

Smith v Merrill Lynch & Co., Inc.

2010 NY Slip Op 32024(U)

July 16, 2010

Supreme Court, Nassau County

Docket Number: 9299/04

Judge: Michele M. Woodard

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

SCAN

-----X
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 12

Index No.: 9299/04

Motion Seq. Nos.:07, 08, 10 & 11

DECISION AND ORDER

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

Third-Party Plaintiffs,

-against-

THE LOCATOR SERVICES GROUP, LTD, 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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In motion sequence number seven, Third-Party defendants The Locator Services Group, Ltd. and Kim Sawyer ("Locator" collectively) move for an order pursuant to CPLR §3212 granting Locator summary judgment dismissing the third-party complaint and all cross-claims against them. In motion sequence number eight, the attorneys for the plaintiff move for an order pursuant to CPLR §3212 awarding summary judgment to the plaintiff and against the defendants Merrill Lynch & Co., Inc. ("Merrill") and Fitzgerald & Fitzgerald, P.C. ("F & F") on the issue of liability.

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 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, 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 Lynch in investment accounts for the benefit of Noel Smith. Although the County timely issued the check in July 1994, sent it to Fitzgerald & Fitzgerald, who forwarded it to Merrill Lynch, the instrument was never cashed, and an account was not ever established. The original check was never negotiated or presented for payment. Merrill Lynch returned the original check to Fitzgerald & Fitzgerald 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. Fitzgerald & Fitzgerald obtained a modified ICO in the malpractice action on January 31, 1995. An attorney working on an "of counsel" capacity for Fitzgerald & Fitzgerald on the malpractice action forwarded a copy of the modified ICO to Edna Mae Dunn on February 5, 1995 and wrote to Merrill Lynch on February 6, 1995, enclosing the original and modified ICO's and the check dated July 21, 1994 in the sum of \$299,500. Merrill Lynch 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 Lynch engaged the services of the Locator Services Group, Ltd. (Locator) to recover the lost settlement check. Locator discovered that the original check was uncashed. Locator entered into an agreement with Merrill Lynch, to act on its behalf to recover the funds. In addition, Merrill Lynch granted Locator a Limited Power of Attorney. Locator then contacted Fitzgerald & Fitzgerald, P.C. to obtain information regarding Noel Smith and also contracted with Edna Mae Dunn (Noel's grandmother) to act on her behalf regarding the missing funds. According to the service agreement Merrill Lynch agreed to pay Locator a service fee equal to 15% of the funds recovered. At the time of its dealings with the County, Locator revealed to the County that it was acting only on behalf of Merrill Lynch in recovering the lost funds. Locator also signed a Professional Service Agreement dated April 15, 1996 with Edna Mae Dunn as Guardian of Noel Smith wherein Locator would receive 10% of the funds collected by Locator.

After Locator and Merrill Lynch 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 Lynch for the benefit of Noel Smith. On June 24, 1996, Locator deposited \$269,550 in a money market account, in trust of Noel Smith, after deducting a \$29,950 service fee.

Locator contacted Ms. Dunn regarding the retention of an attorney in Alabama to represent her in a proceeding to have her appointed guardian of the plaintiff so Locator could transfer the funds from the trust account to Ms. Dunn for the benefit of the plaintiff who was an infant at the time. Locator assisted Ms. Dunn in retaining Ann R. Moses, Esq. who filed a petition dated July 22, 1996 and an amended petition dated December 11, 1996 in Alabama requesting the appointment of a guardian and conservator for the benefit of the plaintiff's property. On February 17, 1997, the Alabama Probate Court issued an amended order appointing Ms. Dunn guardian and James M. Tungle conservator of the plaintiff's estate. In or about June

1999, Locator was directed to turn over the funds to the Nassau County attorney appointed by the court as the *guardian ad litem* for the infant. The court thereafter in an order dated March 7, 2000, directed that the *guardian ad litem* remit the funds to Noel Smith's court-appointed guardian in Alabama, where she resided. On or about April 6, 2000, the Nassau *guardian ad litem* sent to Noel's attorney in Alabama a check in the sum of \$303, 934.83 payable to "Reginald Smith as *Guardian Ad Litem* for Noel Smith and the Probate Court of Jefferson County AL." Reginald Smith is Noel's brother and served as plaintiff's guardian until she turned 18 on December 25, 2001.

In July 2004 plaintiff commenced the within action against Merrill, Fitzgerald & Fitzgerald, P.C. and John J. Fitzgerald alleging causes of action for negligence, malpractice and conversion and against John F. Fitzgerald and Fitzgerald & Fitzgerald, P.C. for breach of the contract of retainer. Fitzgerald & Fitzgerald and Merrill Lynch served cross claims against each other. Defendant Fitzgerald & Fitzgerald commenced a third-party action against Locator, Kim Sawyer and Nassau County. Defendant Merrill Lynch served a cross-claim against Locator, Kim Sawyer and Nassau County. The County cross-claimed.

LOCATOR'S AND SAWYER'S MOTION FOR SUMMARY JUDGMENT

At the outset, the Court notes that Noel Smith, the plaintiff is over the age of 18 and has elected to only bring an action against Merrill Lynch and Fitzgerald & Fitzgerald. Locator (collectively to include Sawyer) argues that without a duty no liability can flow to Locator or Sawyer from the defendants and third-party defendants.

The first cause of action brought by Fitzgerald & Fitzgerald against Locator sounds in contribution or indemnification based upon a quasi contract (third- party plaintiff's language). The first cause of action alleges an unlawful scheme to misappropriate monies. Locator asserts there is no proof in that regard and no evidence which raises a question of fact. Locator argues that its involvement was locating a check from the County of Nassau payable to Merrill Lynch that was never negotiated. Further, Locator argues there is no privity or duty owed by Sawyer or Locator to the third-party plaintiff or to Merrill Lynch or Nassau County.

There is no evidence of any implied contract between Sawyer or Locator and the defendant/third-party plaintiff Fitzgerald & Fitzgerald. The second cause of action in the third-party complaint sounds in conversion. Locator argues that Fitzgerald & Fitzgerald does not have

standing to bring an action in conversion against the third-party defendants. Since Fitzgerald & Fitzgerald cannot establish that it is the assignee or subrogee of a party who might have standing to bring such an action, it cannot continue an action sounding in conversion. Under the Uniform Commercial Code, to state a cause of action in conversion, a plaintiff (in this instance a third-party plaintiff) must allege either an ownership interest or right of possession in any specifically identifiable funds. *Meese v Miller*, 79 AD2d 237 (4th Dept 1981). Fitzgerald & Fitzgerald does not allege an ownership interest or right of possession in any specifically identifiable funds (Uniform Commercial Code § 3-419(1)). There is no subrogation agreement between Fitzgerald & Fitzgerald and the plaintiff herein. Locator asserts that the third-party action contains two causes of action against Locator, all based on “contribution or indemnification based upon a quasi contract.” There is no claim of negligence, no evidence of any affirmative acts of negligence against Locator, and no claims of negligence in the third-party complaint.

Locator has made a *prima facie* showing of entitlement to summary judgment.

In this action, neither the third-party plaintiff Fitzgerald & Fitzgerald nor Merrill Lynch have demonstrated that Locator committed a fraud or wrong, nor can they show what injury they suffered due to any fraud or wrong on Locator’s part. Locator argues and it is not refuted that, if not for Locator, plaintiff would never have recovered the money she received.

Indubitably, it was the efforts and services of Locator that resulted in the recovery of the missing check in the sum of \$299,500. In opposition to Locator’s motion for summary judgment, the attorneys for Fitzgerald & Fitzgerald refer to CPLR §1206, CPLR §01207, Judiciary Law §474 as well as the Uniform Civil Rules for the Supreme Court and County Court §202.67(a) and (d).

CPLR §1206 Disposition of Proceeds of Claim of Infant, judicially declared in competent or conservative, provides that: (c). . . “This money is subject to withdrawal only upon order of the court, except that no court order shall be required to pay over to the infant who has attained the age of eighteen years all money’s so held unless the depository is in receipt of an order from a court of competent jurisdiction directing it to withhold such payment beyond the infant’s eighteenth birthday.”

Moreover with respect to fees for an infant, reference must be made to Judiciary Law § 474 as well as Uniform Civil Rules for the Supreme Court and the County Court §§ 202.67(a) and (d). Locator knew the check was payable on behalf of an infant prior to its receipt of the

check and still took a fee without complying with CPLR §1206, 1207, Judiciary Law § 474 as well as Uniform Civil Rules for the Supreme Court and County Court §§ 202.67(a) and (d).

The Nassau County Court which was the venue for Noel Smith's underlying medical malpractice action did not appoint Ms. Edna Mae Dunn as plaintiff's guardian. Following the death of Noel Smith's mother, Jeannette Smith, the Nassau County Court, on March 12, 1993, appointed a Nassau County attorney *guardian ad litem* for Noel Smith. (Ms. Edna Mae Dunn was appointed as Noel Smith's guardian by order of the Probate Court of Jefferson County, Alabama, in February 1997.)

By not bringing a claim against Merrill Lynch or Fitzgerald & Fitzgerald, the plaintiff, upon becoming an adult, demonstrated that she ratified the actions of Locator. Moreover, the record demonstrates that Locator acted in good faith at all time in locating the missing funds. Ultimately when the checks were finally forwarded to the plaintiff's guardian in Alabama by Locator, it was done pursuant to the order of Justice Dunn of this Court. Paid out of its fees were all Locator's expenses in locating the money, including the bringing of an Article 78 Proceeding against Nassau County to locate the uncollected funds and retaining an attorney in Alabama for the plaintiff's benefit. The evidence does not support Fitzgerald & Fitzgerald's assertion that Locator and/or Sawyer possess "money that, in equity and good conscience, he or she should not retain and that belongs to another." The only reason that any money is even at issue is because Locator recovered it and got it to its rightful owner. Fitzgerald & Fitzgerald argues that contribution is available "if one man has obtained money from another, through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass." There is not one iota of evidence that Locator committed any of those things. Fitzgerald & Fitzgerald has failed to show that it is entitled to subrogation to the rights of the plaintiff or contribution from Locator, *see Raquet v Braun*, 90 NY2d 177 (1997); *Nassau Roofing & Sheet Metal Co. Inc., v Facilities Development Corp.*, 71 NY2d 599 (1988); *Rudy v Lexington Ins. Co.*, 40 AD3d 733 (2d Dept 2007). Nor has Fitzgerald & Fitzgerald shown any wrongdoing, tort, negligence, conversion or breach of contract on the part of Locator sufficient to warrant denial of the summary judgment motion. *See AG Capital Funding Partners L.P., v State Street Bank and Trust Co.* 5 NY3d 582 (2005); *Meese v Miller*, 79 AD2d 237 (4th Dept 1981).

Merrill Lynch opposes the dismissal of its cross-claims against Locator alleging negligence, breach of contract and contribution/indemnification. In the summons and complaint

by the plaintiff against Merrill Lynch, there is no mention of a fee earned by Locator in getting the plaintiff's money. One can conclude that plaintiff did not sue Locator because it was responsible for locating her money. As to the claim that Locator "took the money without authority" Edna Mae Dunn executed a Professional Service Agreement and Power of Attorney before Merrill Lynch even opened a bank account. Merrill Lynch has failed to identify a duty owed by Locator to Merrill Lynch or a breach of that duty. See *Pulka v Edelman*, 40 NY2d 781 (1976). Merrill Lynch has failed to overcome Locator's *prima facie* showing of entitlement to summary judgment.

In opposition to Locator's motion for summary judgment, the County attorney argues that "it is undisputed in the record and by Locator that, at the time of its dealings with the County, Locator revealed to the County that it was acting only on behalf of Merrill Lynch in recovering the lost funds. In addition to the power of attorney running from Merrill Lynch to Locator, which was provided to the County, Locator apparently also had a contract with Merrill Lynch which specifically provided that Locator was to forward any recovered check to Merrill Lynch and was not to deduct is a service fee from that check." (Gray affirmation in partial opposition to Locator's motion for summary judgment, March 29, 2010).

Nassau County's opposition to dismissing the cross-claim against Locator fails to identify any duty owed by Locator to the County or a breach of that duty. In opposition to Locator's motion, the County attorney again makes a strong and persuasive argument as to why the County should be let out of the case. The County's cross-claim against Locator is based on negligence. The opposition to this motion presents no evidence to support that claim, nor does the County provide evidence sufficient to overcome Locator's *prima facie* showing of entitlement to summary judgment against the County.

Locator's motion for summary judgment dismissing the third-party action and all cross-claims against it is **granted**. The Locator Services Group, Ltd. and Kim Sawyer shall be deleted from the caption.

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AS TO MERRILL**

The ICO required Merrill Lynch to establish an account for the benefit of the plaintiff.

Merrill Lynch was in receipt of both compromise orders and failed to ever object or otherwise contest its obligations under the orders. Upon receipt of the Infant Compromise Order, Merrill Lynch took steps to establish an account by instructing Fitzgerald to obtain an order from the Court appointing a custodian for the Plaintiff's account. Merrill Lynch thereafter received a copy of a Modified ICO of the Supreme Court appointing Edna Mae Dunn "custodian." Upon receipt of the Modified Order, Merrill Lynch wrote a letter issuing further instructions for Fitzgerald to follow in order to properly establish an account. Plaintiff argues Merrill Lynch assumed a duty to the plaintiff because they took steps to comply with the Orders. Plaintiff asserts Merrill Lynch breached its duty to handle the settlement check in a reasonable and prudent manner. Merrill Lynch admitted it lost the Plaintiff's settlement check and the only explanation as to why the Settlement Check was lost was that they somehow allowed the \$299,500 check to "fall through the cracks." (Exhibit Y to Plaintiff's motion in support, seq. no. 8.) Moreover, Merrill Lynch was completely unaware that it lost the Plaintiff's settlement check until contacted by Locator.

Plaintiff argues that Merrill Lynch's loss of the settlement check, their failure to have a system in place to track incoming correspondence and funds, their failure to establish an account for the benefit of the plaintiff, their inordinate delay between the time the check was received and its loss, their failure to take any action whatsoever once the check loss was discovered, and their failure to notify the parties that an account would not be opened are the proximate causes of the plaintiff's injuries. The plaintiff has made an adequate *prima facie* showing of entitlement so summary judgment against defendant Merrill Lynch.

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Friends of Animals, Inc. v Associated Fur Mfgs., Inc.*, 46 NY2d 1065 (1979). Conclusory statements are insufficient. *Sofsky v Rosenberg*, 163 AD2d 240 (1st Dept 1990), *aff'd* 76 NY2d 927 (1990); *Zuckerman v City of New York*, 49 NY2d 557 (1980); *see Indig v Finkelstein*, 23 NY2d 728 (1968); *Werner v Nelkin*, 206 AD2d 422 (2d Dept 1994); *Fink, Weinberger, Fredman, Berman & Lowell, P.C. v Petrides*, 80 AD2d 781 (1st Dept 1981), *app. dismissed*, 53 NY2d 1028 (1981); *Jim-Mar Corp. v Aquatic Construction, Ltd.*, 195 AD2d 868 (3d Dept 1993), *lv app. denied*, 82 NY2d 660 (1993).

Merrill's opposition papers do not contain an affidavit from someone from Merrill Lynch

with firsthand knowledge of the facts and may not be used to defeat plaintiff's application. See *Zuckerman v City of New York*, 49 NY2d 557 (1980). In opposition to the motion, Merrill Lynch's attorneys or representatives argue that it appears from the evidence that the original settlement check which could not be deposited because it was made payable without the name of a guardian, was sent to Merrill Lynch by Fitzgerald & Fitzgerald on October 3, 1994 and was returned to Fitzgerald & Fitzgerald on November 4, 1994. A modified order was then issued, naming Edna Mae Dunn as custodian and that order was sent to Merrill Lynch, three months later, but neither the original check, or any reissued check, was sent back to Merrill Lynch. The next time that the original check was seen was when it was produced in court by Merrill Lynch's attorney on April 16, 1998, over three (3) years later. Rather than present evidence to rebut the plaintiff's *prima facie* showing of entitlement to summary judgment as to Merrill Lynch, the defendant looks to hold Fitzgerald & Fitzgerald responsible. Merrill Lynch's reliance on this Court's prior order and its affirmance by the Appellate Division in *Smith v Merrill Lynch & Co. Inc.*, 69 AD3d 843 (2d Dept 2010) in opposition to plaintiff's motion for summary judgment is misplaced. Plaintiff in the within motion has made a *prima facie* showing of entitlement to summary judgment by submitting evidence that Merrill Lynch breached a duty of care to the plaintiff. In the prior proceeding Merrill Lynch failed to even establish that it did not breach a duty of care to the plaintiff. The record contains evidence that Merrill Lynch was in lawful possession of the 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." *Smith v Merrill Lynch & Co., Inc.*, *supra* at p. 843. The court has considered Merrill Lynch's remaining arguments in opposition to plaintiff's motion and finds them to be without merit.

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AS TO FITZGERALD & FITZGERALD, P.C.**

By failing to include an expert's affidavit to establish that Fitzgerald & Fitzgerald breached a standard of professional care and skills, the plaintiff has not made an adequate *prima*

facie showing of entitlement to summary judgment as to Fitzgerald & Fitzgerald.

In *Greene v Payne, Wood and Littlejohn*, 197 AD2d 664 (2d Dept 1993), the Appellate Division, Second Department stated that:

In order to obtain summary judgment on a legal malpractice claim, the movant must establish, through the submission of evidentiary proof in admissible form, that the attorney failed to exercise that degree of care, skill and diligence commonly possessed and exercised by a member of the legal community. Whether malpractice has been committed is ordinarily a factual determination to be made by the jury. Moreover, unless the ordinary experience of the fact-finder provides sufficient basis for judging the adequacy of the professional service, or the attorney's conduct falls below any standard of due care, expert testimony will be necessary to establish that the attorney breached a standard of professional care and skill. (internal citations omitted)

Moreover, in opposition to the plaintiff's motion for summary judgment, the attorneys for Fitzgerald & Fitzgerald submitted an expert affirmation dated March 30, 2010, by Bertram R. Gelfand, attorney-at-law and former Surrogate of Bronx County. Judge Gelfand opined that defendant Fitzgerald & Fitzgerald's attorney-client relationship ended with the death of the plaintiff's mother; and the responsibilities of Fitzgerald & Fitzgerald ended with its submission of the proposed Compromise Order to the court. Also, Fitzgerald & Fitzgerald's expert asserts there is no support for plaintiff's allegations set forth in the moving papers that a personal injury law firm would have a system in place to confirm that a depository would have a system in place to confirm that the check was deposited.

The attorney for the plaintiff argues that Fitzgerald & Fitzgerald failed in its duty to the plaintiff to make sure the settlement proceeds were deposited as delineated and specified in the ICO and had a continuing duty to the plaintiff to make sure that the directives in the ICO were carried out. Nevertheless, in the absence of an expert, it is the determination of this court that solely for the purposes of this motion Fitzgerald & Fitzgerald raised triable issues of fact to the appropriateness of its actions as measured against the "ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession" *Rudolph v Shane, Daces, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 (2007).

Plaintiff's motion for summary judgment against Merrill Lynch on the issue of liability is **granted**. Plaintiff's motion for summary judgment against Fitzgerald & Fitzgerald is **denied**.

Motion (seq. no. 10) by the attorneys for the third-party defendants The Locator Services Group, Ltd. ("Locator") and Kim Sawyer for an order pursuant to CPLR §3025 permitting the defendants Locator and Kim Sawyer to amend their answer is **granted**. On consent, the amended answer of Locator and Kim Sawyer in response to paragraph 42 of the complaint shall be as follows: The answering third-party defendants deny the allegations set forth in paragraph "42" except admit that Locator did not disclose to the County the second power of attorney or its contract with Edna May Dunn as the guardian of Noel Smith.

Although Locator and Sawyer have been let out of the action, this amended response affirms the County's position in its defense against the claims of Merrill and Fitzgerald & Fitzgerald and is in conformity with the testimony of Kim Sawyer that she did not advise the County of her agreement with Edna Mae Dunn. The second amended answer on behalf of Locator and Kim Sawyer which incorporates the aforesaid amendment is deemed served.

Unopposed cross-motion (seq. no. 11) by the attorney for defendant/third-party plaintiff Fitzgerald & Fitzgerald for an order pursuant to CPLR §3025(b) granting leave to serve an amended third-party complaint in the form annexed as Exhibit A to the Notice of cross-motion is **granted** and deemed served.

This matter is referred to DCM for trial on August 11, 2010 at 9:30 A.M. subject to the approval of the Justice there presiding

This decision is the order of the Court.

DATED: July 16, 2010
Mineola, N.Y. 11501

ENTER:



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

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JUL 23 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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