES filed a claim with Amguard in connection with the November 2013 Incident. RRES provided three different causes for the loss: (1) a heating steam pipe was turned on and aggravated the saturated concrete ceiling in the basement, (2) the damages arose from the July 5, 2013 Flood, and (3) a new pipe break occurred sometime after the “soft re-opening” of the restaurant in November 2013.

By letter, dated June 2, 2014, Amguard notified RRES that it was denying the claim based on the November 2013 Incident. (650164/2015, NYSCEF Doc. No. 84, Ex. 8). Amguard explained that it was denying coverage because deterioration and spalling of the concrete ceiling “are the result of continued and repeated exposure to water, the damages from which are not covered by [the 2013 Amguard Policy]” (*id.*). Amguard further noted that “there is an admission of ongoing water leaks at your leased premises in the rider, Page 13, Section 66, contained in your lease agreement signed in August 2005” (*id.*). With respect to the damages that RRES claimed was related to the July 5, 2013 Flood, Amguard stated that “our investigation has concluded that the damage and business interruption reported to have occurred sometime shortly after November 18, 2014, are not related to the July 5, 2013 loss occurrence” (*id.*). Amguard further noted that it found no evidence that the November 2013 Incident was caused by a new pipe break that occurred after the “soft re-opening” (*id.*). Additionally, Amguard relied on the provision that expressly excludes coverage for losses resulting from any acts or decisions of a governmental body that prevents the restaurant from operating (*id.*).

The prior landlord, Harry Field Realty, LLC (**Harry Field**), sued RRES to recover unpaid rent, alleging that RRES had not paid any rent since July 2013. In the landlord/tenant action, Ms. Altieri claimed that Harry Field's acts and omissions, including its failure to make necessary repairs to the Premises, caused RRES to close the restaurant. Subsequently, however, Madison Realty (**Madison**) acquired the subject building from Harry Field. Significantly, as it relates to the instant motions, RRES entered into a settlement agreement with Madison (the **Stipulation of Settlement**) pursuant to which Madison paid RRES \$395,000 and RRES agreed to vacate the premises and release all claims, including claims for negligent maintenance or repairs at the Premises against Harry Field and all contractors and plumbers, including Effective Plumbing. Specifically, the so-ordered Stipulation of Settlement states that “[e]ach party withdraws and releases all claims against the other” and that “[t]he waiver of claims by all parties includes waiver of right to return of security and all claims against the parties['] respective successors-in-interest, insurance carriers, (except as noted in ¶3 [i.e., except “respondent’s claims against its own insurer”]), contractors, plumbers and attorneys” (650164/2015, NYSCEF Doc. No. 70 ¶¶ 3, 6). RRES did not notify Amguard of the Settlement.

RRES filed a summons and complaint against Amguard on January 20, 2015. This lawsuit is captioned *RRES Restaurant Group, LLC d/b/a Destino Restaurant v Amguard Insurance Company* and bears the Index No. 650164/2015 (the **Amguard Lawsuit**), asserting causes of action for breach of contract and bad faith and seeking a declaratory judgment that (1) any damages suffered by plaintiff in connection with the flooding incidents described in this Complaint are covered under the Policy, and (2) plaintiff is entitled to insurance coverage from defendant these damages pursuant to the Policy.

Subsequently, and notwithstanding the release as to claims against Effective Plumbing in the Stipulation of Settlement, RRES sued Effective Plumbing for negligence in a separate lawsuit (the **Effective Plumbing Lawsuit**) by filing a summons with notice on June 30, 2016 and a complaint on July 1, 2016 in the New York State Supreme Court, New York County, in the matter captioned *RRES Restaurant Group, LLC v Effective Plumbing Corp.*, index No. 155485/2016 alleging that the damage resulting from the November 2013 Incident was a direct result of the flooding caused by Effective Plumbing's negligent plumbing work. RRES also did not notify Amguard of the Effective Plumbing Lawsuit.

On August 1, 2017, Effective Plumbing filed a third-party complaint against All County, asserting that All County is primarily responsible for any liability to RRES and if Effective Plumbing is found to be liable, it is entitled to indemnification and contribution from All County. Motion sequence numbers 003 and 004 in the Effective Plumbing Lawsuit have been submitted to this court to be decided in conjunction with motion sequence number 002 in the Amguard Lawsuit (155485/2016, NYSCEF Doc. No. 202).

II. Discussion

Summary judgment shall be granted only when the movant presents evidentiary proof in admissible form that there are no triable issues of material fact and that there is either no defense to the cause of action or that the cause of action or defense has no merit (CPLR § 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The proponent of a summary judgment motion carries the initial burden to make a *prima facie* showing of entitlement to judgment as a

matter of law (*Alvarez*, 68 NY2d at 324). Failure to make such a showing requires denial of the motion (*id.*, citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing is made, the burden shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a triable issue of fact (*Alvarez*, 68 NY2d at 324).

A. Amguard's Motion for Summary Judgment is Granted and RRES's Declaratory Judgment and Breach of Contract Causes of Action are Dismissed

Amguard argues that summary judgment must be granted because RRES impaired Amguard's right to pursue subrogation claims against Harry Field and Effective Plumbing in violation of the 2013 Amguard Policy by settling its claims with Harry Field and releasing claims against Effective Plumbers without notifying Amguard in violation of its obligations under the 2013 Amguard Policy as described above. As a result, Amguard argues that it was relieved of any liability under the 2013 Amguard Policy as a matter of law. In addition, Amguard argues that RRES's cause of action for bad faith and punitive damages should be dismissed because the uncontroverted documentary evidence establishes that Amguard did not act in bad faith or engage in egregious conduct directed to RRES or the general public.

In its opposition papers, RRES argues that because Amguard wrongly limited liability and made only a partial payment with respect to the July 2013 losses and denied liability for the November 2013 Incident, RRES did not impair Amguard's subrogation rights by settling the landlord/tenant matter and commencing an action against Effective Plumbing. RRES also argues that Amguard's breach of the insurance contract by wrongly limiting or denying coverage and intentionally delaying the claims process relieved RRES of its obligations under the insurance

contract and it was free to take actions to mitigate its damages by settling or pursuing its claims.

RRES's arguments fail.

As an initial matter, because it is undisputed that RRES released Harry Field and all contractors and plumbers from all claims, it is RRES's burden as the insured "to establish by virtue of an express limitation in the release or of a necessary implication arising from the circumstances of its execution that the release did not operate to prejudice the subrogation rights of the insurer" (*Weinberg v Transamerica Ins. Co.*, 62 NY2d 379, 382-383 [1984]). As the Court of Appeals has explained:

once the insurer has established the existence of a release, alleged to have constituted a breach of the insured's agreement not to prejudice the insurer's subrogation rights, we conclude that it is fair and fitting and no undue imposition on the insured to place on him the burden of persuasion that there was no such breach.

(*id.* at 383).

Here, RRES has failed to meet its burden to establish that its settlement and release of claims did not prejudice Amguard's subrogation rights. Pursuant to Section III.K.1 of the 2013 Amguard Policy, RRES was required to transfer its rights to recover from any third parties to Amguard and "do everything necessary to secure [Amguard's] rights, and . . . do nothing after loss to impair them" (NYSCEF Doc. No. 94, § III.K.1). The evidence establishes that RRES settled its claim against Harry Field without notifying Amguard and executed a general release pursuant to the so-ordered Stipulation of Settlement waiving all claims against Harry Field and all plumbers and contractors who performed work on the subject building, including Effecting Plumbing (650164/2015, NYSCEF Doc. No. 70, ¶¶ 3, 6; NYSCEF Doc. No. 76, Altieri Tr. at 41:7-10,

74:11-75:11). By settling with Harry Field and releasing all claims against third parties without notifying Amguard, RRES necessarily impaired Amguard's subrogation rights in violation of the 2013 Amguard Policy.

Significantly, the evidence establishes that Amguard did not waive its subrogation rights. First, it is undisputed that the losses in question occurred in July 2013 and November 2013, and the so-ordered Stipulation of Settlement with Harry Field was entered into on July 14, 2014. Therefore, the three-year statutory period for Amguard to bring a claim against a third party had not yet run when RRES settled its claims. In addition, in support of its motion, Amguard adduces a letter, dated January 25, 2019, from Steven R. Dyki as counsel for Amguard to Jason M. Cieri as counsel for RRES, in which Amguard unequivocally asserts its subrogation rights and states: "Amguard Insurance Company does not waive any additional rights, and specifically reserves all rights under the Amguard Policy" (650164/2015, NYSCEF Doc. No. 80). There is simply no evidence to support an implied waiver of Amguard's subrogation rights. Accordingly, Amguard's motion for summary judgment is granted and RRES's first cause of action (declaratory judgment) and second cause of action (breach of contract) are dismissed.

B. RRES's Bad Faith Cause of Action is Dismissed

As a general rule, "[p]unitive damages are not recoverable for an ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights" (*Rocanova v Equitable Life Assur. Soc. Of U.S.*, 83 NY2d 603, 613 [1994]). Punitive damages are only recoverable for a breach of contract where (1) "the breach of contract also involves a fraud evincing a high degree of moral turpitude and demonstrating such wanton dishonesty as to imply

a criminal indifference to civil obligations,” and 2) “the conduct was aimed at the public generally” (*id.* [quotation marks and citations omitted]). As the Court of Appeals has observed,

[a] complaint does not state a claim for compensatory or punitive damages by alleging merely that the insurer engaged in a pattern of bad-faith conduct. The complaint must first state a claim of egregious tortious conduct directed at the insured claimant. Only then does an alleged pattern of bad-faith conduct attain legal significance insofar as it demonstrates that a public wrong would be vindicated by the award of punitive damages.

(*id.*, at 615).

Amguard argues that the evidence establishes that there are no issues of fact that it investigated, reviewed, and paid benefits for the July 5, 2013 Claim, and that it had a good faith basis for denying the November 2013 Claim, and that it is therefore entitled to summary judgment dismissing the bad faith cause of action. In its opposition papers, RRES argues that Amguard acted in bad faith by improperly limiting RRES’s recovery on its claims and delaying the claims process. Here, again, RRES’ argument fails.

Amguard has come forward with sufficient evidence to establish that it did not act in bad faith. The evidence establishes that Amguard relied on independent adjusters to perform a field investigation and it employed independent accountants for an assessment of damages (650164/2015, NYSCEF Doc. No. 84, Loftus Tr. at 21:6-13; *id.*, Ex. 9; NYSCEF Doc. No. 82, McGrady Tr. at 29:24-31:4, 116:16-117:21; *id.*, Ex. 5-9). Based on the documentary evidence, Amguard acted in good faith in determining RRES’s business income loss and loss to covered

property based on the reports of its independent adjusters and accountants and based on its review of all available financial records and documentation.

The evidence further establishes that in denying the November 2013 Claim, Amguard relied on RRES's engineer and the independent adjuster and determined that the loss was the result of "continuous or repeated seepage or leakage of water, or the presence or condensation of humidity, moisture or vapor, that occurs over a period of 14 days or more" (650164/2015, NYSCEF Doc. No. 84, Ex. 8; NYSCEF Doc. No. 82, McGrady Tr. at 37:11-14) and that it was also caused by the actions of a governmental body (650164/2015, NYSCEF Doc. No. 84, Loftus Tr. at 48:24-49:23). RRES fails to come forward with any evidence to raise an issue of material fact as to Amguard's handling of the claims. There is simply no evidence suggesting bad faith, let alone a pattern of the same aimed at the public to rebut Amguard's showing that it handled the July 5, 2013 Claim and the November 2013 Claim in good faith. Accordingly, RRES's third cause of action for bad faith is dismissed.

C. Effective Plumbing's Motion for Summary Judgment is Granted

To invoke the rights of a third party beneficiary under a contract, a party must establish: "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [their] benefit and (3) that the benefit to [them] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [them] if the benefit is lost" (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 336 [1983]). As the Court of Appeals has observed, stipulations of settlement, especially those entered into in open court, "are favored by the courts and not lightly cast aside" (*Hallock v State*,

64 NY2d 224, 230 [1984]). A party may be relieved of consequences of a stipulation of settlement only upon a showing of fraud, collusion, mistake, or accident (*Citibank, N.A. v Rathjen*, 202 AD2d 235, 235 [1st Dept 1994]).

Effective Plumbing argues that it is entitled to summary judgment dismissal of the complaint because RRES expressly waived its right to bring any claims against Effective Plumbing pursuant to the Stipulation of Settlement. In its opposition papers, RRES argues that the release in the Stipulation of Settlement is ambiguous and is invalid because it was entered into by Anthony Curko, another member of RRES, and Mr. Curko did not have the authority to agree to the release.

Here, pursuant to the Stipulation of Settlement, which was so-ordered and entered into on the record in open court, RRES expressly released all claims against Harry Fields and its contractors and plumbers, which includes Effective Plumbing (155485/2016, Carey Aff., Ex. W at ¶ 6; Ex. X at ¶ 6; Ex. 00, Tr. 221:22-222:22; and Ex. PP 495;10-25). Therefore, the evidence establishes that RRES waived its right to bring any claims against Effective Plumbing in connection with the losses occurring at the restaurant in July 2013 and November 2013. To the extent that RRES argues that Mr. Curko did not have the authority to bind RRES with respect to the release (and there is no evidence to suggest that he did not), RRES was represented by counsel who made the Stipulation of Settlement in open court with apparent authority to do so (*Will of Kanter*, 209 AD2d 365, 365-366 [1st Dept [1994])). Therefore, the evidence conclusively establishes that: (i) the Stipulation of Settlement constitutes a valid and binding contract between RRES and Harry Field, (ii) the parties expressly conveyed an intention to release all contractors and plumbers,

including, specifically, Effective Plumbing, and (iii) the benefit to Effective Plumbing was immediate and not incidental. Finally, to the extent that RRES argues that the Stipulation of Settlement's reference to "plumbers" is ambiguous as to whether it includes Effective Plumbing, it is undisputed that Effective Plumbing was Harry Field's plumbing contractor at all relevant times and the evidence establishes that this was known to Mr. Curko and Ms. Altieri prior to the execution of the Stipulation of Settlement (155485/2016, Carey Aff., ¶ 18, Ex. P, Tr. 22:18; Ex. PP, Tr. 376:20-380:17; Ex. QQ, Tr. 44:12-49:6; and Exs. Y, Z and AA). Based on the foregoing, Effective Plumbing's motion for summary judgment is granted and the complaint is dismissed. Because the complaint is dismissed as against Effective Plumbing, the third-party complaint against All County seeking common law indemnification and contribution is dismissed as moot. However, inasmuch as the complaint is dismissed with prejudice and the record does not support a finding of frivolous or other conduct undertaken to delay or harass Effective Plumbing, Effective Plumbing's motion for sanctions pursuant to CPLR § 8303-a and 22 NYCRR § 130.1-1 is denied.

Accordingly, it is

ORDERED that Amguard's motion for summary judgment (650164/2015, Mtn. Seq. No. 002) is granted and RRES's complaint is dismissed; and it is further

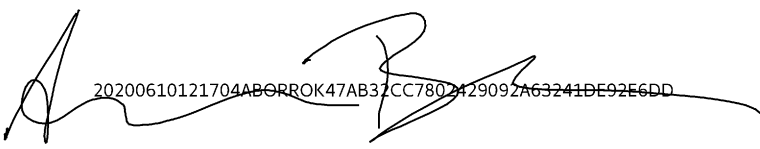
ADJUDGED and DECLARED that Amguard Insurance Company is not obligated to pay any additional monies for RRES's alleged losses or damages in connection with the claims relating to the losses that occurred in July 2013 and November 2013; and it is further

ORDERED that Effective Plumbing’s motion for summary judgment (155485/2016, Mtn. Seq. No. 003) is granted and RRES’s complaint is dismissed; and it is further

ORDERED that All County’s motion to dismiss (155485/2016, Mtn. Seq. No. 004) is granted, and the Third Party Complaint is dismissed; and it is

ORDRED that the Clerk of the Court is directed to enter judgment accordingly.

6/10/2020
DATE



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ANDREW BORROK, J.S.C.

CHECK ONE:

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<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: