

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

D25782
W/prt

_____AD3d_____

Argued - December 15, 2009

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

2009-00465

DECISION & ORDER

Noel Smith, respondent, v Merrill
Lynch & Co., Inc., appellant, Fitzgerald
& Fitzgerald, P.C., et al., defendants.
(and a third-party action).

(Index No. 9299/04)

Stock & Carr, Mineola, N.Y. (Thomas J. Stock of counsel), for appellant.

Saltzman Chetkof & Rosenberg, LLP, Garden City, N.Y. (William B. Saltzman of counsel), for respondent.

John M. Daly, Yonkers, N.Y. (Eugene S. R. Pagano and Mitchell L. Gittin of counsel), for defendants.

In an action, inter alia, to recover damages for negligence and conversion, the defendant Merrill Lynch & Co., Inc., appeals, as limited by its notice of appeal and brief, from so much of an order of the Supreme Court, Nassau County (Woodard, J.), entered November 26, 2008, as denied that branch of its motion which was for summary judgment dismissing the second cause of action asserted against it.

ORDERED that the order is affirmed insofar as appealed from, with costs to the respondent.

The Supreme Court properly denied that branch of the motion of the defendant Merrill Lynch & Co., Inc. (hereinafter Merrill Lynch), which was for summary judgment dismissing the

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second cause of action asserted against it, which sounds in negligence. Merrill Lynch failed to establish, prima facie, that it did not breach a duty of care to the plaintiff. The record contains evidence that Merrill Lynch was in lawful possession of a settlement check and a request by the plaintiff's attorney to open an account for the benefit of the plaintiff in accordance with an infant compromise order issued by the Supreme Court in an underlying medical malpractice action. There is also evidence that Merrill Lynch misplaced the check, and then failed to inform the plaintiff's guardian, or the plaintiff's attorney, that it did not and/or could not open the account as requested. Based on this evidence, a jury could find that Merrill Lynch failed to exercise ordinary care and diligence in handling the check (*see Epic Security Corp. v Banco Popular*, NYLJ, Oct. 10, 1997, at 26, col 3 [Civ Ct New York County]; *National Wholesale Liquidators v Barclays Bank of New York*, NYLJ, Nov. 2, 1992, at 32, col 4 [Sup Ct Nassau County]; *Employers Ins. of Wausau v Chemical Bank*, 117 Misc 2d 601, 603; *Roscoe v Central Natl. Bank of Canajoharie*, 96 Misc 2d 517; *Gramore Stores v Bankers Trust Co.*, 93 Misc 2d 112, 114).

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

ENTER:


James Edward Pelzer
Clerk of the Court