SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARY V. ROSADO PART 33M

Justice

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JOSHUA MARTINEZ,

Plaintiff,

- V -

1380 HOUSING DEVELOPMENT FUND CORPORATION, WINNRESIDENTIAL (NY) LLC,WFHA KING BOULEVARD L.P., INFINITI ESC PLUMBING CORP., ERIN CONSTRUCTION AND DEVELOPMENT CO., INC.,EASCO BOILER CORP.

Defendant.

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INDEX NO. 158506/2016

MOTION DATE 01/27/2023

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 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, 229, 230, 231, 232, 239, 240, 241, 242, 243, 246, 252, 253, 254, 255, 256, 257, 258, 259, 277, 278, 279, 280, 281, 282, 283, 284, 290, 295, 296, 300, 301, 302, 303, 304, 305, 307, 310, 311

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

Upon the foregoing documents, and after oral argument which took place on August 29, 2023 with Xavier Johnson, Esq. appearing for Plaintiff Joshua Martinez ("Plaintiff"), Peter C. Lucas, Esq. appearing for Defendant Erin Construction & Development Co., Inc. ("Erin"), and Courtney Swartz appearing for Defendants 1380 Housing Development Fund Corporation ("1380"), WFHA King Boulevard L.P. ("WFHA"), and Winnresidential (NY) LLC ("Winn")(together the "1380 Defendants")(1380 Defendants and Erin hereinafter referred to collectively as "Defendants"), Defendant Erin's motion for an Order granting summary judgment in favor of Erin dismissing all claims and counter-claims asserted against it is granted in part and denied in part. Plaintiff's cross-motion for an Order granting Plaintiff summary judgment against Defendants on Plaintiff's Labor Law 240(1) claims is denied.

I. Background and Procedural History

The underlying action herein stems from claims arising from an alleged fall suffered by Plaintiff on February 27, 2015 (NYSCEF Doc. 206 at ¶ 72) (the "Accident"). Plaintiff alleges that while employed by non-party Windsor Mechanical, Inc. ("Windsor"), Plaintiff was installing a pipe to a boiler in the basement of 1380 University Avenue in the Bronx, NY (the "Premises") when a co-worker named Sunny, also an employee of Windsor, let go of an unsecured ladder while plaintiff was ascending, causing Plaintiff to fall (NYSCEF Doc. 212 at 74-87). Plaintiff asserts that just prior to his fall from the ladder the ladder felt "shaky" and he told Sunny that he "wasn't feeling comfortable" going higher (*Id.* at 83). Plaintiff alleges that he fell from the ladder because it was not properly secured (NYSCEF Doc. 49 at ¶ 103).

The Premises was owned by Defendants 1380 and WFHA (NYSCEF Doc. 215 at 13, 16) and managed by Defendant Winn (NYSCEF Doc. 215 at 11). At the time of the Accident, Erin was working for WFHA as a General Contractor at the Premises pursuant to an Agreement dated January 27, 2015 (NYSCEF Doc. 230 at 67).

In 2014 or 2015 Winn hired Windsor to perform maintenance work on a temporary boiler system at the Premises (NYSCEF Doc. 219 at 23-24). Separately, pursuant to a proposal letter dated June 6, 2014 (NYSCEF Doc. 221 at 16) and a subsequent contract agreement dated July 16, 2014 (the "Agreement") (NYSCEF Doc. 221), Erin hired Windsor for the limited purpose of "install[ing] [a] new, stainless steel, chimney liner, including all welding DOB permit and sign off with smoke test" (NYSCEF Doc. 221 at 16). The scope of Windsor's work for Erin did not include work on the temporary boiler system and associated piping, and "[o]nce the chimney passed the smoke test, Erin's business association with Windsor ceased" (NYSCEF Doc. 205 at ¶ 9).

Plaintiff initiated this action on October 10, 2016 by filing a Summons and Complaint (NYSCEF Doc. 1). Subsequently, Plaintiff filed an Amended Complaint on February 12, 2018 alleging violations of Labor Law Sections 240(1), 241(6), and 200 (NYSCEF Doc. 49). On June 13, 2018, the 1380 Defendants filed a Verified Answer asserting cross-claims against Co-Defendants Infinity, Windsor, Erin, and Easco for common-law indemnification and contribution (NYSCEF Doc. 58).[1]

On January 27, 2023 Defendant Erin brought the instant motion for an Order granting summary judgment in favor of Erin dismissing all claims and cross-claims asserted against it (NYSCEF Doc. 204). On February 14, 2023 Plaintiff filed a cross-motion for an Order granting Plaintiff summary judgment against the Defendants on his Labor Law 240(1) claims.

II. Discussion

Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact." (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. (*See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (*see Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]).

[1] Plaintiff's claims were discontinued as against Defendants Infinity and Easco pursuant to stipulations of discontinuance dated October 23, 2020 and April 20, 2020, respectively (NYSCEF Doc. 210).

A. Defendant Erin's Motion for Summary Judgment Dismissing Plaintiff's Labor Law 240 and 241 Claims against Erin, is Granted in Part and Denied in Part

Defendant Erin argues that Plaintiff's Labor Law 240 and 241(6) claims asserted against it must be dismissed because Erin is not a proper labor law defendant (NYSCEF Doc. 232 at 4). Specifically, Erin contends that it is not an owner of the Premises and cannot be deemed a general contractor for purposes of the temporary boiler work Plaintiff was performing at the time of his alleged Accident (NYSCEF Doc. 232 at 5). While Plaintiff concedes that Erin is not the owner of the property, Plaintiff contends that Erin "was the general contractor or an agent of the owner for the work which involved boiler replacement" (NYSCEF Doc. 280 at 10).

i. Questions of Fact Remain Regarding Erin's Status as a Proper Labor Law Defendant for Purposes of Labor Law 240 and 241(6)

It is well established that "prime contractors incur no liability for personal injuries arising out of work not specifically delegated to them" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]). Further, a general contractor is not liable under Labor Law Sections 240 and 241 where "it was never delegated the general construction work in which plaintiff was engaged at the time of his injury and therefore was in no way responsible for the work giving rise to the duties referred to in and imposed by sections 240 and 241 of the Labor Law...[I]f liability is to be premised on supervisory control, it must be control over the work in which plaintiff was engaged at the time of his injury" (*Wong v N.Y. Times Co.* 297 AD2d 544, 549 [1st Dept 2002]). Moreover, "[i]t is a defense that the plaintiff's work at the time of the accident was outside the scope of the general contractor's contract" (*Balthazar v Full Circle Constr. Corp.* 268 AD2d 96, 98 [1st Dept 2000]).

Where a party is neither an owner nor a general contractor, liability under the Labor Law "is dependent on whether [the party] was an 'agent' of the owners" (*Santos v Condo 124 LLC*, 161

AD3d 650, 653 [1st Dept 2018]). The First Department has held that "[t]o hold a defendant liable under the Labor Law as a statutory agent of either the owner or the general contractor, it must be shown that the defendant had the 'authority to supervise and control' the injury producing work" (*Id.* quoting *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]).

Here, Plaintiff alleges that, while employed by Windsor, his injuries occurred while "repairing the boiler in the…boiler room" (NYSCEF Doc. 206 at ¶ 72). Erin proffers that, pursuant to Erin's contract with Windsor (NYSCEF Doc. 221), Windsor's work for Erin at the Premises was limited to the installation of a "new, stainless steel, chimney liner, including all welding DOB permit and sign off with smoke test" which was completed on December 22, 2014 (NYSCEF Doc. 232 at 5). However, Erin's contract with Windsor also included the following: "(1) Filing - DOB Permit; (2) Chimney installation; (3) Smoke test; (4) Sign off; (5) Safety meetings; (6) Job meetings; (7) Punchlist & closeout" (*Id.*).

While Erin contends that it did not have authority to direct, supervise, or control the work of Windsor after December 22, 2014 and did not hire Windsor to perform any work at the Premises other than the installation of the chimney liner (NYSCEF Doc. 219 at 9), Insaf Ali ("Mr. Ali"), a Project Manager for Windsor, testified that Windsor's work for Erin also included installation of a boiler flue running from the boiler to the chimney (NYSCEF Doc. 219 at 33). Further, Plaintiff testified at his deposition that, at the time of the Accident, he was attempting to install a pipe that was part of a boiler-flue system designed to release fumes through the chimney (NYSCEF Doc. 212 at pp. 64-65).

The Court finds that a material question of fact remains regarding whether or not Plaintiff's injury causing work was within the scope of the chimney installation work designated to Windsor

by Erin. As such, Erin's motion for summary judgment dismissing Plaintiff's Labor Law 240 claim is denied.

ii. Plaintiff has Failed to Plead Sufficient Industrial Code Violations to Support a Claim Under Labor Law 241(6)

It is well established that to establish liability under Labor Law 241(6) "a plaintiff must specifically plead and prove the violation of an applicable Industrial Code Regulation" (*Garcia v 225 E. 57th St. Owners, Inc.*, 96 AD3d 88, 91 [1st Dept 2012]). Further, the Code violations pled "must constitute a specific, positive command, not one that merely reiterates the common-law standard of negligence. The regulation must also be applicable to the facts and be the proximate cause of the plaintiff's injury" (*Id.*).

Here, Plaintiff's Labor Law 241(6) claim relies upon alleged violations of sections 23-1.7(f) and 23-1.21 of the Industrial Code (NYSCEF Doc. 211 at ¶ 6). Erin argues that Plaintiff's Labor Law 241(6) claims against it must be dismissed because Plaintiff "fails to specifically plead and prove any applicable Industrial Code regulations" (NYSCEF Doc. 232 at 9).

1. Plaintiff has Failed to Adequately Plead a Violation of Industrial Code Section 12 NYCRR 23-1.7(f)

Industrial Code Section 23-1.7(f) entitled "Vertical passage." states that "[s]tairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other sage means of access shall be provided" (NYCRR 23-1.7[f]).

In *Miranda v NYC Partnership Housing Development Fund Company, Inc.*, 122 A.D.3d 445 (1st Dept 2014) the Court dismissed a plaintiff's Labor Law 241(6) claim predicated on a violation of Industrial Code section 23-1.7(f) because the plaintiff, who, while attaching sheet rock to a metal frame, "was injured when he fell from a six-foot-tall A-frame ladder that had been placed

atop an approximately eight-foot-tall scaffold…was not attempting to access another working level within the meaning of §23-1.7(f)" (*Miranda v NYC Partnership Housing Development Fund Company, Inc.*, 122 A.D.3d 445, 446 [1st Dept 2014]). Similarly, in the case at bar Plaintiff alleges that he fell from a ladder while "repairing the boiler in the…boiler room" (NYSCEF Doc. 49). As was the case in *Miranda*, Plaintiff herein was not using the ladder as a "vertical passage" to "access another working level," but rather to reach the necessary height to perform his work. As the ladder in question was not used as a means of passage, Industrial Code 23-1.7(f) is not applicable, and Plaintiff's Labor Law 241(6) claims predicated on Industrial Code 23-1.7(f) are dismissed.

2. Plaintiff has Failed to Adequately Plead a Violation of Industrial Code Section 12 NYCRR 23-1.21

In his Bill of Particulars, Plaintiff cites generally to 12 NYCRR 23-1.2, failing to specify any particular subsection or subdivision alleged to be violated (NYSCEF Doc. 211 at ¶ 6).

It is well settled that dismissal of a plaintiff's Labor Law 241(6) claims is appropriate where, as here, the "plaintiff failed to specify any particular subsection(s) and subdivision(s)" of the Industrial Code (*McLean v Tishman Constr. Corp.* 144 AD3d 534, 535 [1st Dept 2016]).

As Plaintiff's pleadings fail to specify a violation of any particular subsection or subdivision of Industrial Code section 23-1.21, Plaintiff's Labor Law 241(6) claims predicated on Industrial Code 23-1.21 are dismissed.

B. Defendant Erin's Motion to Dismiss Plaintiff's Labor Law 200 and Common Law Negligence Causes of Action is Denied

Section 200 of the Labor Law "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work." (*Comes v N.Y. State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]).

It is well established that to prevail on a claim pursuant to Labor Law 200 or common law negligence a "plaintiff must demonstrate that defendant had the authority to 'control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 140 [1st Dept 2005] citing (*Rizzuto v L.A. Wenger Contr. Co.* 92 NY2d 343, 352 [1998]).

As discussed above, material questions of fact remain regarding whether or not Plaintiff's injury causing work was within the scope of the chimney installation work designated to Windsor by Erin, and thus, whether Erin possessed the requisite authority to control the injury causing activity. Accordingly, Erin's motion for summary judgment dismissing Plaintiff's Labor Law 200 and common law negligence causes of action against them is denied.

C. Defendant Erin's Motion for Summary Judgment Dismissing All Cross-Claims Asserted Against it is Denied

On June 13, 2018, the 1380 Defendants filed a Verified Answer asserting cross-claims against Co-Defendants Infinity, Windsor, Erin, and Easco for common-law indemnification and contribution (NYSCEF Doc. 58).

The Court of Appeals has held that "[a] claim for contribution exists only when two or more tort-feasors share in responsibility for an injury, in violation of duties they respectively owed to the injured person" (*Smith v Sapienza*, 52 NY2d 82, 87 [1981]). Further, a claim for common law indemnification should be dismissed where the defendant "was not actively at fault in bringing about the damages caused to plaintiff...and it did not exercise actual supervision or control over the damage producing work" (*87 Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540, 542 [1st Dept 2014]).

Here, as discussed above, genuine questions of material fact regarding the duty owed by Erin to Plaintiff remain, the resolution of which will have direct bearing on the cross-claims

asserted against Erin for indemnification and contribution. As such, Erin's motion to dismiss the cross-claims asserted against it is denied.

D. Plaintiff's Cross-Motion for Summary Judgment against Defendants is Denied

On February 14, 2023, Plaintiff filed a cross-motion for an Order granting Plaintiff summary judgment against Defendants on Plaintiff's claims under Labor Law Section 240(1) (NYSCEF Doc. 239). Specifically, Plaintiff's cross-motion affirmatively moves for summary judgment "as against 1380 Housing Development Fund Corporation, Winn Residential (NY) LLC, and WFHA King Boulevard L.P., in their status as 'owners' under the Labor Law, and...against Erin Construction Development Co., Inc. based upon their status as a 'general contractor'" (NYSCEF Doc. 240).

Erin filed an Affirmation in opposition to Plaintiff's cross-motion on March 24, 2023 (NYSCEF Doc. 252). Plaintiff filed an Affirmation in reply on April 13, 2023 (NYSCEF Doc. 307). The 1380 Defendants failed to oppose Plaintiff's cross-motion.[2]

i. Plaintiff's Cross-Motion for Summary Judgment on his Labor Law 240(1) Claim is Denied as to Defendant Erin

As discussed above, for purposes of Labor Law 240(1), "[i]t is a defense that the plaintiff's work at the time of the accident was outside the scope of the general contractor's contract" (*Balthazar v Full Circle Constr. Corp.* 268 AD2d 96, 98 [1st Dept 2000]). As Erin has demonstrated questions of fact regarding whether Plaintiff's injury producing work occurred outside the scope of work delegated to Erin as a general contractor as well as the work delegated

[2] Although the 1380 Defendants did not submit any opposition to Plaintiff's cross-motion for summary judgment on his Labor Law 240(1) claims, NYSCEF Doc. 295, filed under the present motion (Mot. Seq. 5), is a Reply Affirmation in support of the 1380 Defendants' motion for summary judgment (Mot. Seq. 6) which argues, *inter alia*, that the 1380 Defendants are not liable under Labor Law 240(1) because Plaintiff was the sole proximate cause of his accident (NYSCEF Doc. 295 at 7). The Court, in its discretion, elects to consider the 1380 Defendants' argument regarding 240(1), as included in NYSCEF Doc. 295, as opposition to Plaintiff's cross-motion for summary judgment.

to Windsor by Erin, Plaintiff's cross-motion for summary judgment on his Labor Law 240(1) cause of action is denied as to Erin.

ii. Plaintiff's Cross-Motion for Summary Judgment on his Labor Law 240(1) Claim is Denied as to the 1380 Defendants

"Labor Law §240(1) imposes a nondelegable duty upon owners, general contractors, *and their agents* to provide proper protection to persons working upon elevated structures" (*White v 31-01 Steinway, LLC*, 165 AD3d 449, 452 [1st Dept 2018]) (emphasis in original). Specifically, Section 240(1) requires that all contractors, owners, and their agents:

> ...in the erection, demolition, repairing, altering, painting, cleaning, or pointing of a building or structure shall furnish or erect or cause to be furnished or erected for the purposes of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed, and operated as to give proper protection to a person so employed

The Court of Appeals has held that "[a] violation of the statute gives rise to absolute liability" (*Cutaia v Bd. of Mgrs. Of the 160/170 Varick St. Condo.*, 38 NY3d 1037, 1042 [2022]). "To prevail on a Labor Law §240(1) claim, a plaintiff must establish that the statute was violated and that the violation was a proximate cause of the injury" (*Id.*). Further, "[i]n order to prevail on summary judgment in a section 240(1) 'falling object' case, the injured worker must demonstrate the existence of a hazard contemplated under that statute 'and the failure to use, or the inadequacy of a safety device of the kind enumerated therein" (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 221 NY3d 658, 662 [2014] quoting (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [2001]. It is the plaintiff's burden to demonstrate "that at the time the object fell, it either was being 'hoisted or secured,' or 'required securing for the purposes of the undertaking'" (*Id.*) citing (*Narducci*, 96 NY2d at 268) and (*Quatar v City of New York*, 5 NY3d 731, 732 [2005]). Further,

the plaintiff "must show that the object fell…because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci*, 96 NY2d at 268).

It is well established that in a summary judgment context "[f]acts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted" (*Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 544 [1975]). Plaintiff asserts in his moving papers that "[t]he property owner represents multiple parties including 1380 Housing Development Fund Corporation, Winn Residential (NY) LLC, and WFHA King Boulevard L.P." The 1380 Defendants do not oppose this assertion. Therefore, for purposes of Plaintiff's cross-motion, the 1380 Defendants are deemed to have admitted ownership of the Premises. Further, John Crotty, who testified on behalf of the 1380 Defendants as an Owner of 1380, affirmed in his deposition that Winn was hired as the managing agent at the Premises (NYSCEF Doc. 215 at 215). As such, Plaintiff has established that Winn was an agent of the owners for purposes of Labor Law 240(1).

Although Plaintiff in this case claims that he fell from a ladder due to the ladder being "wobbly" and unsecured (NYSCEF Doc. 212 at pp. 84, 85-87), and the 1380 Defendants state that "[P]laintiff's testimony demonstrates that he was attempting to install a pipe to the boiler…at the time of his fall," (NYSCEF Doc. 281 at 13), Erin contends that "there is no medical record to support Plaintiff's testimony" (NYSCEF Doc. 252 at ¶ 8). Further, Erin claims that a Pre-hospital Care Report from the FDNY shows that Plaintiff stated that he "fell at home around 9PM last night and is now having left shoulder [pain]" (*Id.*). Erin also contends that records from New York Presbyterian Hospital show that Plaintiff made additional statements to hospital staff stating that "he slipped on ice and injured himself" (*Id.*).[3] Although Plaintiff claims not to recall making either

[3] At this juncture the Court is not able to verify the accuracy of Defendant Erin's claims regarding the New York Presbyterian Hospital records or the Pre-hospital Care Report prepared by the F.D.N.Y., as both records are marked "Confidential – Pending Order to Seal," despite the Court's Decision and Order granting of Erin's motion to seal dated January 8, 2024 (NYSCEF Doc. 315).

of these statements, Erin has sufficiently demonstrated the presence of issues of fact regarding the source of Plaintiff's injuries.

Accordingly, Plaintiff's motion for summary judgment on his Labor Law 240(1) claim is also denied as against the 1380 Defendants.

Accordingly, it is hereby,

ORDERED that Defendant Erin Construction & Development Co., Inc.'s motion for an Order granting summary judgment in favor of Erin dismissing Plaintiff Joshua Martinez's Labor Law 240 claim against it is denied; and it is further

ORDERED that Defendant Erin Construction & Development Co., Inc.'s motion for an Order granting summary judgment in favor of Erin dismissing Plaintiff Joshua Martinez's Labor Law 241(6) against it is granted, and Plaintiff's Labor Law 241(6) claims are dismissed as against all parties; and it is further

ORDERED that Defendant Erin Construction & Development Co., Inc.'s motion for an Order granting summary judgment in favor of Erin dismissing Plaintiff Joshua Martinez's Labor Law 200 and common law negligence claims against it, is denied; and it is further

ORDERED that Defendant Erin Construction & Development Co., Inc.'s motion for an Order granting summary judgment in favor of Erin dismissing all cross-claims asserted against it is denied; and it is further

ORDERED that Plaintiff Joshua Martinez's motion for an order granting summary judgment in favor of Plaintiff on Plaintiff's Labor Law 241 claim is denied; and it is further

[*The remainder of this page is intentionally left blank*]

ORDERED that on or before April 2, 2024, the remaining parties are directed to submit a proposed Status Conference Order to the Court via e-mail to SFC-Part33-Clerk@nycourts.gov. If the parties are unable to agree to a proposed Status Conference Order, the parties are directed to appear for an in-person status conference with the Court in room 442, 60 Centre Street. on April 3, 2024 ad 9:30 a.m.; and it is further

ORDERED that within ten (10) days of entry, counsel for Movant shall serve a copy of this Decision and Order with notice of entry upon all parties to this action; and it is further

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

This constitutes the Decision and Order of the Court.

3/7/2024
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, J.S.C.

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