

**Godoy v Twomey**

2006 NY Slip Op 30233(U)

June 29, 2006

Supreme Court, New York County

Docket Number: 0601476/2005

Judge: Shirley W. Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **Kornreich, Shirley Werner, J.**  
*Justice*

PART 54

CINDY GODOY et ano.

INDEX NO. 601476/05

- v -

MOTION DATE 8/15/08

CATHERINE TWOMEY et ano.

MOTION SEQ. NO. 4

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 5 were read on this motion to Disqualify counsel

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits...

PAPERS NUMBERED

1

Answering Affidavits — Exhibits

2-4

Replying Affidavits

5

Cross-Motion:  Yes  No

Motion is decided in accordance with the accompanying memorandum decision and order.

**FILED**  
JUL 10 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

**SHIRLEY WERNER KORNREICH**  
J.S.C.

Dated: June 29, 2006

*J.S.C.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
CINDY GODOY and JULIO GODOY,

Index No.: 601476/05

Plaintiffs,

-against-

CATHERINE TWOMEY and  
LEATHA J. STURGES, ESQ.

Defendants.

-----X  
KORNREICH, SHIRLEY WERNER, J.

DECISION  
and  
ORDER

**FILED**  
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NEW YORK  
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This Court's decision and order, dated June 26, 2006, is hereby recalled and this decision and order is substituted in its place. This is an action brought to recover damages resulting from the cancellation of a contract for the purchase of cooperative apartment 4D at 415 West 46th Street, New York, N.Y. (the "Apartment") as well as for alleged legal malpractice on the part of Leatha Sturges, Esq. ("Sturges"). Plaintiffs move to disqualify Bonnie L. Mohr, Esq. ("Mohr"), counsel for defendant, Catherine Twomey ("Twomey").

I. *Facts*

Beginning in August 2003, Sturges represented both Cindy Godoy ("Cindy"), buyer, and Twomey, seller, in a real estate transaction for the purchase of the Apartment. Both Cindy and Twomey signed a Conflict of Interest waiver so as to facilitate the transaction. They executed a contract for the sale of the Apartment even though it could not be enforced until the Co-op board approved the sale. The board required Cindy to submit a packet of information and Twomey to submit Letters of Administration.<sup>1</sup>

In a letter to Cindy, Sturges updated her on the Letters of Administration and informed

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<sup>1</sup> There was some question as to the ownership of the Apartment, since the original owner had died and the Apartment was part of her estate.

her that she had delegated the responsibility of obtaining the Letters to her "Associate," Mohr.<sup>2</sup> Even though Sturges only billed Twomey for the work done by Mohr in regard to the Letters of Administration, Mohr kept Cindy abreast of their progress via letters. Throughout this time, the Sturges Law Firm continued to represent both the buyer and the seller.

In October of 2004, Twomey elected to cancel the contract pursuant to a provision, which allowed for cancellation if the seller is "unable to transfer the Lease and the Shares in accordance with [the] Contract for any reason not due to seller's willful acts or omission." Twomey chose to exercise this option "due to the amount of time that ha[d] passed since the scheduled Closing Date . . . during which time written approvals for both Seller and the Purchaser have not been forthcoming from the Co-op." In a letter written by Sturges on Twomey's behalf, defendants explained that the cancellation was due to the delay in obtaining the Letters of Administration. At this juncture, Sturges resigned as counsel for Cindy and continued representing Twomey.

On April 25, 2005, plaintiff brought an action against defendants claiming that Sturges breached her professional duty and that plaintiffs suffered as a result of material misrepresentations and fraud. Plaintiffs claim that the delay in obtaining the Co-op board's approval was due to "acts or omissions" of Twomey and/or Sturges. At present, Mohr is representing Twomey in this action.

## II. *Conclusions of Law*

Disqualification of counsel is not a procedure to be taken lightly, as the right to counsel of choice "is a valued right and any restrictions must be carefully scrutinized." *S&S Hotel Ventures Limited Partnership v. 777 S.H. Corp.*, 69 N.Y.2d 437, 443 (1987). The Code of Professional

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<sup>2</sup> Sturges contends that Mohr was not her "Associate," but rather an independent contractor. Nevertheless, it is clear from the record that Mohr was working for Sturges on issues directly related to the underlying real estate transaction.

Responsibility establishes ethical standards for professional conduct, and although not controlling statutory or decisional law, the Code does "represent the acknowledged standards of the profession and the courts 'should not denigrate them by indifference.'" *In the Matter of Henry Hof, Jr.*, 102 A.D.2d 591, 596 (2d Dept. 1984) (citations omitted).

The Code provides that

a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client whose interests are materially adverse to that person; and [a]bout whom the lawyer had acquired information protected by [attorney-client privilege] that is material to the matter.

DR 5-108. The Court of Appeals has explicated that

[u]nderlying this rule is the notion that an attorney, as part of his fiduciary obligation, owes a continuing duty to a former client – broader in scope than the attorney-client evidentiary privilege – not to reveal confidences learned in the course of the professional relationship. To obtain disqualification of the attorney, the former client need not show that confidential information necessarily will be disclosed in the course of litigation; rather, a reasonable probability of disclosure should suffice.

*Greene v. Greene*, 47 N.Y.2d 447, 453 (1979). "The critical issue . . . is not the actual or probable betrayal of confidences, but the mere appearance of impropriety and conflict of interest." *In the Matter of Henry Hof, Jr.*, 102 A.D.2d at 595. The Court of Appeals has opined that

it is no answer that the lawyer did not in fact obtain any confidential information in connection with the first employment, or even that it was only other members of his firm who rendered the services to the client. Irrespective of any actual detriment, the first client is entitled to freedom from apprehension and to certainty that his interests will not be prejudiced in consequence of representation of the opposing litigant by the client's former attorney.

*Cardinale v. Golinello*, 43 N.Y.2d 288, 296-96 (1977).

In this case, Mohr contends that while working for the Sturges Law Firm she only worked on the Letters of Administration, and since only Twomey was billed for this work, Cindy was never Mohr's client. Nevertheless, neither the Code of Responsibility nor the common law

require that Mohr perform billable work for Cindy in order for Mohr to be disqualified from representing the defendants. For Mohr to be disqualified, it is sufficient that at the relevant time period she worked for a firm representing Cindy and performed tasks pertinent to the present lawsuit.

Moreover, the "advocate-witness" rule requires an attorney to withdraw from a case where it is likely that he will be called as a witness and that his testimony will be prejudicial to his client. DR 5-102(d). In applying this rule, the courts additionally established that "such disqualification is required only where the testimony by the attorney is considered *necessary*." *Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher*, 299 A.D.2d 65, 74 (1st Dept. 2002) (emphasis in original) (citations omitted). "A finding of necessity takes into account factors as the significance of the matters, weight of the testimony, and availability of other evidence." *S&S Hotel Ventures Limited Partnership*, 69 N.Y.2d at 446. Furthermore, the Code of Professional Responsibility states that "a lawyer may act as advocate and also testify . . . if the testimony will relate solely to an uncontested issue." DR 5-102.

Here, plaintiffs are asserting that the delay in obtaining the Co-op board's permission was due to the "acts or omissions" of defendants. Given that Twomey had not yet obtained the Letters of Administration at the time of the contract cancellation and that the delay was one of the reasons stated for the cancellation, Mohr's participation in attempting to obtain the Letters of Administration is pertinent in resolving whether there was bad faith, fraud, and/or malpractice. Since Mohr was the attorney directly involved with obtaining the Letters, her testimony would have the most authority. Furthermore, there is no other evidence that can speak more directly to the amount of effort exerted in acquiring the Letters and the defendant's intentions. Were Mohr's testimony to reveal impropriety on behalf of herself or the defendants, her testimony would clearly have a prejudicial effect on her client, Twomey. Therefore, because Mohr's

testimony is "necessary" for determining key issues in this case and may be prejudicial to her client, she is disqualified from representing Twomey.

Finally, that portion of plaintiffs' motion seeking sanctions is denied. The court is not persuaded that defendants' conduct warrants the imposition of any sanctions under 22 NYCRR 130-1.1. Accordingly, it is

ORDERED that plaintiffs' motion to disqualify Bonnie L. Mohr as counsel for defendant Catherine Twomey is granted; and it is further

ORDERED that plaintiffs' serve a copy of this order with notice of entry upon Ms. Mohr who is directed to serve a copy on Ms. Twomey at her last known addresses by certified mail, return receipt requested; and it is further

ORDERED that, together with the copy of the order with notice of entry served upon Ms. Twomey, Ms. Mohr shall forward a notice directing Ms. Twomey to appoint a substitute attorney; and it is further

ORDERED that no further proceedings may be taken against Catherine Twomey without leave of this Court for a period of 30 days after service upon Mohr of this Order, with notice of entry; and it is further

ORDERED that the parties are to appear before the court for a discovery conference on August 10, 2006 at 9:30 a.m. at 111 Centre Street, Room 1227, New York, N.Y.

Date: June 29, 2006

ENTER:

**FILED**  
JUL 10 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

*[Handwritten signature]*  
J.S.C.