Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D25781
W/prt

_____AD3d_____ Argued - December 15, 2009

STEVEN W. FISHER, J.P.
HOWARD MILLER
RANDALL T. ENG
L. PRISCILLA HALL, JJ.

2008-03323 DECISION & ORDER

Noel Smith, plaintiff, v Merrill Lynch & Co., Inc., defendant, Fitzgerald & Fitzgerald, P.C., defendant third-party plaintiff-appellant, et al., defendant third-party plaintiff; Locator Services Group, Ltd., et al., third-party defendants, County of Nassau, third-party defendant-respondent.

(Index No. 9299/04)

John M. Daly, Yonkers, N.Y. (Eugene S. R. Pagano and Mitchell L. Gittin of counsel), for defendant third-party plaintiff-appellant.

John Ciampoli, Acting County Attorney, Mineola, N.Y. (Gerald R. Podlesak of counsel), for third-party defendant-respondent.

In an action, inter alia, to recover damages for negligence and conversion, the defendant third-party plaintiff Fitzgerald & Fitzgerald, P.C., appeals, as limited by its notice of appeal and brief, from so much of an order of the Supreme Court, Nassau County (Woodard, J.), dated March 3, 2008, as granted that branch of the motion of the third-party defendant County of Nassau which was for summary judgment dismissing the third-party complaint insofar as asserted by it against that third-party defendant.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the motion of the third-party defendant County of Nassau which was for summary judgment dismissing the third-party complaint insofar as asserted against it by the defendant third-party plaintiff Fitzgerald & Fitzgerald, P.C., is denied.

In support of its motion for summary judgment dismissing the third-party complaint insofar as asserted against it by the appellant, the third-party defendant County of Nassau failed to make a prima facie showing of entitlement to judgment as a matter of law (*see Alvarez v Prospect Hosp.,* 68 NY2d 320, 324). Accordingly, its motion should have been denied regardless of the sufficiency of the papers submitted in opposition (*see Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851, 853).

FISHER, J.P., MILLER, ENG and HALL, JJ., concur.

ENTER:

James Edward Pelzer
Clerk of the Court