# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **Hon. James E. d'Auguste** **PART 55**

***Justice***

----------X

GREGORY ZYSKOWSKI

Plaintiff,

- v -

CHELSEA-WARREN CORP.,

Defendant.

----------X

**INDEX NO.** 161536/2019

**MOTION DATE** 07/02/2021

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 47, 50

were read on this motion to/for SUMMARY JUDGMENT.

In Motion Sequence 001, defendant Chelsea-Warren Corp. ("CWC"), owner of the residential cooperative building located at 165 West 20th Street ("the Building"), moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Gregory Zyskowski's ("Zyskowski") Labor Law action against it (NYSCEF Doc. Nos. 22, 33). For the reasons set forth below, the motion is partially granted, and partially denied.

CWC contends Zyskowski cannot establish the essential elements of negligence, thus his Labor Law Section 200 and common-law negligence claims must be dismissed. Also, CWC asserts Zyskowski's Labor Law Section 241(6) claims must be dismissed as Zyskowski failed to prove a violation of a specific applicable Industrial Code regulation alleged in the complaint concerning the unreported incident in a common area of the Building (NYSCEF Doc. No. 22).

CWC entered into an agreement with non-party Cracovia General Contractor Inc. ("Cracovia"), the general contractor on a renovation project of the Building, to furnish all work, labor, tools and materials required for the renovation at CWC's buildings. Cracovia hired sub-contractors for some interior work, including installation of windows throughout the hallways of the Building; Zyskowski was working in one of the Building's hallways on the day of the alleged accident. CWC notes the new windows were fully installed before the date of the alleged accident (NYSCEF Doc. No. 33). Also, CWC states that only Cracovia supervised the work being done by Zyskowski, and CWC claims it did not control, supervise, or instruct Zyskowski on how to perform his work (NYSCEF Doc. No. 33). CWC argues that by Zyskowski's own admission only Cracovia supervised his work and controlled the work he would carry out daily (NYSCEF Doc. Nos. 29, 32).

Additionally, CWC argues it did not have any notice, actual or constructive, of an alleged dangerous condition. All of the materials that Cracovia supplied to Zyskowski to carry out his work were stored in a "shanty" room in the basement of a building located at 155 West 20th Street, beside the Building. The shanty was locked at the end of each day by Cracovia employees. At the construction site, CWC claims it was the Cracovia employees' responsibility to clean up after themselves and leave a clean hallway at the end of every day. CWC further contends that Zyskowski and other Cracovia employees were the only persons performing any renovations at the Building on the day of the alleged accident (NYSCEF Doc. No. 33).

Zyskowski was employed at the time of the alleged accident by Cracovia. He was allegedly injured on December 27, 2018, on the first floor in a common area of the Building when he claims to have stepped on a nail and sustained a puncture wound that became

infected (NYSCEF Doc. No. 22). Zyskowski asserts the alleged accident occurred when he left the "platform/landing area" where he was working to go to the basement shanty to get supplies. He states he felt he stepped on something while walking along the five-foot long passageway, removed his shoe and sock to check what happened, saw a little bit of blood on the sock and toe, and felt pain. Zyskowski removed the 2" nail from his work boot, threw it away, put his sock and boot back on and returned to work (NYSCEF Doc. Nos. 29, 33). Zyskowski continued working and did not seek medical attention until he went to the hospital on January 18, 2019 (NYSCEF Doc. Nos. 29, 33). CWC notes, and Zyskowski concedes, that no complaints were made to CWC, Cracovia, or anyone else at the Building as to any unsafe work conditions or the alleged injury. Zyskowski mentioned the injury only to non-party co-worker Brandon Gatto ("Gatto") on the date of the alleged accident (NYSCEF Doc. No. 29, 33). Gatto's affidavit confirms Zyskowski's claim that he told Gatto his foot hurt, and that he saw Zyskowski limping on the day of the alleged accident (NYSCEF Doc. No. 41).

Zyskowski asserts violations of Labor Law Section 200, alleging he was injured due to stepping on a nail at the work site (NYSCEF Doc. Nos. 29, 32). CWC argues summary judgment dismissing Zyskowski's complaint is warranted. It claims that unless an owner exercises control of the work site, the responsibility for job safety lies with the general contractor – here, Cracovia, Zyskowski's employer (NYSCEF Doc. No. 32). Also, CWC asserts an owner is not liable for a contractor's negligence, and an owner and contractor are not liable for a subcontractor's negligence. *Dawson v. Diesel Construction Co.*, 51 A.D. 2d 397 (1st Dep't 1976). Additionally, CWC claims liability will only be imposed on an owner under Labor Law Section 200 where plaintiff's injuries were sustained as a result of a dangerous condition at the work site, instead of as a result of the manner in which work was

performed; and, also, only if the owner exercised supervision and control over the work or had actual or constructive notice of the unsafe condition causing the alleged accident. *Begor v. Mid-Hudson Hardwoods, Inc.*, 301 A.D. 2d 550 (2d Dep't 2002). However, the authority to stop unsafe work is not enough to establish liability under Labor Law Section 200 and the common law. *Capolino v. Judlau Contr. Inc.*, 46 A.D. 3d 733 (2d Dep't 2007). Finally, the Court of Appeals ruled a plaintiff cannot recover in negligence or under Labor Law Section 200 if no triable issues of fact exist that a defendant "controlled the activity bringing about the injury to enable it to avoid or correct an unsafe condition." *O'Sullivan v. IDI Constr. Co., Inc.*, 7 N.Y. 3d 805 (2006).

While Zyskowski testified that CWC's superintendent of the Building was supposed to inspect the area, CWC argues that the mere fact a superintendent would inspect an area where a Cracovia employee was working at the end of each day to ensure it was left in a clean condition is not enough to rise to the level of control and supervision that Labor Law Section 200 requires (NYSCEF Doc. Nos. 29, 32, 37). CWC contends that, as in *Hughes v. Tishman Constr. Corp.*, 40 A.D. 3d 305 (1st Dep't 2007), the control must relate to the manner in which the work was carried out, and CWC notes that the superintendent did not instruct Zyskowski and his co-workers on how to perform their jobs. Moreover, CWC asserts that Zyskowski's employer was responsible for the safety on the worksite, and Zyskowski and the Cracovia workers were expected to clean up after themselves and leave a clean hallway at the end of each workday (NYSCEF Doc. Nos. 29, 32, 33). Thus, CWC claims it did not create the defective condition, noting that the only way in which the alleged nail would be on the ground at the time of Zyskowski's alleged accident is if he, or one of his co-workers, caused it to be there (NYSCEF Doc. No. 32).

Zyskowski testified that except for one other Cracovia employee that helped him as needed – Gatto – he was working alone in the same area for four hours before he left for lunch at 12:00 p.m. (NYSCEF Doc. Nos. 29, 33). Also, Zyskowski testified he did not see any debris or nails on the ground in the hallway, steps or stairwell, and while construction debris accumulated as he was working, he swept the debris before he went to lunch. Yet, he noted he did not know if anyone else worked on the window he was working on while he was at lunch, or if anyone, other than himself, inspected the area between 8:00 a.m. and when he left for lunch. However, Zyskowski claims everything was left in the same place when he returned from lunch as it was prior to his departure to lunch (NYSCEF Doc. Nos. 29, 33).

In contrast, Gatto's affidavit states he was working with Zyskowski on the day of the incident; also, he notes they were using nails and screws in their work to install wooden blocks around newly installed windows in the hallways. Additionally, Gatto claims there was debris and materials, including nails, around the working area and passageway on the day of the alleged accident, and asserts that the passageways and work areas were "poorly maintained and never free from debris and construction materials" during his time working on the project. Further, Gatto contends that while he was directed to clean-up the hallways towards the end of the shift, no one told him to clean up the passageways or work areas while work was being performed. Also, Gatto testified that while he did as much as he could, it was not possible for him alone to thoroughly sweep the floors in the short period of time towards the end of his shift (NYSCEF Doc. No. 41).

In its reply affirmation, CWC argues Zyskowski should be precluded from offering Gatto's affidavit as he was not identified as a notice witness in response to discovery demands. CWC argues that Zyskowski admitted Gatto did not witness the alleged accident,

thus, the affidavit does not include facts to show he has personal knowledge of the alleged accident or the circumstances surrounding it (NYSCEF Doc. No. 45). Yet, as there is no prejudice to CWC from the lack of formal disclosure given that CWC was on notice of the witness because he was identified in Zyskowski's deposition, and CWC's own agent/investigator spoke with Gatto, preclusion is unwarranted (NYSCEF Doc. No. 47; *Yax v. Development Team, Inc.*, 67 A.D. 3d 1003 [2d Dep't 2009] [Supreme Court providently exercised discretion in considering affidavit of undisclosed witness in response to discovery demands as deposition testimony revealed parties had knowledge of witness' existence, and there is no evidence the failure to disclose was willful]). However, CWC also claims that self-serving affidavits, especially ones that contradict prior deposition testimony, should not be considered by the Court in deciding summary judgment and cannot raise triable issues of fact sufficient to defeat summary judgment. *Gloth v. Brusco Equities*, 1 A.D. 3d 294 (1st Dep't 2003).

CWC asserts that there is no evidence that it was actually or constructively aware of any alleged defect for liability to be imposed under Labor Law Section 200. It stated that it did not cause nor contribute to the alleged dangerous condition, as only Zyskowski and his Cracovia co-workers were using nails on the premises. Also, CWC states that Zyskowski admitted that the alleged nail he stepped on was the same model that he and his co-workers used, and only Cracovia was carrying out renovations at the Building on the day of the alleged accident (NYSCEF Doc. Nos. 29, 32). Further, the affidavit of non-party Stuart Spiro, a senior property manager for CWC's managing agent, indicates he was never informed of any alleged accident and was unaware of Zyskowski's complaint until the filing of this case (NYSCEF Doc. No. 36).

Zyskowski, however, argues that "to meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff was injured." *Hickson v. Walgreen Co.*, 150 A.D. 3d 1087 (2d Dep't 2017); *see Pereira v. New School*, 148 A.D. 3d 410 (1st Dep't 2017) ("As to the Labor Law § 200 and common-law negligence claims, defendants failed to establish that they lacked constructive notice of the dangerous condition that caused plaintiff's injury, since they submitted no evidence of the cleaning schedule for the work site or when the site had last been inspected before the accident"). Hence, while CWC meets its initial burden of showing that it did not control or supervise the work Zyskowski or his Cracovia co-workers performed, Zyskowski raises a triable question of fact on CWC's claim that it lacked constructive notice. CWC fails to establish via any witness testimony or documentation when the area in question was last cleaned or inspected, or what the practice or schedule of any inspection or cleaning was before the alleged accident. *Trinidad v. Turner Constr. Co.*, 189 A.D. 3d 565, (1st Dep't 2020). As such, CWC's motion for summary judgment on the Labor Law Section 200 and common-law negligence claims are denied.

Next, CWC argues that Zyskowski's Labor Law Section 241(6) claims must be dismissed as he failed to plead and prove a violation of a specific applicable Industrial Code regulation. "Labor Law § 241(6) imposes a non-delegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed. The provision requires owners and contractors to comply with specific safety rules and regulations promulgated by the Commissioner of the

Department of Labor." *Lopez v. New York City Dept. Of Envtl. Protection*, 123 A.D. 3d (2d Dep't 2014).

In his bill of particulars, Zyskowski alleges CWC violated Labor Law Section 241(6) and the following sections of Rule 23 of the Industrial Code of the State of New York (12NYCRR23): 23-1.5, 23-1.7(d), 23-1.7(e)(1)(2), 23-1.30, 23-1.32, 23-1.33, 23-2.1, 23-3.2, 23- 3.3. Also, Zyskowski claims CWC violated the following provisions of the Occupational Safety & Health Administration ("OSHA") rules and regulations as they pertain to construction (29 CFR 1926/1910): Section 450(a) (NYSCEF Doc. Nos. 25, 32). Zyskowski argues CWC "cannot escape liability by demonstrating that it delegated the responsibility for its duties under Labor Law Section 241(6) to its" contractors or subcontractors. *Giacomazzo v. Exxon Corp.*, 185 A.D. 2d 145 (1st Dep't 1992). He claims "Industrial Code (12 NYCRR) § 23-1.7(e)(1) and (2), are both sufficiently specific to support a claim under Labor Law § 241(6)." *Jara v. New York Racing Ass'n, Inc.*, 85 A.D 3d 1121 (2d Dep't 2011). The two Code sections pertain to tripping and other hazards, specifically: (1) passageways, and (2) working areas.

CWC argues Section 23-1.7(e)(1) is inapplicable as it applies to tripping hazards in passageways, and alleges Zyskowski was not using the area as a passageway when the incident occurred. *Salinas v. Barney Skanska Const. Co.*, 2 A.D. 3d 619 (2d Dep't 2003). Zyskowski argues such assertion is contrary to the evidence which describes the area as a passageway and hallway between two separate areas in which he was passing from one building to another (NYSCEF Doc. Nos. 29, 37). Zyskowski argues that CWC's contention that a passageway must include a doorway is not supported by any law (NYSCEF Doc. No. 37). The Appellate Division in *Quigley v. Port Auth. Of New York*, 168 A.D. 3d 65 (1st Dep't

2018) noted that, "Although regulations do not define the terms 'passageway' …, courts have interpreted the term to mean a defined walkway or pathway used to traverse between discrete areas as opposed to an open area" … 12 NYCRR § 23-1.7(e)(1) is limited to passageways. A 'passageway' is commonly defined and understood to be "a typically long narrow way connecting parts of a building" and synonyms include the words corridor or hallway (citing Merriam-Webster's online Thesaurus). In other words, it pertains to "an interior or internal way of passage inside a building." Here, Zyskowski was injured while walking along a five-foot passageway from the Building to access the basement shanty in a different building where supplies were stored. As such, CWC fails to establish that the area in which Zyskowski was allegedly injured was not a passageway within the meaning of 12 NYCRR § 23-1.7(e)(1). Also, Zyskowski argues even if the interior passage where the alleged accident occurred is not found to be a passageway under Section 23-1.7(e)(1), it would be "part of floors, platforms and similar areas where persons work or pass" under Section 23-1.7(e)(2) (NYSCEF Doc. No. 37).

CWC asserts that both Code Sections 23-1.7(e)(1) and (2) are inapplicable as the alleged nail in question was a transient condition that could only have been in the area where the alleged accident occurred if it was being used by Zyskowski or his co-workers. Indeed, CWC argues that the nail was part of debris left by Cracovia's workers, including Zyskowski, which was an integral part of the work being performed (NYSCEF Doc. No. 32; see *Harvey v. Morse Diesel Intl.*, 299 A.D. 2d 451 (2d Dep't 2002)). Further, CWC contends Section 23-1.7(e)(1) is inapplicable as Zyskowski stepped on a nail and did not trip. The Appellate Division dismissed a plaintiff's Labor Law Section 241(6) claims based on Industrial Code Section 23-1.7(e)(1) where "plaintiff did not trip." *Doxey v. Freeport Union Free School*

*Dist.*, 115 A.D. 3d 907 (2d Dep't 2014). However, Section 23-1.7(e)(1) specifically includes that, "Sharp projections which could cut or puncture any person shall be removed or covered" from the passageways. Here, there is no question that the nail that caused Zyskowski's injuries was a "sharp projection which could cut or puncture any person," and in fact, did cut and puncture Zyskowski's foot. Further, the nail also constituted a "sharp projection" under Section 23-1.7(e)(2)'s broader category indicating that working areas were to "be kept free from accumulation of…debris…and from sharp projections insofar as may be consistent with the work being performed" (N.Y. Comp. Codes R. & Regs. tit. 12 sec. 23-1.7; NYSCEF Doc. No. 37). Thus, both Code Sections 23-1.7(e)(1) and (2) are applicable herein.

CWC also argues that the Appellate Division in *Lopez*, *supra,* stated that while "Industrial Code (12 NYCRR) § 23-1.7(e)(2) is sufficiently specific to support a cause of action to recover damages pursuant to Labor Law § 241(6), ... it has no application where the object that caused the plaintiff's injury was an integral part of the work being performed" (citing *Harvey*, *supra*). While CWC speculates that the "nail…could only have been in the area…if it was being used by plaintiff or his co-workers", thus, "an integral part of [Plaintiff's] work," there is no admissible evidence to support such assertion as testimony shows that other trades worked on the job site, and Zyskowski testified he did not know where the nail came from (NYSCEF Doc. Nos. 29, 37). Moreover, Zyskowski claims the nail was not permanent nor integral to any work he was performing at the time of the accident. *See White v. Vill. Of Port Chester*, 92 A.D. 3d 872 (2d Dep't 2012) ("speculative deposition testimony…regarding the [object]'s purpose was insufficient to establish, as a matter of law, that the [object] was not debris, but, rather, was integral to…the work being performed"); *see* also *Lopez*, *supra*, 123 A.D. 3d 984 ("defendants failed to raise a triable issue of fact as to

their allegation that the uncapped rebar was an integral part of the work that was not subject to the cited regulation…"); *Maldonado v. Flintlock Const. Services, LLC*, 32 Misc 3d 1209(A) (Sup. Ct. 2011) ("A question of fact…exists as to whether the plywood constituted 'accumulat[ed]…debris' or 'scattered…material,' or a 'sharp projection,' by virtue of the plywood's exposed edge, as opposed to material intentionally placed" (citing *Boyette v. Algonquin Gas Transmission Co.*, 952 F Supp 192 (S.D.N.Y. 1997)).

While the Court agrees that the area in which Zyskowski's alleged accident occurred was a passageway pursuant to Section 23-1.7(e)(1), it disagrees with CWC's contention that the nail in question was an integral part of the work being performed. Also, a question of fact remains if the subject nail was part of the debris left by Cracovia's workers. In fact, testimony demonstrates that other trades worked on this job site, and Zyskowski's testimony indicates that everyone working at the site used the same types of nails (NYSCEF Doc. No. 29). Further, Zyskowski's testimony stated that he did not know where the nail came from, noting it was not in the explicit area where he was working, but rather in the common passageway he had to travel through when he went to or came back from lunch, or the basement shanty (NYSCEF Doc. Nos. 29, 37). Additionally, Zyskowski testified that the specific area where he was working was "basically clean" and that neither he nor Cracovia had a duty to clean the passageway (NYSCEF Doc. Nos. 29, 37). Indeed, Zyskowski's testimony reveals that the superintendent would keep the common areas clean and inspect those areas (NYSCEF Doc. Nos. 29, 37, 38, 45). Gatto's testimony further shows that while he was directed to clean the hallways where he and Cracovia's employees were working, he was not directed to clean the passageways while work was being performed. Gatto testified he was directed to clean up the hallways towards the end of his shift, and did as much as he

could, but "it was impossible for me alone to thoroughly sweep the floors in such a short period of time" (NYSCEF Doc. No. 41). Moreover, "the First Department does not factor the issue of who is responsible for debris removal into its analysis of 12 NYCRR § 23-1.7(e)(2)." *Colella v. The Port Authority of New York and New Jersey*, 2012 N.Y. Slip Op. 32222[U] (Sup. Ct. New York County 2012).

While CWC relies on *Singh v. 1221 Ave. Holdings, LLC*, 2014 N.Y. Slip Op 30371[U] (Sup. Ct. New York County 2014) for its position of the nail being integral to the work being performed, Zyskowski notes, the First Department, in modifying New York County Supreme Court's decision in *Singh*, reversed dismissal of the Labor Law Section 241(6) claim predicated upon Section 23-17(e)(1) as "integral to the work" is not a defense to such claim. *Singh v. 1221 Ave. Holdings LLC*, 127 A.D. 3d 607 (1st Dep't 2015). Further, while CWC further attempts to distinguish *Singh v. Young Manor, Inc.*, 23 A.D. 3d 249 (1st Dep't 2005), and acknowledges the case held that Section 23-1.7(e)(2) applied where a plaintiff stepped on a nail, the First Department held that there was no "merit to defendant's contention that hazard must be viewed as having been an integral part of plaintiff's work removing wood paneling," as the nail was discarded and near other debris. Therefore, as in *Young Manor*, *supra*, the nail herein is arguably not part of the work, but discarded debris that was supposed to be removed.

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 eliminate any material issues of fact from the case." *Finkelstein v. Cornell Univ. Med'l College*, 169 A.D. 2d 114 (1st Dep't 2000); see *Winegrad v. New York Univ. Med'l Ctr.*, 64 N.Y. 2d 851 (1985). Additionally, the Court of Appeals in *Ayotte v. Gervasio*, 81

N.Y. 2d 1062 (1993) held that "regardless of the sufficiency of the opposing papers" in the absence of admissible evidence sufficient to preclude any material issue of fact, summary judgment is unavailable.

Therefore, just as the First Department in *Trinidad*, *supra*, found "…defendant submitted no evidence showing when the site had last been inspected before the accident," so too, this Court finds nothing from CWC, including an affirmation from the superintendent, indicating when the passageway, that was used by all workers, was last cleaned or inspected prior to Zyskowski's accident. Also, the Court notes there is conflicting testimony as to where the nail may have come from. While CWC asserts the nail could have only come from Zyskowski or other Cracovia workers, Zyskowski's testimony indicates he did not know where the nail came from, and that other trades worked at the site. Further, Gatto's affidavit points out that there was debris in the passageway, with garbage bags that were open or broken (NYSCEF Doc. Nos. 29, 37, 41, 45).

Accordingly, given the parties' dueling factual contentions, and conflicting testimonies, including where the nail came from, such questions of fact are best left to be determined by a trier of fact, and thus, preclude summary judgment. Hence, CWC's motion for summary judgment dismissing Zyskowski's Labor Law Section 241(6) claim premised on violations of Section 23-1.7(e)(1) and (2) is denied.

Finally, CWC asserts that Zyskowski's opposition to CWC's motion for summary judgment concerning Labor Law Section 241(6) was limited to arguments regarding Sections 23-1.7(e)(1) and (2). As such, CWC argues Zyskowski's failure to oppose CWC's arguments for dismissal of the Sections 23-1.5, 23-1.7(d), 23-1.30, 23-1.32, 23-1.33, 23-2.1, 23-3.2, 23-3.3, and OSHA claims should constitute an abandonment of these claims and they should be

dismissed. *Leveron v. Prana Growth Fund I, L.P.*, 181 A.D. 3d 449 (1st Dep't 2020). The Court agrees and deems the unopposed Industrial Code sections and OSHA claims abandoned.

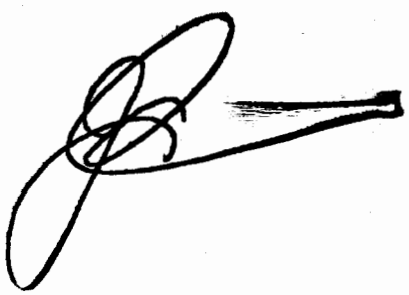
Accordingly, it is

ORDERED that CWC's motion for summary judgment dismissing the Labor Law Section 200 and common-law negligence claims is denied, and

ORDERED that CWC's motion for summary judgment dismissing the Labor Law Section 241(6) claim premised on violations of the Industrial Code Sections 23-1.7(e)(1) and (2) is denied, and

ORDERED that the remainder of Zyskowski's alleged claims of violations of the Industrial Code Sections 23-1.5, 23-1.7(d), 23-1.30, 23-1.32, 23-1.33, 23-2.1, 23-3.2, 23- 3.3, and OSHA claims are deemed abandoned, and dismissed.

This constitutes the decision and order of this Court.



9/18/2023
DATE

James d'Auguste, 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 |