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.

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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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MICHELE M. WOODARD, J.S.C.
TRIAL/IAS Part 16
Index No.: 9299/04
Motion Seq. Nos.: 3, 4, 5 & 6

DECISION AND ORDER

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In motion sequence number three, Merrill Lynch and Co. (hereinafter referred to as Merrill) move for an order pursuant to CPLR§3212 for Summary Judgment dismissing the Plaintiff's Complaint and any cross-claims against them and to renew this Court's March 3, 2008 order.

In motion sequence number four, the attorneys for third-party Defendants James Sawyer, Halpern & Dimitri f/k/a Sawyer, Davis and Halpern (the Sawyer Defendants) move for an order pursuant to CPLR§3212 dismissing the third-party Complaint and any cross-claims against the Sawyer Defendants.

In motion sequence number five, Plaintiff moves for an order pursuant to CPLR §3025(b) granting leave to the Plaintiff to serve the proposed Amended Verified Complaint to add a cause of action sounding in *res ipsa loquitur*.

In motion sequence number six, the Defendant Fitzgerald & Fitzgerald, P.C. move for an order pursuant to CPLR Rule 3124 directing Merrill to produce for deposition two witnesses: Charles L. Henderson and Paula Lewis, and directing third-party Defendant James Sawyer, Esq. to appear for depositions.

A motion for leave to renew must be based upon new facts, not offered on the prior motion, that would change the prior determination and set forth a reasonable justification for the failure to present such facts on the prior motion. *Renna v Gullo*, 19 AD3d 472, 473 (2d Dept 2005); *see* CPLR §2221(e); *O'Connell v Post*, 27 AD3d 631 (2d Dept 2006). The attorneys for Merrill's assertion that "Merrill is bound by the acts of Locator" may not be supported by the

deposition testimony of Kim Sawyer made after the March 3, 2008 decision where she testified that once Locator became aware that the missing check was for the benefit of the infant (and not written directly to Merrill Lynch), from that time forward, Locator was acting solely on behalf of Edna Mae Dunn as guardian for the infant (Carr Affirmation in Support, ¶s 36-37). This Court agrees with Merrill's attorney that based on those facts, obtained subsequent to the submission of the prior motion, and unknown at that time to the Court, it can be argued that the status and relationship between Merrill and Locator as well as their respective roles in regard to the check are questions of fact that remain outstanding and not determined in the prior decision of this Court. In the absence of Merrill's advising the Court of additional facts that have come to light subsequent to its March 3, 2008 decision, upon renewal, the motion to renew is granted only as hereinbefore stated and adhered to in all other respects.

In support of its motion to dismiss the second cause of action against Merrill sounding in negligence, Merrill argues it had the right to reject any deposit that did not comply with the terms and conditions prescribed by Banking Law § 96. Further, Merrill contends it had no legal obligation or duty to accept the check for deposit and open an account, and the refusal or failure to do so does not constitute actionable negligence citing *Palsgraf v Long Is. R.R. Co.*, 248 N.Y. 339 (1928). Plaintiff asserts that if Merrill did not want to assume the obligation to accept the check as set forth in the Infant Compromise Order, the check should have been returned forthwith. Acceptance of a check for deposit depends on the intent of both parties. *See Friede v National City Bank of New York*, 250 NY 288, 294 (1929). Incredulously, Merrill argues that it did not intend to accept the funds for deposit. Since issue finding, rather than issue determination, is the key to summary judgment (*In re Cuttitto Family Trust*, 10 AD3d 656 [2d Dept 2004]; *Greco v*

Posillico, 290 AD2d 532 [2d Dept 2002]; *Gniewek v Consolidated Edison Co.*, 271 AD2d 643 [2d Dept 2004]; *Judice v DeAngelo*, 272 AD2d 583[2d Dept 2000]), the court should refrain from making credibility determinations (*see S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341[1974]; *Surdo v Albany Collision Supply Inc.*, 8 AD3d 655[2d Dept 2004]; *Greco v Posillico, supra; Petri v Half Off Cards, Inc.*, 284 AD2d 444, 445[2d Dept 2001]), and the papers should be scrutinized carefully in the light most favorable to the party opposing the motion. *Glover v City of New York*, 298 AD2d 428 (2d Dept 2002). There is a question of fact as to whether Merrill intended to accept the funds for deposit precluding the granting of summary judgment on the negligence cause of action. In support of the within motion, Merrill fails to provide evidence of any probative value that once it received the checks the instrument was handled in a commercially reasonable and prudent manner. In addition, once Merrill received the check there are questions of fact as to whether Merrill was negligent in not making sure that the account was properly opened for the infant's benefit as provided for in the Infant Compromise Order. Merrill argues that a cause of action for conversion (fourth) has not been pleaded. Plaintiff has not alleged the basic elements of a cause of action in conversion: (1) intent; (2) interference with her property rights to the exclusion of her rights; and (3) possession or the right to possession. *Meese v Miller*, 79 AD2d 237 (4d Dept 1981). The allegation in the fourth cause of action that Merrill "failed to negotiate, cash or deposit the check "(¶ 40 of complaint) is duplicative of the cause of action that alleges Merrill was negligent. The fourth cause of action against Merrill sounding in conversion is **dismissed**.

Res ipsa loquitur is not a separate theory of liability but merely a common-sense application of the probative value of circumstantial evidence. Generally, a Plaintiff cannot be

precluded from relying on *res ipsa loquitur* once evidence of negligence has been introduced. However, *res ipsa loquitur* may not be pleaded as a separate cause of action. *See Abbott v Page Airways*, 23 NY2d 502, 512 (1968); *Ianotta v Tishman Speyer Properties, Inc.*, 46 AD3d 297 (1st Dept 2007). Plaintiff's motion for an order pursuant to CPLR §3025(b) for leave to serve the Amended Complaint is **denied**.

In 1995 Locator brought an Article 78 proceeding against the County of Nassau to obtain a list of unpaid funds. The Sawyer Defendants represented Locator in the Article 78 proceeding. Mr. Sawyer states that the Article 78 proceeding resulted in Nassau County delivering a list of unpaid funds to Locator in December 1995 or January 1996. He further states that in June 1996, his daughter, Kim Sawyer, the President of Locator contacted him (the Sawyer law offices are located a few blocks from the Nassau County Attorney's Office) and requested that he go to the Nassau County Attorney's Office, pick up the check representing the amount of the settlement; and forward same to her, which Mr. Sawyer did on or about June 21, 1996. (James Sawyer affidavit sworn to March 19, 2008). Upon receipt of the check, Locator negotiated the check and deposited same into Locator's client's escrow account at Fleet Bank in Boston (f/k/a Shawmut Bank). On June 24, 1996, Locator opened a money market account in the amount of $269,550.00 for the benefit of Noel Smith, from the proceeds of the $299,500.00 check, less the ten percent (10%) fee to Locator. In or about 1997 or 1998 informal hearings were held before the Hon. John P. Dunne which resulted in Judge Dunne issuing a Supplemental Infant Compromise order dated July 21, 1998. The Sawyer Group also represented Locator in the conferences held before the Hon. John P. Dunne in 1997 and 1998. The first cause of action brought by Fitzgerald against the Sawyer firm sounds in contribution or indemnification based on quasi contract. There is not one

iota of credible evidence of any privity between Fitzgerald and James Sawyer or his law firm, Sawyer, Halpern & Demetri f/k/a Sawyer, Davis & Halpern to base a claim against the latter sounding in quasi-contract or implied contract. The first cause of action alleges an "unlawful scheme" to misappropriate monies. There is no proof or evidence that James Sawyer was involved in any "unlawful scheme." The second cause of action in the third-party complaint against James Sawyer alleges conversion. Under the Uniform Commercial Code (see UCC3-419[1]) to state a cause of action in conversion, Fitzgerald must allege either an ownership interest, or right of possession in the funds. Fitzgerald does not allege an ownership interest or right of possession in any specifically identifiable funds [Uniform Commercial Code § 3-419[1]); *see also Meese v Miller*, 79 AD2d 237 (4th Dept 1981). Nor is there a subrogation agreement between Fitzgerald and the Plaintiffs herein. The Sawyer firm has made an adequate *prima facie* showing of entitlement to support their motion for summary judgment dismissing Fitzgerald's third-party complaint only against the Sawyer law firm. *See Alvarez v Prospect Hospital*, 66 NY2d 320. In opposition to the motion, Fitzgerald asserts that the Sawyer law firm is liable for its own personal participation in alleged tortious conduct by failing to notify Fitzgerald and the Plaintiffs in 1996 that Locator received the check, deposited same into its account and took a fee without further order of the Court. Although summary judgment is a drastic remedy (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]), nevertheless a "court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated" (*Assing v United Rubber Supply Co., Inc.*, 126 AD2d 590 [2d Dept 1987]; *see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]), and where there is nothing left to be resolved at trial, the case should be summarily decided. *Andre v Pomeroy, supra* at 364. Notably, bald conclusory assertions, even if believable, are not enough to defeat a motion

for summary judgment. *See Spodek v Park Property Dev. Assocs.*, 263 AD2d 478 (2d Dept 1999).

" '[A]verments merely stating conclusions, of fact or law, are insufficient' to 'defeat summary judgment.' " *Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004], quoting from *Mallad Constr. corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]). It is well settled that "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a triable issue of fact. *See Billordo v E.P. Realty Associates,* 300 AD2d 523 (2d Dept 2002); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Dunlap v Levine*, 271 AD2d 396 (2 Dept 2000). " '[A]verments merely stating conclusions of fact or law, are insufficient' to 'defeat summary judgment.' " *Banco Popular North America v Victory Taxi Management, Inc., supra*, quoting from *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 (1973). The Sawyer law firm was a disclosed agent of Locator. An agent for a disclosed principal is not personally bound under contract unless there is clear and explicit evidence of the agent's intention to substitute its personal liability for that of the principal. *See Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1, 4 (1964); *see also Pelton v 77 Park Ave. Condominiums*, 38 AD3d 1 (1st Dept 2006). The Sawyer law firm was acting only on behalf of its disclosed principal, Locator. None of the other parties has alleged or established that they relied on the representations or actions of the James Sawyer law firm. The motion for summary judgment for an order dismissing the third-party claim and all cross claims only against James Sawyer is **granted**. The caption of this action should 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. and
KIM SAWYER,
Third-Party Defendants.
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The Court will next address Fitzgerald's motion by order to show cause (seq. No. 6) for an order pursuant to CPLR §3124 directing depositions of Charles L. Henderson and Paula Charles, employees of Merrill; and third-party Defendant James Sawyer. For the reasons stated herein the application as to James Sawyer is moot. Fitzgerald contends that Charles Napolitano was the Merrill employee most knowledgeable about the circumstances surrounding Merrill's opening of the account for Noel Smith and dealt with Locator to obtain the replacement check from Nassau County. However, Charles Napolitano is dead. As such, Merrill produced Phillip LaQuaglia for a deposition. CPLR §3101(1) provides for "full disclosure of all matters material and necessary in the prosecution or defense of an action. . ." This provision has been liberally construed to require disclosure of any information or material reasonably related to the issues "which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." *Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 (1968); *see also Titleserv, Inc. v Zenobio*, 210 AD2d 314, 315 (2d Dept 1994). "If there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-

examination, it should be considered evidence material . . . in the prosecution or defense." *Allen v Crowell-Collier Pub. Co., supra* at 407 (citations omitted). In 1998, Charles L. Henderson was a Merrill Vice President and Senior Counsel. In support of the application to depose Charles L. Henderson, Fitzgerald submits a letter dated March 16, 1998 to Henderson from Howard Meyers, Esq., the attorney engaged by Merrill to appear before Justice Dunn in 1998 to explain the disappearance of the original settlement check. The letter stated "enclosed is the Noel Smith File #97-0346 regarding the above captioned matter." (Exhibit J, Motion seq. No. 6). Fitzgerald seeks to depose Henderson regarding Merrill's policy in handling infant compromise orders, its dealings with third-party Defendant Locator and the subject check. The fact that Merrill's Compliance Officer Phillip LaQuaglia was already deposed does not preclude the further deposition of Merrill's Vice President and Senior Counsel, Charles L. Henderson. The application to depose Paula Lewis, the secretary who typed an April 7, 1995 letter from Phillip LaQuaglia to Fitzgerald advising that check #8670339 in the amount of $299,500 was being returned is **denied**. Fitzgerald has not offered any reasonable basis in law or fact to require a secretary who types a letter to appear at a deposition. *See Allen v Crowell-Collier Pub. Co., supra.* Charles L. Henderson shall appear for a deposition no later than thirty (30) days after service of a copy of this order with notice of entry on Merrill's counsel.

ORDERED, the remaining parties are directed to appear before the undersigned on December 22, 2008 at 9:30 a.m.

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

DATED: November 21, 2008
Mineola, N.Y. 11501

ENTER:

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

H:\Smith v Merrill Lynch - Motions 3,5,5,6 wpd.wpd