

Zapata v Orga LLC
2022 NY Slip Op 32177(U)
July 7, 2022
Supreme Court, New York County
Docket Number: Index No. 157906/2016
Judge: Shlomo Hagler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHLOMO S. HAGLER PART 17

Justice

INDEX NO. 157906/2016

SANTIAGO ZAPATA,

Plaintiff,

MOTION DATE 06/28/2021, 06/28/2021

- v -

MOTION SEQ. NO. 006 007

ORGA LLC and LONDON GROCERY CORP,

Defendants.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 183, 187, 188, 189, 190, 195, 196, 197

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 007) 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 184, 185, 186, 191, 192, 193, 194, 198, 199

were read on this motion to/for JUDGMENT - SUMMARY

Motion sequence nos. 006 and 007 are consolidated for disposition.

In motion sequence no. 006, defendant London Grocery Corp. (LGC) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and the cross claims asserted against it. In motion sequence no. 007, defendant Orga LLC (Orga) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint against it and for summary judgment on its cross claim for contractual indemnification against LGC.

Background

This personal injury action arises out of an incident that occurred on August 10, 2016 when plaintiff Santiago Zapata slipped and fell on a step at 252 Tenth Avenue, New York, New York (the Building). Orga owned the Building and leased the ground floor store and basement to LGC. LGC operated a 24-hour bodega in the demised premises (the Store).

A. The Accident

Plaintiff testified that, at the time of the accident, he was working for a friend, Juan Luna (Luna), who delivered magazines for Hudson News in Manhattan (NY St Cts Elec Filing [NYSCEF] Doc No. 146, Anthony M. Grisanti [Grisanti] affirmation, Ex C at 25-26 and 28). Plaintiff had delivered magazines to the Store on three or four prior occasions (*id.* at 30). The accident occurred between 7 and 7:15 a.m. on a sunny morning; it had not rained the night before (*id.* at 36-38). A single step led from the sidewalk into the Store (*id.* at 39). Plaintiff testified that he did not look at the step before he fell (*id.* at 122). He testified that as he turned to pull the hand truck loaded with magazines up the step through the open door, “I stepped down with my right foot and ... my left foot, was up at the top [inside the store] and that -- at the place where I put my [right] foot down was wet ... and the right foot slipped” (*id.* at 42-44). His right foot slipped “because it’s wet” (*id.* at 62). He did not notice that the step was wet before he fell (*id.* at 65 and 113), but as he lay on the ground, he saw several drops of water on the ground (*id.* at 116). He stated that the air conditioner above the entrance door was “dripping water” (*id.* at 67-68), and the water “landed on the step ... where I stepped on it and slipped” (*id.* at 73). He added that a “little bit” of water fell in “drops” on him as he lay on the ground (*id.* at 123-124). On his prior visits, the air conditioner was off, but because the door was open on this trip, “they had it on and the water was coming down. It was dripping and it was like a small puddle” (*id.* at 130). Plaintiff testified that he had never noticed any debris or water on the step on his earlier visits (*id.* at 39, 113 and 129). He never complained to anyone about the step, and he did not know of anyone else who had complained about it before the accident (*id.* at 113).

Jose Lloves (Lloves) testified that he and his wife owned Orga (NYSCEF Doc No. 148, Grisanti affirmation, Ex E at 10-12). The Building consisted of three floor-through apartments

and one ground floor/basement commercial unit (*id.* at 13). Orga leased the Store to LGC and its owner, Munaf F. Indawala (Munaf), who built out the space (*id.* at 21-22 and 51). Lloves could not recall if he discussed installing an air conditioner above the Store's front door with anyone at LGC, and Orga did not pay for its installation (*id.* at 33). Lloves added that his permission was not necessary to install an air conditioner (*id.* at 55), and he did not know if a unit had been installed before the accident (*id.* at 32). When shown a photograph of the Store's entrance, Lloves stated the horizontal slats above the door were for a fan (*id.* at 32). He stated that LGC was responsible under the lease for sweeping the sidewalk and performing snow and ice removal (*id.* at 38 and 46). Lloves never made any complaints to LGC, and none of the residential tenants complained to him about condensation from the vent above the Store's door (*id.* at 55-56). Building superintendent Manuel Antonio Angamarca (Angamarca) never complained to Lloves about LGC or the condition of the step and never told Lloves that he had seen condensation on the step (*id.* at 56-57).

Angamarca testified that he was tasked with cleaning the Building's interior stairs and hallways and addressing issues in the apartments (NYSCEF Doc No. 151, Grisanti affirmation, Ex H at 19, 22 and 32). LGC was responsible for sweeping and performing snow removal on the sidewalk (*id.* at 22-23). Angamarca testified that a grey-colored fan had been installed above the Store's door, and he never saw any water dripping from the fan onto the step (*id.* at 40-42). However, he has seen water on the step "[w]hen it rains a lot" (*id.* at 43). Angamarca was not aware of anyone slipping and falling on water in front of the Building (*id.* at 61).

Zakir Indawala (Zakir) testified that he has worked for LGC since 2000, when it was in the building next to its current location (NYSCEF Doc No. 149, Grisanti affirmation, Ex F at 14, 16 and 26). Munaf is his cousin (*id.* at 15). Zakir testified that Munaf had a contractor install a

counter, refrigerator and air conditioning unit when LGC leased the Store, but he made no changes to the exterior step at that time (*id.* at 27). Zakir explained that the air conditioning unit was installed five feet inside the Store on the wall above a magazine rack as there was no space for it above the door (*id.* at 29-30 and 66). A ventilation fan that blew air onto the street was installed over the door (*id.* at 30-31 and 34). Horizontal slots acted as a cover for the fan, and the slots opened when the fan was turned on (*id.* at 34). Zakir admitted that as soon as LGC moved into the Store, Munaf asked him to paint the exterior step yellow so people could see it (*id.* at 28). In 2016, there were eight surveillance cameras positioned throughout the Store and basement (*id.* at 43). Zakir testified that he did not witness the accident as he was in the Store's basement (*id.* at 48). When he came up from the basement, he saw plaintiff sitting outside the Store (*id.* at 57 and 70). Zakir testified that police were also present, and he heard plaintiff tell them that “[h]e fell” (*id.* at 61). Zakir stated that he did not see any wetness or moisture on the step when he reentered the Store after the accident (*id.* at 65 and 86), and the air conditioner was not on that morning (*id.* at 67). He never saw any water or liquid on the step prior to the date of the accident, was not aware of any prior complaints of water or liquid on the step (*id.* at 72-73), and was not aware of anyone else slipping or tripping on the step (*id.* at 91).

B. The Lease Agreement

The lease agreement between Orga, as owner, and I.G.C., as tenant, dated May 24, 2011 (the Lease) provides, in relevant part, that:

“Owner shall maintain and repair the public* and structural portions of the building, both exterior and interior ... [and] Tenant shall, throughout the term of this lease, take good care of the demised premises and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition, reasonable wear and tear, obsolescence and damage from the elements, excepted”

(NYSCEF Doc No. 172, Driscoll affirmation, Ex Q at 2 [Paragraph 4]). Paragraph 30 obligates LGC, at its own expense, to “keep demised premises clean and in order ... and if demised premises are situated on the street floor, Tenant shall, at Tenant’s own expense, make all repairs and replacements to the sidewalk and curbs adjacent thereto, and keep said sidewalks and curbs free from snow, ice, dirt and rubbish” (*id.* at 5). Paragraph 8, titled “Tenant’s Liability Insurance Property Loss, Damage, Indemnity” reads, in part:

“Owner or its agents shall not be liable ... for any injury or damage to persons or property resulting from any cause of whatsoever nature, unless caused by or due to the negligence of Owner, its agents, servants or employees. Owner or its agents will not be liable for any such damage caused by other tenants or persons in, upon or about said building or caused by operations in construction of any private, public or quasi public work. Tenant agrees, at Tenant’s sole cost and expense, to maintain general public liability insurance in standard form in favor of Owner and Tenant against claims for bodily injury or death or property damage occurring in or upon the demised premises, effective from the date Tenant enters into possession and during the term of this lease ... Tenant shall indemnify and save harmless Owner against and from all liabilities, obligations, damages, penalties, claims, costs and expenses for which Owner shall not be reimbursed by insurance, including reasonable attorneys fees, paid, suffered or incurred as a result of any breach by Tenant ... of any covenant on condition of this lease, or the carelessness, negligence or improper conduct of the Tenant, Tenant’s agents, contractors, employees, invitees or licensees”

(*id.* at 3). Paragraph 19 states:

“If Tenant shall default in the observance or performance of any term or covenant on Tenant’s part to be observed or performance under or by virtue of any of the terms or provisions of any article of this lease, then, unless otherwise provided elsewhere in this lease, Owner may immediately or at any time thereafter and without notice perform the obligation of Tenant thereunder, and if Owner, in connection therewith or in connection with any default by Tenant in the covenant to pay rent hereunder, makes any expenditures or incurs any obligations for the payment of money, including but not limited to attorney’s fees, in instituting, prosecuting or defending any actions or proceeding, such sums so paid or obligations incurred

with interest and costs shall be deemed to be additional rent hereunder and shall be paid by Tenant to Owner within five (5) days of rendition of any bill or statement to Tenant therefor”

(*id.* at 4).

The Lease also contains a rider (the Rider), the terms of which prevail over a conflict with any provision in the Lease (*id.* at 7 [Paragraph 40]). Under Paragraph 46, LGC agreed to “conduct its business with special care and precaution, so as not to cause offensive odors, noise, annoyance, discomfort and/or injury to the other occupants and users of the demised premises, with particular care and sensitivity being exercised in regard to the inner courtyard and front sidewalk areas” (*id.* at 8). Paragraph 47 states that “Tenant shall take good care of the demised premises ... and shall make as and when required other than those repairs required to be performed by Owner under this Lease, all repairs to the interior thereof required to keep them in good order and condition” (*id.* at 8). Paragraph 55 provides that LGC “shall keep and maintain the floors and the sidewalk in front of and alongside of the demised premises free of dirt, debris, ice and snow” (*id.* at 12). LGC agreed to maintain “Comprehensive bodily injury and property damage liability insurance against claims for bodily injury, death or property damage occurring in, on or about the demised premises and on, in or about any adjoining street, avenue, property and passageway, naming the Owner and the Tenant as insureds” (*id.* at 9 [Paragraph 48 (a)]). Paragraph 49 provides, in part:

“Tenant shall indemnify and save harmless Owner ... from (a) any and all claims (i) arising from the conduct of its business or in the management of the demised premises or any work or thing whatsoever done or in any condition created (other than by Owner for Owner’s or Tenant’s account) in or about the premises during the term of this Lease or (ii) arising from any negligent or otherwise wrongful act or omission of Tenant or any of its subtenants, licensees, guests, invitees, patrons, employees, agents, or contractors, and (b) All costs, expenses and liabilities incurred in connection with claim, action or proceeding brought therein. In case any action or proceeding is brought against the Owner by reason of such claim, the Tenant upon written notice from the Owner shall

resist and defend such action or proceeding by counsel chosen by Tenant who shall be reasonably satisfactory to the Owner. Tenant or its counsel shall keep Owner fully apprised at all times of the status of such defense”

(*id.* at 10). Last, under Paragraph 54, LGC agreed to:

“pay Owner all reasonable attorney’s fees and disbursements (and all other Court costs and expenses of legal proceedings) and such other fee and costs which Owner may incur or pay by reason of, or in connection with ... (e) any other appearance by Owner ... or otherwise in any action or proceeding against Owner involving or affecting Owner, arising out of Tenants [sic] conduct under the Lease ... provided however, that Tenant’s liability hereunder shall not include any such costs or fees, which are recovered by Owner by reason of its insurance coverage”

(*id.* at 12).

Procedural History

Plaintiff commenced this action on September 21, 2016 by filing a summons and complaint asserting a single a cause of action sounding in negligence. Orga and LGC interposed answers with cross claims against each other for contribution and common-law and contractual indemnification. Orga pleads an additional cross claim for breach of contract for LGC’s failure to procure insurance. Orga and LGC now move separately for summary judgment. Submitted on the motions are the pleadings, deposition transcripts, the lease agreement between Orga and LGC, and a report from expert engineer Scott E. Derector, P.E. (Derector), among other exhibits.

Standard of Review

A party moving for summary judgment “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions

and written admissions (*see* CPLR 3212). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Discussion

A. Plaintiff's Claim against Defendants

LGC and Orga argue that summary judgment is warranted because wetness on an exterior step or sidewalk is not actionable as a matter of law, and the evidence does not show that defendants created or had actual or constructive notice of a hazardous condition on the step. They refute plaintiff's assertion that a leaking air conditioner was the source of the wet condition because defendants' testimony, photographs of the storefront in plaintiff's notice to admit directed to LGC and Director's report all show that an electric fan, not an air conditioner, had been installed over the Store's front door. As for actual notice, defendants argue their witnesses stated there were no prior complaints about a wet condition on the step before the accident and that plaintiff had never complained about the step before he fell. Defendants maintain that constructive notice is lacking because plaintiff never saw the condition before he fell. Orga also argues that Zakir did not see any wetness or dripping water on the step after the accident.

Plaintiff counters that defendants failed to demonstrate their lack of constructive notice of a wet, transitory condition. He claims that the dispute whether an air conditioner or fan was installed over the entrance is a red herring because he identified the cause of his fall, namely accumulated water that dripped from above. Plaintiff tenders an affidavit from Luna, who avers that he "consistently observed water on the step that leads into the London Grocery bodega every time I would visit that store in the summer of 2016 when the air conditioning unit was on leading up to the date of the Plaintiff's accident" and that he "believe[d] that [the] air conditioning unit

above the step outside the London Grocery bodega was the source of the water that I consistently observed on that step” (NYSCEF Doc No. 188, Christopher J. Soverow affirmation, Ex A, ¶¶ 5-6). As for Derector’s report, plaintiff claims it is defective in several respects.

Defendants, in reply, object to the considerable length of plaintiff’s opposition. LGC rejects the contention that a “phantom” air conditioner was the source of the water on the step; urges the court to disregard Luna’s affidavit for plaintiff’s failure to disclose him as a notice witness; repeats its contention that water on an exposed walkway is not a dangerous condition; and characterizes plaintiff’s objections to Derector’s opinion as “meaningless.” Orga largely adopts the arguments raised in LGC’s reply. Orga also argues that it is an out-of-possession landlord who had no duty to maintain the sidewalk abutting the Building.¹

“Liability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises” (*Gibbs v Port Auth. of N.Y.*, 17 AD3d 252, 254 [1st Dept 2005], citing *Balsam v Delma Eng’g Corp.*, 139 AD2d 292, 296 [1st Dept 1988], *lv denied, lv dismissed* 73 NY2d 783 [1988]). Thus, an owner or a tenant in possession has a duty to maintain the premises in reasonably safe condition (*Nyambuu v Whole Foods Mkt. Group, Inc.*, 191 AD3d 580, 581 [1st Dept 2021]).

It is well settled that “[a] defendant moving for summary judgment in a slip-and-fall action has the initial burden of showing that it neither created, nor had actual or constructive notice of the dangerous condition that caused plaintiff’s injury” (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]). Actual notice of a dangerous condition exists where the defendant created the condition or was aware of it before the accident (*Atashi v*

¹ Orga contends in reply that the exterior step may not be part of the sidewalk, and as an out-of-possession landlord, it cannot be held liable as a matter of law. It is improper to raise arguments for the first time in reply (*Simon v Francinvest*, 192 AD3d 565, 569 [1st Dept 2021], *lv dismissed* 37 NY3d 1005 [2021]), and Orga admits it did not raise this argument in its initial moving papers.

Fred-Doug 117 LLC, 87 AD3d 455, 456 [1st Dept 2011]). Thus, it follows that a defendant demonstrates its lack of actual notice by producing “a witness who can testify that no complaints about the location were received before the accident, and there were no prior incidents in that area before the plaintiff fell” (*Velocci v Stop & Shop*, 188 AD3d 436, 439 [1st Dept 2020]). As to constructive notice, a defendant is charged with constructive notice of a dangerous condition when the condition is visible and apparent and has existed long enough for the defendant to discover and remedy it (*Ross*, 86 AD3d at 421). A defendant demonstrates its lack of constructive notice by producing evidence that the condition did not exist when the area was last inspected and cleaned prior to the accident (*id.*), or by furnishing proof that it followed a regular cleaning schedule for the area on the day of the accident (*see Person v New York City Hous. Auth.*, 167 AD3d 438, 439 [1st Dept 2018]).

Here, assuming without deciding that defendants did not create or have actual notice of a wet condition on the step, defendants have failed to demonstrate their lack of constructive notice as they failed to produce any evidence of when the area was last cleaned and inspected prior to the accident (*see Castillo-Sayre v Citarella Operating LLC*, 195 AD3d 513, 513 [1st Dept 2021] [denying summary judgment where the defendant failed to tender any evidence of when the sidewalk adjacent to the defendant’s store was last cleaned and inspected]; *Brown v Phillbert*, 188 AD3d 559, 559 [1st Dept 2020] [denying summary judgment where the defendant failed to establish when the step leading to a vestibule]).

The cases defendants cite in support of the proposition that wetness on an exterior step exposed to the elements is not actionable are distinguishable as those cases involved a wet condition caused by rainwater (*see Bock v Loumarita Realty Corp.*, 118 AD3d 540, 540-541 [1st Dept 2014] [granting summary judgment where the plaintiff testified “that he fell on a sidewalk

that was slippery when wet, during a period of heavy rain, defendants' lack of prior notice of a dangerous condition, and an expert opinion that there was no defect in the area of the fall"]; *McGuire v 3901 Independence Owners, Inc.*, 74 AD3d 434, 435 [1st Dept 2010] [granting summary judgment because "mere wetness on walking surfaces due to rain does not constitute a dangerous condition"]; *but see Merkin v AWR Group, Inc.*, 2015 NY Slip 32197[U], *7 [Sup Ct, NY County 2015] [relying on *Bock* and *McGuire* to grant the defendants summary judgment where the plaintiff had slipped on a wet public sidewalk on water "from water tests which [the third-party defendant] was performing on the renovated façade of the building"]. In contrast to this action, plaintiff testified that it had not rained before the accident and he claimed to have slipped on dripping water from an overhead air conditioner.

The court also declines to consider Director's unsigned, unsworn report, which is not in admissible form (*see Damas v Valdes*, 84 AD3d 87, 95 [2d Dept 2011] [refusing to consider an unsigned and unsworn expert report in support of a summary judgment motion]; *Frees v Frank & Walter Eberhart L.P. No. 1*, 71 AD3d 491, 492 [1st Dept 2010] [same]). As defendants failed to meet their prima facie burden, their motions for summary judgment dismissing the complaint are denied without regard to the sufficiency of plaintiff's opposition.

B. Orga's Cross Claim for Contractual Indemnity

Orga's cross claim for contractual indemnification emanates from the Lease and Rider. Orga argues that LGC was contractually obligated under the Lease to clean and maintain the step where plaintiff fell, except for any structural defects. Orga asserts that it has tendered a claim for defense and indemnification with respect to plaintiff's claim to LGC's insurance carrier (NYSCEF Doc No. 171, Michael Driscoll [Driscoll] affirmation, Ex P at 2-3), who refused Orga's tender because Orga was not listed on LGC's policy and did not qualify as an additional

insured (*id.* at 8). LGC's insurer also claimed that "the portion of the building where plaintiff was injured, based on our investigation, was due to structural issues which are to be maintained by owner" (*id.*). Orga's counsel repeated Orga's request for defense and indemnification to LGC's counsel on January 25, 2019 (*id.* at 12). Orga then commenced a separate action against LGC and Hartford captioned *Orga, LLC v London Grocery Corp.*, Sup Ct, NY County, index No. 657343/2019 (the Orga Action), for a judgment declaring that the defendants in that action are obligated to defend and indemnify Orga in plaintiff's personal injury action and to recover damages for LGC's failure to procure insurance in accordance with the Lease and Orga's attorneys' fees incurred in the underlying personal injury action (NYSCEF Doc No. 155, Driscoll affirmation, ¶ 81; NYSCEF Doc No. 185, Grisanti affirmation, Ex A). Orga has since learned that it is a named additional insured under an endorsement to LGC's insurance policy (NYSCEF Doc No. 73, Driscoll affirmation, Ex R at 7).

"When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]). The "intention to indemnify [must] be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], *mot to amend remittitur dismissed* 70 NY2d 999 [1988] [internal quotation marks and citation omitted]). A party seeking contractual indemnification must show that it is free from active negligence and that it may be held liable solely because of statutory or vicarious liability (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]). As applied here, Orga has demonstrated its entitlement to a conditional order of contractual indemnification (*see Collado v Cruz*, 81 AD3d 542, 543 [1st Dept 2011]). The Lease and Rider

required LGC to take good care of the Store and the sidewalk adjacent thereto, and expressly obligated it to make all repairs and replacements to the sidewalk and curb (NYSCEF Doc No. 172 at 2 and 6).

LGC fails to raise a triable issue of fact in opposition. Contrary to LGC's contention, the indemnification provision in Paragraph 8 of the Lease does not run afoul of General Obligations Law § 5-321, which reads as follows:

“Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable.”

Paragraph 8 does not provide for indemnity for Orga's own negligence.

Nor is there a danger of inconsistent verdicts reached in this action and in the Orga Action, as LGC has suggested. Orga states that the parties in the Orga Action have agreed discovery in that action will proceed only after this cross motion is decided, and that Orga will voluntarily withdraw the Orga Action if this court reaches a determination favorable to Orga on the cross motion.

Accordingly, it is

ORDERED that the motion of defendant London Grocery Corp. for summary judgment dismissing the complaint and the cross claims asserted against it (motion sequence no. 006) is denied; and it is further

ORDERED that the motion of defendant Orga LLC for summary judgment dismissing the complaint and for summary judgment on its cross claim for contractual indemnification (motion sequence no. 007) is granted to the extent of granting defendant Orga LLC conditional

contractual indemnification against defendant London Grocery Corp., and the motion is otherwise denied.

7/7/2022
DATE


SHLOMO HAGLER, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE