SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ **PART** 47

Justice

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THOMAS J. ORR, AS CHAPTER 7 BANKRUPTCY TRUSTEE OF THE ESTATE OF DOYLE BELMAR,

Plaintiff,

- v -

VORNADO REALTY, L.P., VORNADO REALTY TRUST, OTIS ELEVATOR COMPANY,

Defendants.

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INDEX NO. 153563/2015

MOTION DATE 08/29/2022
08/29/2022

MOTION SEQ. NO. 007 008

DECISION + ORDER ON MOTION

VORNADO REALTY, L.P., VORNADO REALTY TRUST

Plaintiffs,

-against-

BUILDING MAINTENANCE SERVICE LLC

Defendant.

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Third-Party
Index No. 595947/2019

VORNADO REALTY, L.P., VORNADO REALTY TRUST

Plaintiffs,

-against-

666 FIFTH ASSOCIATES LLC

Defendant.

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Second Third-Party
Index No. 595968/2019

The following e-filed documents, listed by NYSCEF document number (Motion 007) 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 229, 231

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 230, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254

were read on this motion to/for JUDGMENT - SUMMARY .

In this action to recover damages for a workplace personal injury at 666 Fifth Avenue, New York, New York 10019 (the building), due to two separate incidents (the incidents), on August 21, 2014 and August 28, 2014, in freight elevator number 22 (the elevator) defendant Otis Elevator Company (Otis) moves for summary judgment pursuant to CPLR 3212 dismissing the complaint (Mot Seq No 008) for the following reasons: (1) plaintiff's claimed accident scenario is physically, electrically, and mechanically impossible; (2) *res ipsa loquitor* doctrine does not apply to the facts of this case; (3) Otis did not breach its duty of reasonable care in maintaining, servicing, and repairing the elevator; (4) Otis had no notice, actual or constructive, of any intermittent stoppage in flight, overspeeding conditions, or any other defective conditions alleged by plaintiff; and (5) plaintiff did not sustain any new injury or exacerbate an existing injury as a result of the August 28, 2014 incident.

Defendants Vornado Realty, L.P. and Vornado Realty Trust (collectively "Vornado") also move for summary judgment pursuant to CPLR 3212 dismissing the complaint (Mot Seq No 007) based on: (1) not owning or managing the building where the incidents took place; and (2) all maintenance and repairs to the elevator were the exclusive responsibility of co-defendant Otis, which had a full-service preventive maintenance contract with the building's owner.

The motions are consolidated for disposition and for the reasons that follow, are granted.

BACKGROUND

Doyle Belmar worked as a nighttime porter and elevator operator assigned to freight elevator number 22 located at the building (Belmar EBT 1, pp 14, 23, NYSCEF Doc No 165).

In or around 2008, 666 Fifth Associates, LLC became the owner of the building and at the time of the incidents, 666 Fifth Management, LLC was the property management company (Wallace EBT, NYSCEF Doc No 167, pp 24, 26; Wallace Aff, ¶¶ 2-3, NYSCEF Doc No 170).

666 Fifth Associates, LLC was owned by another company, 666 Fifth Equity, LLC, which in turn was owned by a joint venture partnership between VNO 666 Fifth Member, LLC and Fifth K Two, LLC (NYSCEF Doc No 167, pp 22-24). Vornado Realty, L.P. was the sole member of VNO 666 Fifth Member, LLC (NYSCEF Doc No 167, p 23). The members of 666 Fifth Management, LLC were Vornado Realty, L.P. and Brookdale Plaza Associates, L.P. (NYSCEF Doc No 167, pp 27-28). Defendant Vornado Realty Trust has an ownership interest in Vornado Realty, L.P., an investment trust with various asset/investment interests in Manhattan, including the building at the time of the incidents (NYSCEF Doc No 167, pp 17-18).

Defendant Otis performed all maintenance and repair work for the elevators at 666 Fifth Avenue during and prior to August 2014 pursuant to a contract with 666 Fifth Associates LLC (*see* Comprehensive Vertical Transportation Maintenance and Repair Agreement Art 4, NYSCEF Doc No 140; *see also* NYSCEF Doc No 170, ¶ 4). Otis stationed a resident on-site mechanic, Tommy Vallario, in the building five or six days a week during normal business hours (Vasak EBT, p 23, NYSCEF Doc No 168). Vallario performed regular maintenance on all the elevators and responded to any particular issue or complaint (NYSCEF Doc No 168, p 98). If the issue occurred outside of the resident mechanic's work hours, the matter was referred to an on-call Otis mechanic Debbie Vasak (NYSCEF Doc No 168, pp 98-99).

Belmar testified that on August 21, 2014, around 10:00 p.m., he entered the elevator on the subcellar floor and pushed the designated button for the 39th floor (NYSCEF Doc No 165, pp 53, 62). Once the doors closed and the elevator began to ascend it started to bounce very hard, rapidly ascend and descend, and then abruptly stopped with a bang (NYSCEF Doc No 165, pp 53-59). Belmar claims the incident immediately caused pain in his neck, lower back and knees so much so that he attempted to see his primary care physician within hours (NYSCEF Doc No 165,

pp 61, 66-69). The doctor referred Belmar to a workers' compensation doctor (Plaintiff's Opposition Memorandum of Law, p 33, NYSCEF Doc No 234). Due to the pain and discomfort, Belmar called in sick the next day (NYSCEF Doc No 234, p 33). Belmar's first medical treatment was with a physiatrist, Dr. Steven S. Moalemi, on September 2, 2014 (Otis Statement of Facts, ¶¶ 97-98, NYSCEF Doc No 177).

Belmar returned to work and testified that on August 28, 2014, around 11:00 p.m., he entered the elevator on the subcellar floor and pushed the designated button for the 39th floor (NYSCEF Doc No 165, p 72). When the doors closed and the elevator began to ascend it once again started to bounce very hard, slowly descend, and then rapidly ascend, eventually stopping abruptly with such force that Belmar "hit the floor . . . [b]umped and crashed." (NYSCEF Doc No 165, pp 78-79, 85). When the elevator door opened, Belmar saw Chuck Simm, another porter, who told Belmar he heard "things falling inside the elevator shaft." (NYSCEF Doc No 165, pp 73-74).

Belmar claims there were prior incidents where the elevator malfunctioned in similar ways. He recalled that in 2011 or 2012 he was in freight elevator number 22 when it felt like it was free falling and then came to a hard stop (NYSCEF Doc No 167, p 40). Some time after this, an Otis mechanic came to inspect the elevator and allegedly told Belmar that it needed a part (NYSCEF Doc No 165, p 39). Belmar also claims that in the months leading up to the August 2014 incidents freight elevator number 22 would jump, skip floors, fall rapidly and stop in between floors with the door open as often as twice per month (NYSCEF Doc No 165, pp 48-49, 52). Belmar testified that he would report the incidents to Owen, who would write out an accident report signed by Belmar (NYSCEF Doc No 165, pp 50-51).

Otis also maintained an Otis Online History Report (OOHR) which documented several other incidents when freight elevator number 22 malfunctioned.

On April 14, 2014, work was performed on freight elevator number 22's control relay, which controls the elevator direction, braking system, and speed (OOHR, pp 15-19, NYSCEF Doc No 208; NYSCEF Doc No 200, p 88).

A May 23, 2014 entry details a customer complaint that freight elevator number 22 was dropping floors (NYSCEF Doc No 208, p 27). Vallario testified at his deposition that a malfunction in the brake relay, replaced on May 27, 2014, could have caused the elevator to drop as reported by the May 23, 2014 ticket (NYSCEF Doc No 208, p 28; Vallario EBT, pp 105-06, NYSCEF Doc No 200).

On August 21, 2014, prior to the first incident, there is a service ticket pertaining to another issue with the elevator's control relay—the "P" relay was replaced (NYSCEF Doc No 208, p 46).

The service ticket pertaining to the first incident on August 21, 2014 states that a customer complained about the elevator being stuck on the 18th floor and showed that Vasak was dispatched, who did not find any problems or perform any maintenance or repairs (NYSCEF Doc No 208, p 49; NYSCEF Doc No 200, p 51).

A service ticket dated August 22, 2014 indicates the brake relay for the elevator was replaced—Vallario testified that a bad relay could cause an elevator to suddenly stop (NYSCEF Doc No 208, p 47; NYSCEF Doc No 200, p 123). Another service ticket from August 25, 2014 states that Vallario removed the drive to be repaired and reinstalled it on August 27, 2014 (NYSCEF Doc No 208, pp 50, 53).

The service ticket pertaining to the second incident on August 28, 2014 indicates a customer complained that the elevator was jumping from floor to floor and skipping floors (NYSCEF Doc No 208, p 59). Vasak was dispatched and made no repairs (NYSCEF Doc No 208, p 59).

Freight elevator number 22 was eventually taken out of service on September 19, 2014 and remained out of service until October 21, 2014 (Vallario Aff, ¶ 26, NYSCEF Doc No 207). On October 1, 2014, the drive was completely replaced and the intermittent stoppages still continued (McPartland Reply Aff, ¶ 19, NYSCEF Doc No 251). On October 16, 2014, Otis identified the cause of the unexpected stoppages, a minute piece of solder loosely floating inside the relay on the controller (NYSCEF Doc No 207, ¶ 26). It took six Otis service mechanics spending approximately 256 labor hours in troubleshooting to resolve the issue (McPartland Aff, ¶ 48, NYSCEF Doc No 212).

DISCUSSION

"It is well settled that 'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [internal citations omitted]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action." (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010], citing *Alvarez*, 68 NY2d at 342).

"The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility." (*Meridian Mgmt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be examined "in the light most favorable to the non-moving party" (*Schmidt v One New York Plaza Co.*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*id.*).

OTIS

Admissibility of the Otis Online History Report

As an initial matter, plaintiff asserts that the OOHR is inadmissible hearsay that was not properly qualified as a business record exception because Vallario and Vasak did not have personal knowledge of Otis's business practices and procedures as they relate to the OOHR at issue (*see Johnson v Lutz*, 253 NY 124 [1930] [the CPLR 4518 [a] business records exception to hearsay requires the person who made the record have personal knowledge of the event recorded or must have received the information from someone within the business who had actual knowledge and was under a business duty to report the event to the maker of the record]; *see also 76th & Broadway Owner LLC v Consol. Edison Co. of N.Y. Inc.*, 160 AD3d 447 [1st Dept 2018]). Plaintiff argues that since the OOHR is inadmissible hearsay, defendant's expert witness could not properly rely on it when giving his expert testimony.

On reply, Otis submitted an affidavit by Jared Guritzky, an Account Manager at Otis, to lay a proper foundation for the OOHR (Guritzky Aff, NYSCEF Doc No 247). However, laying

such a foundation on reply is impermissible (*see Aurora Loan Servs., LLC v Baritz*, 144 AD3d 618, 620 [2d Dept 2016] [internal citations omitted] [Allegations in an affidavit of a secretary were inadmissible under the business record exception to the hearsay rule because secretary failed to demonstrate personal familiarity as to plaintiff's record-keeping practices and procedures. Furthermore, plaintiff "could not rely on the affidavit of its vice-president to meet its prima facie burden since [it] was improperly submitted for the first time" on reply.]). "The function of reply papers is to address arguments made in opposition to the position taken by the movant, and not to permit the movant to introduce new arguments in support of, or new grounds for the motion." (*See EPF Int'l Ltd. v Lacey Fashions Inc.*, 170 AD3d 575, 575 [1st Dept 2019], citing *Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]). Therefore, the OOHR is inadmissible hearsay because Otis failed to lay a proper foundation for it in Otis's initial moving papers.

The question remains, however, whether Otis's expert witness, Patrick McPartland, could still rely on the OOHR when giving his expert opinion on the impossibility of plaintiff's claims as to how the elevator malfunctioned even though the records are inadmissible. "It is settled and unquestioned law that opinion evidence must be based on facts in the record or personally known to the witness." (*Hambsch v New York City Transit Auth.*, 63 NY2d 723, 725 [1984] [internal quotations and citations omitted]; *see also Pascocello v Jibone*, 161 AD3d 516 [1st Dept 2018]). However, there are two limited exceptions to this rule such that an expert may rely on out-of-court material if "it is of a kind accepted in the profession as reliable in forming a professional opinion or if it comes from a witness subject to full cross-examination on the trial." (*Hambsch*, 63 NY2d at 726 [internal citation omitted]).

Here, Otis submitted the Guritzky affidavit laying the foundation for the business record exception on reply, thereby establishing that the material partially relied upon by Otis's expert—the OOHR—is "material . . . [derived] from a witness subject to full cross-examination." (*Id.*). Therefore, even though Otis did not lay a proper business record foundation for the OOHR, McPartland was still permitted to rely on the records in forming his expert opinion.

Impossibility

Otis seeks summary judgment on the basis that plaintiff's claim of erratic movement by freight elevator number 22 is physically, mechanically, and electrically impossible such that plaintiff cannot sufficiently establish that Otis's negligence caused Belmar's injuries (*see DiGelormo v Weil*, 260 NY 192, 199-200 [1932] ["The law is that where the evidence is capable of an interpretation which makes it equally consistent with the absence as with the presence of a wrongful act, that meaning must be ascribed which accords with its absence."]).

Otis submitted an expert affidavit from Patrick J. McPartland, P.E., an electrical engineer and President of PM Engineering PLLC with a B.S. in electrical engineering from Polytechnic University, a license as a Professional Engineer in New York since 1997, and a certified private elevator inspector by both the City of New York and the American Society of Mechanical Engineers (NYSCEF Doc No 212, ¶¶ 2-3). McPartland states that it is not possible for the elevator to bounce as it ascends as well as overspeed up and down (NYSCEF Doc No 212, ¶¶ 36-39). He elaborates that over-speeding in the way described by Belmar is impossible because the electrical and mechanical components of the elevator's governor force the elevator's brake to apply if it reaches a speed approximately 25 percent over the contract speed (NYSCEF Doc No 212, ¶¶ 40-43). If the elevator over-sped in the manner as claimed by Belmar then its' governor would have engaged resulting in the elevator shutting down until a mechanic reset it (NYSCEF

Doc No 212, ¶¶ 40-43). Since, by Belmar's own testimony, the elevator continued to run throughout both incidents, the brake could not have applied and accordingly, create the sensation of an abrupt drop or fall (NYSCEF Doc No 212, ¶ 57). Additionally, McPartland's review of the OOHR found no indication of any overspeeding events of the elevator prior to August 21, 2014 (NYSCEF Doc No 212, ¶ 45). Though McPartland acknowledges that the elevator was stopping intermittently, he concludes that the issue could not have been due to the elevator drive since the elevator's intermittent stoppages continued even after the drive was refurbished and eventually replaced (NYSCEF Doc No 251, ¶ 19). It was not until a minute piece of solder was discovered in the relay after extensive inspection and the relay was replaced that the elevator ceased to intermittently stop (NYSCEF Doc No 251, ¶¶ 32-33).

Plaintiff submitted an affidavit from Patrick A. Carrajat, who describes himself as an "elevator consultant" with a B.A. in History/Speech and M.A. in Constitutional Law from Long Island University (Carrajat Aff, p 1, 13, NYSCEF Doc No 240). Carrajat's only proffered credentials are previously "testif[ying] 117 times" in court and working as an elevator mechanic's helper during the summers of 1961 to 1963 (NYSCEF Doc No 240, pp 1, 15). Carrajat states that to a layman, the sensation they feel when the elevator makes an abrupt stop may be described as over-speeding when in fact the elevator was not actually over-speeding (NYSCEF Doc No 240, p 6). Carrajat also mentions that elevator bouncing can and does occur for various reasons, including the possibility of a drive issue (NYSCEF Doc No 240, p 8). Carrajat concludes that the intermittent stoppages were due to the elevator's drive and had Otis properly diagnosed the issues with the drive and removed the elevator from service the accident would not have occurred (NYSCEF Doc No 240, pp 10-11).

"While issues of credibility are, except in rare cases, for the finder of fact to resolve, [a court] may find testimony to be utterly incredible as a matter of law when it is manifestly untrue, physically impossible, or contrary to common experience, and such testimony should be disregarded as being without evidentiary value." (*Price v City of New York*, 172 AD3d 625, 629 [1st Dept 2019] [internal quotations and citations omitted]). Additionally, "fail[ing] to show a hypothesis from which a finding of negligence may be drawn, is, in the circumstances, fatal." (*Williams v Port Auth. of New York & New Jersey*, 247 AD2d 296, 297 [1st Dept 1998]).

Here, Otis has established, *prima facie*, that the elevator did not and could not have operated in the manner alleged by plaintiff on either August 21, 2014 or August 28, 2014. McPartland produced sufficient evidentiary support that if the elevator oversped in the manner as claimed by plaintiff then its' governor would have engaged resulting in the elevator shutting down until a mechanic reset it (NYSCEF Doc No 212, ¶¶ 40-43). Though Carrajat opines on his own version of the incidents his version does not merit consideration because of Carrajat's lack of the necessary credentials to testify as an expert witness (*see Schechter v. 3320 Holding LLC*, 64 AD3d 446, 449-50 [1st Dept 2009], citing *Matott v Ward*, 48 NY2d 455, 459 [1979] ["For a witness to be qualified as an expert, the witness must possess the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable."]). As in *Schechter v 3320 Holding LLC*, Carrajat's affidavit "does not demonstrate that he is familiar with the laws, rules, regulations, and accepted customs and practices in the field of elevator maintenance." (*Id.* at 450). Because plaintiff failed to demonstrate that Carrajat "is qualified to render a reliable opinion regarding the cause of the failure of the" elevator relay, plaintiff "failed to raise a triable issue of fact with respect to the issue of" Otis's negligence (*id.*; *see also Sarasky v Law Enf't Training & Consulting Servs., Inc.*, 108 AD3d 401, 402 [1st Dept

2013] ["The expert affidavit submitted by plaintiff is not sufficient to raise an issue regarding" defendant's negligence because "[t]he expert failed to elaborate on his experience or provide any information establishing that he is qualified to opine on this issue."]).

Even if plaintiff had made such a showing and Carrajat's opinions were considered they still do not rebut Otis's *prima facie* showing. Plaintiff's argument that had Otis maintained the elevator drive then the elevator would not have malfunctioned is not supported by the repair history (*see generally* NYSCEF Doc No 200; *see also* NYSCEF Doc No 251, ¶ 17). The elevator drive was reset multiple times and even refurbished, which did not resolve the issue—it was not until the relay was replaced did the intermittent stoppages cease (NYSCEF Doc No 251, ¶¶ 16-20). Accordingly, based on McPartland's affidavit and plaintiff's failure to rebut Otis's *prima facie* showing, summary judgment must be granted in favor of Otis.

VORNADO

Vornado seeks summary judgment on plaintiff's claims, arguing that it was not the owner nor management company of the building when the incidents took place. The owner of the building in August 2014 was 666 Fifth Associates, LLC, which was owned by 666 Fifth Equity, LLC, which in turn was owned by a joint venture partnership between VNO 666 Fifth Member, LLC and Fifth K Two, LLC (NYSCEF Doc No 167, pp 21-22). Vornado Realty, L.P. was the sole member of VNO 666 Fifth Member, LLC (NYSCEF Doc No 167, p 23). The property management company of the building in August 2014 was 666 Fifth Management, LLC whose members included Vornado Realty, L.P. (NYSCEF Doc No 167, pp 26-27).

Notwithstanding defendant failing to cite authority for the proposition that plaintiff is precluded from suing a shareholder twice removed from the owner of the property, "shareholders cannot be held liable for the acts of the corporation" (*Abdurakhmanov v Ruinsky*, 273 AD2d 420,

420 [2d Dept 2000], citing *Seuter v. Liberman*, 229 AD2d 386 [2d Dept 1996]) because "a corporation exists independently of its owners, as a separate legal entity." (*Matter of Morris v N. Y. State Dept. of Tax'n & Fin.*, 82 NY2d 135, 140 [1993]; *see also Franklin St. Realty Corp. v NYC Env't Control Bd.*, 34 NY3d 600, 604 [2019]). Additionally, "as a general matter, a corporate entity is liable for the acts of a separate, related entity only under extraordinary circumstances." (*Da Silva v Kinsho Int'l Corp.*, 210 F Supp 2d 241, 243 [SD NY 2000] [internal quotations and citations omitted]). Therefore, since defendant Vornado was not the building's owner nor management company, but rather a shareholder/member of the owner and management corporate entities, it is not the proper party to be sued in this matter.

In addition, since Vornado is not a proper party, its third party claims must be dismissed, and in any event, it failed to move for a default judgment as against non-appearing third party defendants within one year of their defaults (*see* CPLR § 3215 [c] ["If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed."]). Accordingly, Vornado's motion for summary judgment must be granted.

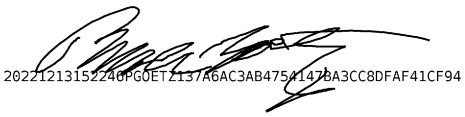
Based on the foregoing, it is hereby

ORDERED that defendant Otis's motion for summary judgment dismissing the complaint (Mot Seq No 008) is granted; and it is further

ORDERED that defendant Vornado's motion for summary judgment dismissing the complaint (Mot Seq No 007) is granted; and it is further

ORDERED that the third-party complaints are dismissed; and it is further

ORDERED that the complaint and all cross-claims are dismissed against defendants, with costs and disbursements to defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly.



12/13/2022
DATE

PAUL A. GOETZ, J.S.C.

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