

Smith v Merrll Lynch & Co., Inc.

2008 NY Slip Op 30698(U)

March 3, 2008

Supreme Court, Nassau County

Docket Number: 9299-04/

Judge: Lori Currier Woods

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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NOEL SMITH,

Plaintiff,

-against-

MERRILL LYNCH & CO., INC., and
FITZGERALD & FITZGERALD, P.C., and,
JOHN E. FITZGERALD,

Defendants.

MICHELE M. WOODARD,
J.S.C.

TRIAL/IAS Part 16

Index No.: 9299/04

Motion Seq. Nos.: 01 & 02

DECISION AND ORDER

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FITZGERALD & FITZGERALD, P.C., and JOHN E.
FITZGERALD,

Third-Party Plaintiffs,

-against-

THE LOCATOR SERVICES GROUP, KTD., KIM
SAWYER, JAMES SAWYER, SAWYER, HALPERN
& DEMETRI f/k/a SAWYER, DAVIS & HALPERN
and the COUNTY OF NASSAU,

Third-Party Defendants.

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Papers Read on this Motion:

Defendant County of Nassau Notice of Motion	01
Fitzgeralds' Notice of Motion for Summary Judgement	02
Fitzgeralds' Affirmation in Opposition	xx
Plaintiff's Supplemental Affidavit	xx
Fitzgeralds' Affirmation in Reply	xx
County of Nassau Affirmation in Opposition	xx
Plaintiff's Affidavit in Opposition to Motion for Summary Judgement	xx
County of Nassau Reply Affirmation	xx

Motion (seq. No. 1) by the attorney for the Third-Party Defendant County of Nassau (the County) for an order pursuant to CPLR 3212 granting Summary Judgment dismissing the Third-Party complaint and all cross-claims against the County of Nassau is **granted**. Cross-motion (seq.

No. 2) by the attorneys for John E. Fitzgerald (Fitzgerald) for an order pursuant to CPLR §3212 granting Summary Judgment to the Defendant John E. Fitzgerald and severing and dismissing the complaint and all cross-claims and counterclaims against said Defendant, on the ground that John E. Fitzgerald is not individually liable for the torts or breach of contract, if any, of his co-Defendant Fitzgerald & Fitzgerald, P.C., of which Defendant John E. Fitzgerald was at all relevant times president and sole shareholder is **granted**.

Noel Smith was born at Nassau County Medical Center on December 25, 1983. A medical malpractice action was commenced on her behalf against the County in 1984. Jeanette Smith, the mother of the Plaintiff who retained Fitzgerald & Fitzgerald, P.C. (F&F) to represent her daughter in the medical malpractice action died on April 1, 1992 during the pendency of the lawsuit. Letters of Administration were issued to Jeanette Smith's daughter, Melissa Smith, who was substituted as Plaintiff in the malpractice suit on behalf of the Estate of Jeanette Smith. The malpractice action was settled for \$450,000 in 1993. Pursuant to the terms of the infant's compromise orders (ICO) dated June 2, 1994 and modified January 31, 1995 the County was to issue a check payable to an officer of Defendant Merrill Lynch, Pierce, Fenner and Smith, Inc. (Merrill) for the benefit of Noel Smith in the amount of \$299,500.00 (\$450,000.00 less attorney's fees) and other disbursements. The funds (\$299,500.00) were to be deposited by Merrill in investment accounts for the benefit of Noel Smith. Although the County timely issued the check in July 1994, sent it to F&F, who forwarded it to Merrill, the instrument was never cashed, and no account ever established. The original check was never negotiated or presented for payment. Merrill returned the original check to F&F with a request that an amended or modified ICO be obtained, to specify that the infant Noel Smith's grandmother Edna Mae Dunn (with whom the

infant was living in Alabama) be identified as custodian of the infant's account, and authorize Merrill Lynch to pay income taxes on behalf of the infant on the interest earned. F&F obtained a modified ICO in the malpractice action on January 31, 1995. An attorney working on an "of counsel" capacity for F&F on the malpractice action, forwarded a copy of the modified ICO to Edna Mae Dunn, on February 5, 1999 and wrote to Merrill on February 6, 1999, enclosing the original and modified ICO's and the check dated July 21, 1994 in the sum of \$299,500. Merrill received the July 21, 1994 check in the sum of \$299,500, but failed to open the infant account pursuant to the modified ICO or notify any of the parties that the check was missing.

Subsequent thereto, on or about February 26, 1996, Merrill engaged the services of the Locator Services Group, Ltd. (Locator) to recover the settlement check. Locator discovered that the original check was uncashed. Locator entered into an agreement with Merrill, dated February 6, 1996, to act on its behalf to recover the funds. In addition, Merrill granted Locator a Limited Power of Attorney. Locator then allegedly contacted F&F, P.C. to obtain information regarding Noel Smith and contracted with Edna Mae Dunn the guardian of Noel Smith, to act on her behalf regarding the missing funds. Locator then allegedly contacted the County. After Locator and Merrill satisfied the County that the original check had not been cashed, the County issued a replacement check in the sum of \$299,500.00 payable to Merrill for the benefit of Noel Smith. On June 24, 1996, Locator deposited \$269,550 in a money market account, in trust for Noel Smith, after deducting a \$29,950 service fee.

In July, 2004 Plaintiff commenced the within action against Merrill, F&F, P.C. and John J. Fitzgerald alleging causes of action for negligence, malpractice and conversion and against John F. Fitzgerald and F&F, P.C. for breach of the contract of retainer.

According to the Plaintiff's Complaint, on April 6, 2000, Locator deposited \$269,550 in a money market account, in trust for Noel Smith, after deducting a \$29,950 service fee. Plaintiff alleges that on or about April 6, 2000, approximately \$303,934.63 with interest, was discovered and delivered to the Plaintiff.

Although the Plaintiff seeks damages of \$327,435.77 with interest from April 6, 2000, based upon the submissions before this Court, it appears that the damages may be quantified by determining the loss of the interest on the principal sum of \$299,500 from the date the original check was received by Merrill and the account eventually opened, in addition to the fees retained by Locator, to wit: \$29,950, plus interest on that amount.

F&F in its Third-Party complaint, allege a "cause of action for contribution or indemnification" against the County. F&F further alleges that the County "owed a duty of care" to the Plaintiff not to deliver the replacement check to "a friend or relative" of Third-Party Defendant Sawyer without first checking with either Fitzgerald, Plaintiff's guardian or Merrill; court approval as required by the infant's compromise order and CPLR §1206(c); and requesting court approval on notice to all "interested parties" prior to delivering the replacement check. Fitzgerald alleges that if "Plaintiff recovers judgment against Third-Party Plaintiffs, they in turn shall be entitled to indemnification or contribution from the County." The cross-claims of Merrill and Locator against the County include claims based upon express and/or implied indemnification and/or contribution. F&F is the only party who has submitted opposition to the County's motion for summary judgment for an order dismissing all claims and cross claims against the County.

The County Attorney sent a letter dated April 10, 1997 to F&F stating the following:

Over the past month I have received numerous telephone calls from various members of Noel Smith's family, including her sister Melissa Smith who was the legal representative at the time this case was settled in 1994. These family members have advised me that they do not believe that Merrill Lynch has deposited the County's second check for the benefit of Noel Smith. In fact, they have told me that they believe Locator Services Group, Ltd. has taken a finders fee out of the \$299,500. This would certainly be totally improper, since the entire \$299,500 was to be deposited for the benefit of Noel Smith. . . . Unless I receive a reasonable explanation from you as to the status of these funds within ten days, I will be compelled to bring this very disturbing situation to the attention of the Court.

Contrary to F&F's, claims there is no basis in law for the proposition that the County was required to protect the Plaintiff's interest in any way other than naming them as co-payee on the check. Merrill is bound by the acts of Locator. The aforesaid letter dated April 10, 1997, from the County Attorney to F&F demonstrates that the County had no knowledge of any limitation on Merrill's authority, or any reason to question the negotiation of the check by Locator. *Hutzler v Hertz Corp.*, 39 NY2d 209; *Fara, Inc. v Gouvis, et al.*, 245 AD2d 483. When dealing with F&F, Merrill and Locator, the County was not bound to inquire whether the fiduciary was applying the fund for the purposes set forth in the ICO and amended ICO, unless the County had some notice that the funds would be used for other purposes. In the absence of such notice, the County had a right to presume the funds would be applied to a proper purpose as set forth in the ICO and amended ICO. *Brown v Flushing Federal Savings & Loan Association*, 112 AD2d 185.

Based on the foregoing, the Third-Party complaint and all cross-claims against the County are **dismissed**. The County of Nassau as Third-Party Defendant shall be deleted from the caption.

The Court will next address John E. Fitzgerald's (Fitzgerald) motion for summary

judgment for an order dismissing all claims and counterclaims against him. Fitzgerald seeks to dismiss the complaint and all cross-claims and counterclaims against him on the ground that he “is not individually liable for the torts or breach of contract, of his co-Defendant, F&F” of which Fitzgerald is its president and sole shareholder. Fitzgerald claims he did not personally act on behalf of the Plaintiff; knew nothing about the matter until F&F received a letter dated April 10, 1997 from the Nassau County Attorney’s Office; and “did not direct or supervise those attorney and support personnel at F&F who were involved in any activities alleged by the Plaintiff to have resulted in damages to her.”

Business Corporation Law §1505(a) provides that a shareholder, employee or officer of a professional corporation shall be liable only for negligent or wrongful acts committed by him or any person under his direct supervision while rendering services on behalf of the corporation. *Ecker v Zwaik & Bernstein, P.C.*, 240 AD2d 360. Liability is a reflection of the common-law rule that a shareholder is liable for the torts of the corporation in which he is a participant or committed by those acting under his direct supervision and control. *We’re Associates Company v Cohen, Stracher & Bloom, P.C.*, 65 NY2d 148. The Plaintiff has failed to present any proof beyond a speculative belief that Fitzgerald handled the Plaintiff’s file during the relevant period in issue, or that he supervised anyone who handled the matter who allegedly committed acts of malpractice. Mere hope and speculation that additional discovery might uncover evidence sufficient to raise a triable issue of fact is not sufficient to deny Fitzgerald’s application for summary judgment. *Sasson v Setina Mfg. Co., Inc.*, 26 AD3d 487. Plaintiff’s suggestion that even if Fitzgerald did not supervise the attorneys, his failure to do so was a violation of some affirmative duty under DR-104(b) (the New York Lawyer’s Code of Professional Responsibility)

is misplaced. "The Code of Professional Responsibility provides no basis for the imposition of personal liability in this case." *We're Associates Company, supra* at p. 151. Hence, the Complaint and all cross claims and counterclaims as against Fitzgerald are **dismissed**. John E. Fitzgerald shall be deleted as a Defendant.

The caption of this action shall now be:

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NOEL SMITH,

Plaintiff,

-against-

MERRILL LYNCH & CO., INC. and
FITZGERALD & FITZGERALD, P.C.

Defendants.

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FITZGERALD & FITZGERALD, P.C.,

Third-Party Plaintiff,

-against-

THE LOCATOR SERVICES GROUP, LTD.,
KIM SAWYER, JAMES SAWYER and
SAWYER, HALPERN & DEMETRI f/k/a
SAWYER, DAVIS & HALPERN,

Third-Party Defendants.

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Simply put, the remaining issue is who is responsible to the Plaintiff for the damages resulting from the failure of Merrill to timely deposit the settlement check.

A Certification Conference shall be held before me on March 31, 2008 at 9:00 AM, at which time counsel familiar with the case must be present and certify to the Court that discovery

has been completed, settlement discussions have been unsuccessful and the case is ready for trial.


Failure to comply with the terms and conditions of this Order may result in sanctions.

Attorney for Plaintiff is to serve a copy of this Order, with Notice of Entry, upon all counsel.

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: March 3, 2008
Mineola, NY

ENTER:


HON. MICHELE M. WOODARD
J.S.C.

G:\Smith v Merrill Lynch-DEG.wpd

ENTERED
MAR 06 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE