Jadusingh v New York Univ. Hosps. Ctr.
2020 NY Slip Op 30057(U)
January 10, 2020
Supreme Court, New York County
Docket Number: 158284/2014
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

Justice

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TYRONE JADUSINGH, SHELIA JADUSINGH,

Plaintiff,

- v -

NEW YORK UNIVERSITY HOSPITALS CENTER S/H/A NYU LANGONE MEDICAL CENTER,

Defendant.

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INDEX NO. 158284/2014

MOTION DATE 08/26/2019, 08/26/2019

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

NEW YORK UNIVERSITY HOSPITALS CENTER S/H/A NYU LANGONE MEDICAL CENTER

Plaintiff,

-against-

NOUVEAU ELEVATOR INDUSTRIES, INC.

Defendant.

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Third-Party
Index No. 595173/2016

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TYRONE JADUSINGH, SHEILA JADUSINGH,

Plaintiff,

- v -

NOUVEAU ELEVATOR INDUSTRIES INC.,NEW YORK UNIVERSITY HOSPITALS CENTER, TURNER CONSTRUCTION COMPANY,

Defendant.

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TURNER CONSTRUCTION COMPANY,

Third party Plaintiff,

- v –

E-J ELECTRIC INSTALLATION CO.,

Third-party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 163, 164, 165, 171, 177, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 163, 164, 165, 171, 177, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195

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

Upon the foregoing documents, it is

ORDERED that defendants/third-party plaintiffs New York University Hospitals Center s/h/a NYU Langone Medical Center (NYU) and Turner Construction Company's (Turner) motion is granted only to the extent that Plaintiff's Labor Law § 240 (1) claims are dismissed; and it is further

ORDERED that defendant/third-party defendant Nouveau Elevator Industries, Inc. (Nouveau) cross motion for summary judgment is granted only to the following extent:

· Plaintiff's Labor Law §§ 200, 240 (1), and 241 (6) are dismissed as against Nouveau;

· Turner's cross claim for contractual indemnification against Nouveau is dismissed; and it is further

ORDERED that the Clerk of the Court is respectfully requested to enter judgment accordingly and the remaining claims are severed and continue to trial; and it is further

ORDERED that counsel for Plaintiff shall serve a copy of this order, along with notice of entry on all parties, within 10 days of entry.

NON-FINAL DISPOSITION

In these consolidated Labor Law actions, defendants/third-party plaintiffs New York University Hospitals Center s/h/a NYU Langone Medical Center (NYU) and Turner Construction Company move, pursuant to CPLR 3212, for summary judgment dismissing all claims and cross claims as against them. Turner and NYU also seek summary judgment on their own cross claims and third-party claims against defendant/third-party defendant Nouveau Elevator Industries, Inc. (Nouveau). Nouveau partially opposes, and moves for summary judgment dismissing all claims and cross claims as against it.

BACKGROUND

Plaintiff Tyrone Jadusingh's accident arose in the long aftermath of Hurricane Sandy, as NYU worked to renovate infrastructure that was damaged in flooding following the superstorm. On October 2, 2013, plaintiff Tyrone Jadusingh was part of a team rolling a pallet jack bearing a 4,000 pound transformer onto an elevator in NYU's Langone Medical Center. Plaintiff and the others pushing the pallet jack were all employed by third-party defendant E-J Electric Installation Co. (E-J Electric).

Plaintiff alleges that, when he and his co-workers tried to push the pallet jack onto the elevator, "it just came to a dead crash" (NYSCEF doc No. 126 at 44). "[T]he transformer," Plaintiff alleges, "tipped forward and came back" injuring Plaintiff's shoulder and bicep as it rocked back and he maintained contact with it with his hands (*id.*). Plaintiff stated that after his accident, he "walked in front to see what we hit" and found that "[t]he elevator was sticking up about two and a half to three inches" (NYSCEF doc No. 124 at 143-144).

The record presents an inconsistency as to the position of the elevator at the time of the accident. While Plaintiff testified that the elevator was "sticking up," E-J Electric's foreman, Kevin Grandon (Grandon), who was not present at the time of the accident, testified that Plaintiff

and other workers told him that the elevator dropped below the level of the floor when the transformer was partially rolled onto it (NYSEF doc No. 140 at 70-71). Grandon also testified that his contention that the elevator had misleveled when the pallet jack was rolled onto it was informed not only by the statements of Plaintiff and his colleagues, but from going "out into the field after the fact and looking at the time" (*id*. at 71). While this testimony presumably means that Grandon looked at the elevator after the accident, he testified that he did not inspect the elevator (*id*.).

NYU is the owner of the subject hospital building. While Turner does not submit its contract with NYU, Turner does not contest that it is a general contractor for Labor Law purposes. NYU and Turner submit both a subcontract agreement between Turner and EJ-Electric (NYSCEF doc No. 139), as well as a construction agreement between NYU and EJ-Electric (NYSCEF doc No. 138). NYU and Turner also submit a comprehensive elevator maintenance and repair contract between NYU and Nouveau.

Plaintiff alleges that defendants are liable under Labor Law § 200 and common-law negligence, as well as Labor Law §§ 240 (1) and 241 (6). Plaintiff's wife, Shelia Jadusingh, brings derivative claims for the loss of her husband's services.

DISCUSSION

"Summary judgment must be granted if the proponent makes '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,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist*., 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp*., 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a *prima facie* showing, the court

must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

I. Labor Law § 240 (1)

Labor Law § 240 (1) provides, in relevant part:

> "All contractors and 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 performance 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 this duty to provide safety devices is nondelegable (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused a plaintiff's injury (*Bland v Manocherian*, 66 NY2d 452, 459 [1985]). A statutory violation is present where an owner or general contractor fails to provide a worker engaged in section 240 activity with "adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Where a violation has proximately caused a plaintiff's injuries, owners and general contractors are absolutely liable "even if they do not have a continuing duty to supervise the use of safety equipment" (*Matter of East 51st St. Crane Collapse Litig.*, 89 AD3d 426, 428 [1st Dept 2011]).

As Plaintiff alleges that his accident arose from a misleveled elevator, NYU and Turner argue that gravity-related issues are not present, and that, as a result, the statute is not applicable. Nouveau argues initially that it is not a proper Labor Law defendant, as it was not an owner, or a general contractor on the subject project. As to the applicability of the statue, Nouveau argues that section 240 (1) is not triggered, as the transformer was not being hoisted or secured, but was

instead being moved horizontally into an elevator. In support, Nouveau cites to two cases in which loads fell from pallet jacks, *Simmons v City of New York* (165 AD3d 725 [2d Dept 1997]) and *Davis v Wyeth Pharmaceuticals* (86 AD3d 907 [3d Dept 2011]).

In *Simmons*, a pallet jack carrying a 600-pound compressor hit a piece of concrete debris, causing the compressor to fall on the plaintiff's ankle, while in *Davis*, a 1000-pound filtration unit fell off a pallet jack and onto the plaintiff's leg after he slipped and grabbed hold of it. In both cases, the Court upheld dismissals, as the load was being moved only horizontally, in contrast to the load in *Runner*, and was not being hoisted or secured.

Plaintiff, in opposition, does not argue that Nouveau was an agent of NYU or Turner. Thus, Nouveau is not a proper Labor Law defendant, and the branch of its motion seeking dismissal of the Labor Law §§ 200, 240 (1), and 241 (6) claims as against it must be granted.

As to the cases cited by Nouveau, *Simmons* and *Davis*, Plaintiff argues that they are distinguishable, as the transformer-laden pallet here was being transported not just horizontally, but also vertically. That is, it was to be brought up through the building in the elevator. In Plaintiff's characterization, then, the elevator is a section 240 (1) device, provided as a protection against a gravity risk, which failed to provide him adequate protection.

As to the question of whether a service elevator is a safety device under the statute, Nouveau cites to *Barrios v Boston Props* (55 AD3d 339 [1st Dept 2008]), where the First Department held that a freight elevator is not a "material hoist," as that term is interpreted under the Industrial Code provisions 12 NYCRR 23-6.1 (d), 12 NYCRR 23-6.3 (e) (3), 12 NYCRR 23-1.4 (b) (33). Plaintiff argues that this case is irrelevant, as it did not involve a section 240 (1) claim, and the holding that a freight elevator is not a material hoist was made, instead, in the section 241 (6) context.

One possible reason why there was no section 240 (1) claim in *Barrios* is that it was decided before *Runner*. The import of *Runner* has traveled a long distance, but defendants are correct that if this case only involved a transformer that slipped from a pallet jack, while being pushed across a flat surface, the protection of the statute would not be implicated under *Simmons* and *Davis*. The question of whether the result is altered if the equipment-laden pallet jack is rolled onto an allegedly misleveled elevator is one of first impression.

In Plaintiff's broad view of the work, the transformer was being lifted through the building, and the elevator was the device used to hoist it, and it proved insufficient to that task, injuring him in the process. This is a plausible *a priori* view, but courts have been reluctant to view elevators as hoists or protective devices. For example, in *Kleinberg v City of New York* (61 AD3d 436 [1st Dept 2009]), the First Department held that a service elevator that free-fell 80 to 100 feet, injuring workers, did not give rise to a section 240 (1) claim, as "the injuries were not attributable to the elevation risks contemplated" by section 240 (1) and "[t]he elevator was not designed as a safety device within the meaning of the statute" (*id*. at 437).

While *Kleinberg* was decided before *Runner*, Plaintiff is unable to cite to a case in the more than a decade since *Runner* contradicting its holding. Plaintiff cites to *Megna v Tishman Const*. (306 AD2d 163 [1st Dept 2003]) for the proposition that an elevator is an elevation device under section § 240 (1). However, while the injured worker in *Megna* was an elevator worker, he was injured when a temporary wooden straircase on which the plaintiff stood (206 AD2d at 164 [holding that the statute was implicated "[a]s the temporary stairway was being used to facilitate plaintiff's access to a different elevation level"]). Thus, the safety device, in *Megna*, provided to protect against gravity-related dangers was the staircase, rather than an elevator, and does not alter the caselaw pertaining to elevators.

Under that caselaw, Plaintiff cannot use the elevator to distinguish *Simmons* and *Davis*, and to extend the holding of *Runner* to give life to his section 240 (1) claim. Accordingly, the branch of Turner and NYU's motion that seeks dismissal Plaintiff's section 240 (1) claim must be granted.

II. Labor Law § 200 and Common-law Negligence

Section 200

Labor Law § 200 "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 New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, "liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed" (*id.*).

In contrast, where the defect arises from a dangerous condition on the work site, instead of the methods or materials used by plaintiff and his employer, an owner or contractor "is liable under Labor Law § 200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive

notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; *see also Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675, 675 [1st Dept 2010]). In the dangerous-condition context, "whether [a defendant] controlled or directed the manner of plaintiff's work is irrelevant to the Labor Law § 200 and common-law negligence claims . . ." (*Seda v Epstein*, 72 AD3d 455, 455 [1st Dept 2010]).

As stated above, Plaintiff does not have a viable section 200 claim against Nouveau, as it was not the owner or contractor, or an agent of either. Plaintiff alleges that his accident arose from a defect in the premises. Specifically, Plaintiff argues that his accident was caused by a misleveled elevator.

Turner and NYU argue that there is no defective condition in this action, and that they had no notice of any such condition. However, they do not submit any evidence as to when they last inspected the subject elevator. Thus, they fail to make a *prima facie* showing as to entitlement to judgment on Plaintiff's section 200 claims against them (*see Jahn v. SH Entertainment, LLC*, 117 A.D.3d 473, 473 [1st Dept 2014] [holding the defendant owner's affidavit "was insufficient to establish a lack of constructive notice as a matter of law because he did not state how often he inspected the floor or that he or defendant's employees inspected the accident location prior to the accident"]). Accordingly, the branch of NYU and Turner's motion seeking dismissal of Plaintiff's section 200 claim as against them must denied.

Common-law Negligence

Nouveau seeks dismissal of the negligence claim against it, but its application fails for the same reason that Turner and NYU application for dismissal of the secton 200 and common-law negligence claims as against them fails. That is, Nouveau does not submit any evidence as to when it last inspected the subject elevator. In these circumstances, where Nouveau was

responsible for maintaining the subject elevator, if Nouveau had constructive notice of a problem with the elevator and failed to remedy it, it is possible that a jury could find that such conduct launched an instrument of harm, conferring a duty and possibly liability on Nouveau (*Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 138 [2002]; *see also Church ex rel. Smith v. Callanan Indus., Inc.*, 99 N.Y.2d 104, 111 [2002]). Thus, as there remain questions of fact as to constructive notice and Nouveau's duty to Plaintiff, Nouveau is not entitled to dismissal of Plaintiff's common-law negligence claims as against it.

III. Labor Law § 241 (6)

Labor Law § 241 (6) provides, in relevant part:

> "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

It is well settled that this statute requires owners and contractors and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241 [6]). While this duty is nondelegable, and exists "even in the absence of control or supervision of the worksite" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]), it is not absolute and "comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

To maintain a viable claim under Labor Law § 241 (6), plaintiffs must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). The Court of Appeals has noted that "[t]he

Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (*St. Louis,* 16 NY3d at 416).

Nouveau, in their moving papers, argues that Plaintiff does not allege violation of any Industrial Code regulations in the complaint (NYSCEF doc No. 109), the amended complaint (NYSCEF doc No. 110), or the bill of particulars (NYSCEF doc No. 130), all of which Turner and NYU submit with their moving papers.

Under *Rosada v Briarwoods* (19 AD3d 396 [2d Dept 2005]), it is defendants' burden to make *prima facie* showing that a code violation was not a proximate cause of the plaintiff's accident. *Rosada*, however, held that while moving defendants must make a *prima facie* showing that a violation of a sufficiently concrete code provision was not the proximate cause of the plaintiff's accident in order to be entitled to summary judgment, a plaintiff must first "allege that a specific and concrete provision of the Industrial Code was violated" (19 AD3d at 397).

Here, Plaintiff, in his bill of particulars dated October 10, 2017, alleges violations of the following Industrial Code provisions: 12 NYCRR § 23-1.5; 12 NYCRR § 23-1.7 (d), 12 NYCRR § 23 – 1.7 (e) (2), 12 NYCRR § 23-1.22; 12 NYCRR § 23-1.27; 12 NYCRR § 23-1.28; 12 NYCRR § 23-1.32; 12 NYCRR § 23-2.1; 12 NYCRR § 23-2.4; 12 NYCRR § 23-2.2.5; 12 NYCRR § 23-6.1; 12 NYCRR § 23-6.2; NYCRR § 23-6.3; and NYCRR § 23-7.3 (NYSCEF doc No. 130). Thus, Plaintiff has alleged violations of the Industrial Code which are sufficiently specific to serve as the basis of section 241 (6) liability (*see, e.g., Garcia v 95 Wall Associates*, 116 AD3d 413 [1st Dept 2014] [holding that the second sentence of 12 NYCRR 23-1.28 (a) is sufficiently specific]).

The court finds that Nouveau is entitled to summary judgment dismissing Plaintiff's section 241 (6) claim, as it is not a proper Labor Law defendant. Turner and NYU, on the other

hand, sketch the broad outlines of Labor Law § 241 (6), but do not make any specific arguments as to why Industrial Code provisions alleged by Plaintiff cannot subject them to liability under the statute. Turner and NYU do, however, invoke Caps Lock, when arguing generally that "plaintiff injuring his shoulder by trying to push something that did not move is NOT a Labor Law covered action (NYSCEF doc No. 108, ¶ 63).

Plaintiff argues in opposition that Turner and NYU fail to make a *prima facie* showing of entitlement to judgment, as they fail to discuss any of the Industrial Code provisions that Plaintiff alleges were violated. In reply, Turner and NYU make one sentence arguments as to why the various Industrial Code violations are inapplicable.

Without making any determination as to the applicability of these regulations, the court notes that it was Turner and NYU's burden to make these arguments in their moving papers (*see EPF Intl. Ltd. v Lacey Fashions Inc.*, 170 AD3d 575, 575 [1st Dept 2019] ["(t)he 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"]). As Turner and NYU fail, in their moving papers, to make any arguments as to the applicability of Industrial Code violations alleged by Plaintiff, they are not entitlement to summary judgment dismissing Plaintiff's Labor Law § 241 (6) claim.

IV. Turner and NYU's Claims Against Nouveau

NYU has third-party claims against Nouveau for contribution, common-law indemnification, and contractual indemnification (NYSCEF doc No. 114). Turner has cross claims against Nouveau for contribution, common-law indemnification, and contractual indemnification (NYSCEF doc No. 149).

Turner and NYU argue that they should be indemnified by Nouveau. While they refer to the full-service elevator contract with Nouveau, Turner and NYU, in an apparent copy and paste mishap, argue that "there is no reason why Vornado Two Penn Plaza should not be granted Summary Judgment" (NYSCEF doc No. 108, ¶ 71).

In opposition, and in support of its cross motion to dismiss Turner and NYU's claims as against it, Nouveau notes that it has no contract with Turner, and that its contract with NYU contains a provision requiring it to indemnify NYU where injuries arise out of Nouveau's performance of the contract, "but only to the extent caused in whole or in part by any negligent act, error or omission or breach of statutory duty or obligation of [Nouveau]" (NYSCEF doc No. 134). This indemnification provision clearly requires a showing of negligence to be triggered, and, as there has not yet been any such showing against Nouveau, NYU and Turner's application for summary judgment as to indemnification must be denied.

In reply, Turner and NYU make no argument as to Nouveau's assertion that it has no contractual relationship with Turner. Accordingly, Turner's cross claims against Nouveau for contractual indemnification must be dismissed. As to Nouveau's application for dismissal of NYU's claim against it for contractual indemnification, it is not entitled to dismissal of this claim, as Nouveau has not established that it was free of negligence.

Similarly, Nouveau's application for dismissal of Turner and NYU's claims for common-law indemnification and contribution, those claims cannot be dismissed at this time, as there remains an issue of fact as to Nouveau's negligence (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374, 375 [2011] [internal quotation marks and citation omitted] [common-law negligence requires an showing of active negligence]; *Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2nd Dept 2003] [contribution requires an active showing of negligence]).

CONCLUSION

Based on the foregoing, it is

ORDERED that defendants/third-party plaintiffs New York University Hospitals Center s/h/a NYU Langone Medical Center (NYU) and Turner Construction Company's (Turner) motion is granted only to the extent that Plaintiff's Labor Law § 240 (1) claims are dismissed; and it is further

ORDERED that defendant/third-party defendant Nouveau Elevator Industries, Inc. (Nouveau) cross motion for summary judgment is granted only to the following extent:

· Plaintiff's Labor Law §§ 200, 240 (1), and 241 (6) are dismissed as against Nouveau;

·Turner's cross claim for contractual indemnification against Nouveau is dismissed; and it is further

ORDERED that the Clerk of the Court is respectfully requested to enter judgment accordingly and the remaining claims are severed and continue to trial; and it is further

ORDERED that counsel for Plaintiff shall serve a copy of this order, along with notice of entry on all parties, within 10 days of entry.

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1/10/2020
DATE

CAROL R. EDMEAD, 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