SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LORI S. SATTLER** **PART** **02TR**

Justice

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OLIVERO QUINTERO,

Plaintiff,

- v -

333 W. 46TH STREET CORP., THE TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT COMMITTEE, INC.,D/B/A THE TIMES SQUARE ALLIANCE, TIMES SQUARE DISTRICT MANAGEMENT ASSOCIATION, INC.,D/B/A THE TIMES SQUARE ALLIANCE,

Defendant.

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INDEX NO. 159849/2018

MOTION DATE N/A, N/A, N/A, N/A

MOTION SEQ. NO. 002 003 004 004

DECISION + ORDER ON MOTION

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333 W. 46TH STREET CORP., THE TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT COMMITTEE, INC., D/B/A THE TIMES SQUARE ALLIANCE, TIMES SQUARE DISTRICT MANAGEMENT ASSOCIATION, INC., D/B/A THE TIMES SQUARE ALLIANCE

Plaintiff,

-against-

CABARET RENTALS, INC.

Defendant.

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Third-Party
Index No. 595818/2019

The following e-filed documents, listed by NYSCEF document number (Motion 002) 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 108, 139, 140, 141, 144, 145, 146, 147, 148, 149, 154, 156, 162, 163, 164, 167, 168

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 142, 151, 152, 153, 155, 157, 165, 166

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 131, 132, 133, 134, 135, 136, 137, 138, 143, 158, 159, 160, 161, 169, 170

were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 131, 132, 133, 134, 135, 136, 137, 138, 143, 158, 159, 160, 161, 169, 170

were read on this motion to/for DISMISS.

In Motion Sequence 002 of this Labor Law action, Plaintiff Olivero Quintero ("Quintero") moves for an order granting summary judgment on his Labor Law § 240(1) cause of action against Defendant 333 W. 46th Street Corp. ("333 W. 46th Street"). 333 W. 46th Street opposes the motion and cross-moves for an order granting summary judgment dismissing all claims in the Complaint against it.

In Motion Sequence 003, Defendant The Times Square Business Improvement District Committee, Inc., d/b/a Times Square District Management Association, Inc., d/b/a The Times Square Alliance (collectively "Times Square Alliance") moves for summary judgment dismissing Quintero's Labor Law § 200 and common law negligence causes of action as against it. Times Square Alliance further moves for summary judgment on its common law indemnification cross claim and dismissing 333 W. 46th Street's cross claims for contractual and common law indemnification. Quintero and 333 W. 46th Street oppose the respective branches of this motion, and 333 W. 46th Street cross-moves for summary judgment on its cross claims and for dismissal of Times Square Alliance's cross claims.

In Motion Sequence 004, Times Square Alliance moves to amend its Verified Answer pursuant to CPLR 3018 and 3025(b) to add an affirmative defense for collateral estoppel and to dismiss Quintero's allegations of head and brain injuries and to strike these allegations from Quintero's Bill of Particulars. Quintero opposes this motion. The motions are consolidated for disposition.

On June 5, 2018, Times Square Alliance hosted an event known as "Taste of Times Square," featuring food, live music, and dancing. The event was held in a parking lot located at

333 West 46th Street in Manhattan, which Times Square Alliance rented from its owner. Times Square Alliance contracted with Cabaret Rentals Inc. ("Cabaret") to erect a large, 40 x 100-foot frame tent for the occasion. Quintero was employed by Cabaret on the day of the accident and was one of its workers tasked with assembling and disassembling the tent. Assembly involved fitting together supports of tubes or pipes, bolts, and other hardware.

After the event, the Cabaret workers on site disassembled the tent. As part of this work, Quintero had to hold one of the pipes that provided support to the tent canvas so that other workers could remove the pins keeping it in place (NYSCEF Doc. No. 97, Quintero EBT at 41-45). Quintero was standing on an adjustable, a-frame ladder on the second step from the top, approximately eight feet off the ground (*id.* at 24, 34). He testified that he had both hands above his head, with his left hand lifting one pipe to make it easier for the other workers to remove the pins, and his right hand holding a second pipe so that he would not lose his balance (*id.* at 41-43). While he was in this position, the other workers suddenly pushed the first pipe towards him, and he lost his balance and fell (*id*. 46-47). He states: "all of a sudden they grabbed the tube and they pushed it up with all their might and this tube, they put their strength or force towards me that's when I lost my balance and that's when the accident occurred" (*id.* at 34). When asked if he jumped from the ladder when he lost his balance, he stated that he could not remember (*id.* at 48). He testified he and his co-workers use ladders and tools to assemble and disassemble the tent (*id.* at 24). He did not testify as to the presence of any safety devices.

The foreman on the project, Luis Enriquez-Avila, testified that he witnessed Quintero's accident: "I saw him – when the pin came off . . . the structure, he – he wobbled, he was bouncing, and he jumped off the ladder, and fell off" (NYSCEF Doc. No. 101, Enriquez-Avila EBT at 25). He further elaborated that "[w]hen the pin [comes] out of the pipe, normally, the

pipes wobble, normally" (*id*. 65-66). After this, he states that Quintero "jumped off the ladder" when he lost his balance, rather than tripping and falling off (*id.* at 67). He clarified that Quintero "jumped off to regain his balance . . . I don't mean to say that he jumped off on purpose" (*id.* at 90-91).

Jonathan Louie, an owner of Cabaret who was present at the time of the accident, also testified that he saw Quintero lose his balance while removing pins from the pipes supporting the tent canvas (NYSCEF Doc. No. 102, Louie EBT at 27). Louie states that he then saw Quintero jump off the ladder after losing his balance, although he could not say if Quintero did this by accident or on purpose (*id.* at 27-31).

Quintero was approximately eight feet above the ground when he fell (Quintero EBT at 39). He allegedly sustained injuries to his spine and right shoulder, as well as mild traumatic brain injury and post-concussion syndrome (NYSCEF Doc. No. 96, Bill of Particulars). Quintero alleges that he is disabled as a result of the accident and has not worked since (*id*.; Quintero further EBT at 80).

He pursued a Workers' Compensation claim and was awarded temporary total disability (NYSCEF Doc. No. 137, Notice of Decision). However, his claims for traumatic brain injury were rejected by the Workers' Compensation Law Judge. That decision was affirmed by the Administrative Review Division of the Workers' Compensation Board, which found that the medical record supported a disallowance of traumatic brain injury and post-concussion syndrome (NYSCEF Doc. No. 138, Board Panel Decision).

Quintero then commenced this action alleging Labor Law §§ 240(1), 241(6), and 200 and common law negligence causes of action. 333 W. 46th Street asserts cross claims against Times Square Alliance for contractual and common law indemnification, while Times Square Alliance

asserts a cross claim for common law indemnification against 333 W. 46th Street. After discovery was completed, these motions followed.

On a motion for summary judgment, the movant "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. Center*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 39 NY2d 557, 562 [1980]). Failure of the movant to make this showing requires denial of the motion, regardless of the sufficiency of opposing papers (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). If the movant makes this initial showing, the burden shifts to the opposing party which must then produce evidentiary roof in admissible form to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Quintero moves, in Motion Sequence 002, for summary judgment on his Labor Law § 240(1) cause of action against 333 W. 46th Street. He contends that he was required to use both hands to perform his work while standing on a ladder, and was not provided with any other protections, such as a harness or safety device (NYSCEF Doc. No. 89, Statement of Material Facts, ¶ 8). In opposition, 333 W. 46th Street argues there are issues of fact as to whether his accident was caused by the lack of an adequate safety device and as to whether Quintero was the sole proximate cause of his accident. Times Square Alliance also opposes this motion, arguing that Quintero fails to meet his prima facie burden because he does not show a lack of dispute of facts as to whether the ladder was defective or inadequately secured or whether there was a failure to provide him an adequate safety device. Times Square Alliance further argues that a question of fact exists as to whether Quintero intentionally jumped off the ladder.

Labor Law § 240(1) was enacted to protect workers from gravity-related hazards stemming from differences in elevation on worksites (*see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Section 240(1) requires contractors, owners, and agents who contract for the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" to furnish scaffolding, ladders, and other devices to give proper protection to persons employed in such tasks. Labor Law § 240(1) "places a nondelegable duty on owners, contractors, and their agents to furnish safety devices giving construction workers adequate protection from elevation-related risks" (*Hill v City of New York*, 140 AD3d 568, 569 (1st Dept 2016). "The single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

Quintero has demonstrated prima facie entitlement to summary judgment on his Labor Law § 240(1) claim based on testimony that he lost as balance when his fellow workers unexpectedly moved a tent pole, causing him to fall from a ladder. Both the project foreman and Quintero's employer testified that Quintero lost his balance after the pipe he was holding moved. This establishes that Quintero was exposed to an elevation-related risk against which there was a failure to provide him with proper protection (*Lindsay v CG Maiden Member, LLC*, 213 AD3d 604 [1st Dept 2023], citing *Rodriguez v Milton Boron, LLC*, 199 AD3d 537, 538 [1st Dept 2021]; *see also Goundan v Pav-Lak Contr. Inc.*, 188 AD3d 596 [1st Dept 2020])).

Defendants fail to raise an issue of fact as to the presence of an adequate safety device that could have prevented his fall. The evidence proffered by Defendants, namely the testimony of Enriquez-Avila that he did not see the ladder itself move, is insufficient to controvert Quintero's prima facie case. Defendants' additional contention that an issue of fact exists as to

whether Quintero may have jumped off the ladder, and as such was the sole proximate cause of his injuries, is not supported by the evidence Defendants present. Enriquez-Avila testified that Quintero jumped "to regain his balance," while Louie could not say whether Quintero jumped intentionally or accidentally. This testimony does not raise a factual dispute as to whether Quintero was the sole proximate cause of his injuries. Accordingly, Quintero's motion for summary judgment on his § 240(1) cause of action against 333 W. 46th Street is granted and 333 W. 46th Street's motion to dismiss that cause of action is denied.

333 W. 46th Street further moves for summary judgment dismissing Quintero's remaining causes of action against it. It argues that the § 241(6) cause of action should be dismissed because Quintero fails to demonstrate any violation of applicable Industrial Code provisions. Quintero does not directly address this argument in his opposition to the cross motion.

Labor Law § 241(6) "imposes a nondelegable duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection' to persons employed in . . . all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Constr. Co.*, 91 NY2d 343, 348-349 [1998]). To establish a claim under § 241(6), "a plaintiff must show that a specific, applicable Industrial Code regulation was violated and that the violation caused the complained-of injury" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 [1st Dept 2012], *citing Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-02 [1993]). Furthermore, the applicable rule or regulation must be a "specific, positive command . . . rather than a reiteration of common-law standards . . . ." (*Rizzuto* at 349, quoting *Ross* at 504 [internal citations and quotation marks omitted]).

Quintero alleges that Defendants violated Industrial Code Sections 23-1.5(a), 23-1.5(c)(1)-(3), 23-1.16, 23-1.21(a), 23-1.21(b)(4), and 23-2.7. Section 23-1.5, which sets forth the general responsibility of employers under the Industrial Code, cannot support a Labor Law § 241(6) cause of action as its provisions do not amount to a "specific, positive command" setting forth a "specific standard of conduct" (*Gasques v State of New York*, 15 NY3d 869, 870 [2010], quoting *Rizzuto*, 91 NY2d 343 at 349; *see* 12 § NYCRR 23-1.5). 12 NYCRR § 23-1.16 is inapplicable to this case as its provisions regulate the safety standards for safety belts, harnesses, tail lines, and lifelines, and Quintero does not allege that he was using or should have been provided with any of these devices while working on the ladder.

Although Section 23-1.21 contains specific regulations for ladders, the subsections for which Quintero alleges violations, (a) and (b)(4), are inapplicable to the facts of this case. Subsection 23-1.21(a) requires approval of ladders "10 feet or more in length"; here, Quintero does not allege that the ladder was 10 feet or longer or that he was injured by use of an unapproved ladder. Similarly, there is nothing in the record suggesting that Section 23-1.21(b)(4) was violated, as Quintero was not using a ladder as a regular means of access between floors, using a ladder on insecure footings or a slippery surface, or using a leaning ladder. The Court further finds that Industrial Code Section 23-2.7 is inapplicable to this case. This section sets forth requirements for stairways during the construction of "any reinforced concrete building or other structure." No stairway was involved in Quintero's accident. Therefore, this branch of 333 W. 46th Street's motion is granted and Quintero's § 241(6) claim is dismissed as against 333 W. 46th Street.

Finally, 333 W. 46th Street argues it is entitled to summary judgment dismissing Quintero's Labor Law § 200 and negligence causes of action against it because there is no

evidence that Quintero's accident arose out of a defective condition on the premises and that it did not exercise control or supervision over the manner and means of Quintero's work. Quintero does not address this argument in his opposition to the cross motion.

Labor Law § 200 codifies the common law duty of owners and general contractors to provide a safe workplace to construction site workers (*Comes v NY State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Where a dangerous premises condition or existing defect causes an injury, "liability attaches if the owner or general contractor created the condition . . . ." (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-44 [1st Dept 2012]). "Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work" (*Cappabianca* at 144). An owner or general contractor will not be liable under a method and means theory where they "at most exercised general supervisory powers over plaintiff" (*see Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 [1st Dept 2011]). The "mere presence" of an owner's or general contractor's personnel on a work site is "insufficient to infer supervisory control" (*id.*; *Philbin v A.C. & S., Inc.*, 25 AD3d 374 [1st Dept 2006]).

333 W. 46th Street meets its prima facie burden by presenting evidence that it did not exercise control or supervision over Quintero's work. Quintero himself testified that he only received direction from coworkers and supervisors employed by Cabaret (Quintero EBT at 28). The testimony of Quintero's supervisor, Enriquez-Avila, and his employers, Louie and Solomon Wang, neither mention the presence of any 333 W. 46th Street representatives at the site nor any supervisory control over the tent disassembly. Therefore, this branch of the cross motion is

granted, and the Court dismisses Quintero's Labor Law § 200 and negligence causes of action as against 333 W. 46th Street.

In Motion Sequence 003, Times Square Alliance moves for summary judgment dismissing Quintero's Labor Law § 200 and negligence causes of action as against it and dismissing 333 W. 46th Street's cross claims for contractual and common law indemnification. 333 W. 46th Street opposes that branch of the motion, and cross-moves for an order granting summary judgment on its cross claims and dismissing Times Square Alliance's cross claim for common law indemnification. Quintero does not submit opposition papers.

The Court grants the first branch of Times Square Alliance's motion and dismisses Quintero's Labor Law § 200 and negligence causes of action against it. Like 333 W. 46th Street, Times Square Alliance meets its burden of showing that it lacked supervisory control over Quintero's work. In addition to the testimony of Quintero and other Cabaret witnesses, Times Square Alliance invokes the testimony and affidavit of Gary Winkler, its Vice President of Events and Programming at the time of the accident, who states that his oversight of the work involving the tent was limited to marking the location on which it was to be set up, and that nobody from Times Square Alliance oversaw, directed, or supervised Cabaret's work (NYSCEF Doc. No. 124, Winkler EBT at 35-38; NYSCEF Doc. No. 129, Winkler aff ¶ 7-9).

Times Square Alliance further argues it is entitled to dismissal of 333 W. 46th Street's cross claims for contractual and common law indemnification because there is no indemnification clause in their contract and that it did not exercise supervisory control over Quintero's work at the time of the accident and cannot otherwise be held vicariously liable for his injury. 333 W. 46th Street argues in opposition that only Times Square Alliance can be held

liable for Quintero's injury, as the event organizer, and contends Times Square Alliance did exercise actual supervision and control over Quintero's work.

In support of its motion seeking dismissal of the contractual indemnification cross claim, Times Square Alliance submits a letter memorializing the terms of its agreement with 333 W. 46th Street, signed by Winkler and agent of 333 W. 46th Street. The agreement provides that the Times Square Alliance "will provide an insurance certificate naming . . . 333 46th Street Corp. . . . as additional insureds" (NYSCEF Doc. No. 129 at 8). However, the agreement contains no specific language about indemnification. The contract between Times Square Alliance and 333 W. 46th Street therefore does not require indemnification, as "entitlement to additional insured status and contractual indemnification are distinct" (*Lexington Ins. Co. v Kiska Dev. Group LLC*, 182 AD3d 462, 463 [1st Dept 2020]). 333 W. 46th Street fails to present any evidence of an issue of fact as to the contract. Accordingly, this branch of Times Square Alliance's motion is granted, and the contractual indemnification cross claim is dismissed.

A party is entitled to common law indemnification where it shows "(1) that it has been held vicariously liable without proof of negligence or actual supervision on its party; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012], citing *McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]). As the Court has found that neither Times Square Alliance nor 333 W. 46th Street exercised actual supervision or control over Quintero's work at the time of the accident, both party's common law indemnification claims must be dismissed.

Finally, Times Square Alliance moves to amend its Verified Answer pursuant to CPLR § 3018 and 3025(b) to add an affirmative defense for collateral estoppel on the grounds that the

Worker's Compensation Board found that Quintero's purported head and brain injuries were not sustained during the accident. It further moves to dismiss these allegations pursuant to CPLR 3211, and to strike them from the Verified Bill of Particulars.

Quintero opposes this motion, arguing it is defective on its face because Times Square Alliance failed to attach its proposed amended pleadings to the motion, and that he would be prejudiced by the filing of an Amended Verified Answer at this time. He further argues that, should the amendment be allowed, he did not have a full and fair opportunity to litigate his alleged head injuries before the Workers' Compensation Board, as he did not offer testimony in those proceedings, was not "a party to the proceedings," and that the Board's determination "was based solely upon the Staten Island Hospital emergency room records" and deposition testimonies of two doctors (NSYCEF Doc. No. 159 ¶¶ 7, 19).

Times Square Alliance attaches its proposed Amended Verified Answer to its reply papers (NYSCEF Doc. No. 170). It argues that Quintero would not be prejudiced by the Amended Verified Answer as it filed its Answer in January 2019, over a year before the Workers' Compensation Board Decision in March 2020, and that Quintero has known about this decision and its possible effects for over two years. It further argues that Quintero was a party to the Workers' Compensation Board proceedings, where he was represented by counsel, and therefore he had the opportunity to fully and fairly litigate his head injury claims.

Discretionary leave to amend pleadings under CPLR 3025(b) should be freely given unless doing so would result in surprise or prejudice to the nonmoving party (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011]). The initial Workers' Compensation decision was issued in March 2020 and the Board Decision was filed in August 2020, however Times Square Alliance only moved to amend its Answer in April 2022. Nevertheless, "delay

alone is not a sufficient ground for denying leave to amend" (*Johnson v Montefiore Med. Ctr.*, 203 AD3d 462, 463 [1st Dept 2022] [internal citations and quotation marks omitted]). The Court finds that Quintero is not prejudiced by the proposed amendment or the delay since he was aware of the Board Decision concerning his claims. Moreover, the failure to include the proposed amended answer with the motion papers is a technical defect and should be overlooked under the circumstances, where the pleading was annexed to the reply and the proposed amendment is limited and clearly described in the moving papers (*id.* at 464, citing *Medina v City of New York*, 134 AD3d 433 [1st Dept 2015]). Accordingly, Times Square Alliance's motion to amend its Answer is granted.

The branch of the motion dismissing Quintero's head injury claims as collaterally estopped is also granted. "The doctrine of collateral estoppel, or issue preclusion, bars relitigation of issues of ultimate fact where the issues have been conclusively determined against one party in a proceeding where that party had a full and fair opportunity to litigate the issue" (*Vera v Low Income Mktg. Corp.*, 145 AD3d 509, 510 [1st Dept 2016]). Collateral estoppel precludes a plaintiff from litigating an issue previously raised before the Workers' Compensation Board (*see, e.g., Guaman v 1963 Realty Corp.*, 127 AD3d 454, 456 [1st Dept 2015]). Here, Quintero raised his purported head injuries, including traumatic brain injury and post-concussion symptom, in his initial Workers' Compensation hearing and on appeal before the Board Panel. The Board disallowed these claims (NYSCEF Doc. No. 137), and this finding was affirmed on appeal by the Board Panel in August 2020 (NYSCEF Doc. No. 138). Furthermore, Quintero testified that he participated in the Workers' Compensation proceedings, provided testimony for at least one hearing, and was represented by counsel (Quintero EBT at 99).

Accordingly, it is hereby:

ORDERED that Quintero's motion for summary judgment on his Labor Law § 240(1) cause of action is granted; and it is further

ORDERED that 333 W. 46th Street's summary judgment motion on Quintero's Labor Law §§ 241(6) and 200 and common law negligence claims is granted and those causes of action are dismissed against it; and it is further

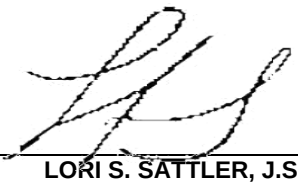
ORDERED that Times Square Alliance's summary judgment motion on Quintero's Labor Law § 200 and common law negligence claims is granted and those causes of action are dismissed against it; and it is further

ORDERED that 333 W. 46th Street's cross claims for contractual indemnification, common law indemnification, and contribution are dismissed; and it is further

ORDERD that Times Square Alliance's cross claim for common law indemnification is dismissed; and it is further

ORDERED that Times Square Alliance's motion for leave to amend its Answer is granted, and the amended Answer in the proposed form annexed to the reply papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that Plaintiff is collaterally estopped from alleging injuries previously disallowed by the Worker's Compensation Board, and those allegations are stricken from Plaintiff's Verified Bill of Particulars.



4/13/2023
DATE

LORI S. SATTLER, 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