

**Godoy v Twomey**

2006 NY Slip Op 30234(U)

September 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: Shirley Werner Kornreich,  
Justice

PART 54

Index Number : 601476/2005  
GODOY, CINDY  
vs.  
TWOMEY, CATHERINE  
SEQUENCE NUMBER : 003  
DEFAULT JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE 9/21/06  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1-2  
3-8  
9-10

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes <sup>(2)</sup>  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

OCT 05 2006

NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION AND ORDER.**

Dated: 9/29/06

Shirley Werner Kornreich  
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,

Plaintiffs,

-against-

CATHERINE TWOMEY and LEATHA STURGES,

Defendants.  
-----x

Index No. 601476/05

**DECISION & ORDER**

**FILED**  
OCT 05 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

SHIRLEY WERNER KORNREICH, J.

Plaintiffs move for a default judgment against one of the defendants, Catherine Twomey ("Twomey"), for failure to timely serve an answer to plaintiffs' amended complaint, verified on March 20, 2006. In addition, plaintiffs move to strike discovery demands served by each defendant on April 3, 2006, and for sanctions for failing to withdraw the demands. Plaintiffs' claim that sanctions are warranted against Twomey's former attorney, Bonnie Mohr ("Mohr")<sup>1</sup>, for the additional reason that she made a material misrepresentation in papers filed with the court about the manner in which she served Twomey's answer to the amended complaint, as well as for her refusal to withdraw a notice for discovery and inspection. Mohr's alleged falsehoods were statements that she served Twomey's answer on April 14, 2006 by first class mail, when in fact she served it by first class parcel post. On May 1, 2006, plaintiffs rejected a second copy of Twomey's answer served by Mohr, as this motion had already been made.

\_\_\_\_\_  
<sup>1</sup>Mohr, who had been affiliated with the Sturges firm, was disqualified from representing Twomey by order of this court, dated June 29, 2006.

Twomey cross-moves to dismiss plaintiffs' discovery motion; for an order compelling plaintiffs to accept her answer to the amended complaint; for an order of supervision of disclosure; an order directing plaintiffs' to reply to her counterclaims; for an order scheduling depositions; and for sanctions.

Defendant Leatha Sturges ("Sturges") cross-moves to compel plaintiffs to respond to her combined demands; for dismissal of plaintiffs' motion; for an order directing supervision of disclosure; for an order setting new deposition dates; and for sanctions and costs.

This is an action to recover damages resulting from alleged legal malpractice and the cancellation of a contract for the purchase of cooperative apartment 4D ("Apartment", in a building located at 415 West 46<sup>th</sup> Street, New York, N.Y. ("Building")). Twomey and plaintiff Cindy Godoy ("Cindy") entered into a contract for the sale of the Apartment in August of 2003 ("Contract"). Twomey resides in Virginia. *See*, ¶2, Amended Complaint, annexed as Exh. F to Plaintiffs' Motion. Sturges, an attorney, represented both parties in the transaction.<sup>2</sup>

The Contract, describes the seller as "Catherine Twomey, as sole heir to Mary T. Levins,"<sup>3</sup> not as administrator or executor of Mary T. Levins, who died intestate. The amended complaint alleges that Twomey falsely represented that she was the sole heir to Mary T. Levins, when in fact there were others. Plaintiffs allege they were damaged because Twomey was unable to convey title due to the alleged misrepresentation that she was Levins' sole surviving heir, despite the fact that it was apparent from the face of the Contract that Twomey was not an

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<sup>2</sup>The counterclaim alleges that plaintiffs, New York residents, took Twomey, who resides in Virginia, to Sturges' office.

<sup>3</sup>The Contract is Exhibit A to Plaintiffs' Reply, which is annexed as Exhibit F to Plaintiffs' Motion.

administrator of the estate. Although it should have been apparent to Sturges, the attorney who drew the Contract, that an administrator must be appointed to convey property belonging to the estate of an intestate decedent, the Contract makes the following representation with respect to Twomey's title to the Apartment:

4.1 ... Seller represents and covenants that:

4.1.1 Seller is and shall at Closing be the sole owner of the Shares and Lease the full right and power to sell and assign them.

With respect to the buyer's remedies for breach, the Contract provides, in paragraph 13.2, that if the sale cannot be consummated due to the seller's default or misrepresentation, the buyer shall have remedies which she "is entitled to at law or in equity." If the failure to convey title is not the result of the seller's default or misrepresentation, paragraph 16 of the Contract limits the buyer's remedies to return of the deposit.

Twomey cancelled the Contract pursuant to paragraph 6.3, and returned Cindy's deposit. *See*, Reply, Exh. E to Plaintiffs' Motion, ¶3. Cindy cashed the check. *Id.* Twomey's position in this action is that she cancelled the Contract because the Cooperative's Board failed to approve the sale. Plaintiffs counter that the Board did not approve the sale because Twomey did not obtain Letters of the Administration.

The following facts are alleged in Twomey's third amended answer, which she verified on February 15, 2006, paragraphs 26 through 77, which is annexed as Exhibit C to Plaintiffs' Motion. Plaintiff, Julio Godoy ("Julio"), is the superintendent of the Building and the father of Cindy. Twomey is the sole surviving sibling of Mary T. Levins, who owned the Apartment. In March of 2003, Julio, contacted Twomey and made an offer to have Cindy, Julio's daughter, purchase the Apartment. At the time, Twomey was a widow over the age of sixty-five. Julio,

with the knowledge of Cindy, falsely represented to Twomey that the Apartment was a low income cooperative under the New York State Article 11 Housing Development Fund Corporation Program. The false representation induced Twomey to sell the Apartment for \$45,000.00, which was well below its market value. Julio brought his daughter and Twomey to Sturges to prepare the Contract. Plaintiffs admit that, at the time the Contract was made, Julio believed that the Apartment was worth more than \$45,000.00. Plaintiffs' Reply, Exh. E to Plaintiffs' Notice of Motion, ¶6.

*A. Plaintiffs' Motion for a Default Judgment*

Plaintiffs' motion for a default judgment is denied as plaintiff failed to submit proof of service of the Amended Complaint, as required by C.P.L.R. §3215(f). The alleged default, if there was one, was minor, excusable and non-prejudicial. In the absence of prejudice, the court may disregard any mistake or irregularity. C.P.L.R. §2001. Here, the parties agree that Twomey served the answer to plaintiffs' amended complaint on time. The alleged defect is that it was served by first class mail parcel post instead of by ordinary first class mail. Twomey submitted a copy of the post office receipt for the mailing on April 14, 2006. Although C.P.L.R. §2103 requires service by first class ordinary mail, the defect was trivial. Moreover, plaintiffs' attorney acknowledged by letter that he received a second copy of Twomey's answer on or before May 1, 2006. Finally, Twomey's verified answer, alleging that Julio made material misrepresentations to induce the sale, and brought Twomey to his attorney who represented both parties, constitutes a meritorious claim and defense. This State's public policy favors determinations on the merits. *Guzetti v. City of New York*, 2006 NY Slip Op 6197 (1<sup>st</sup> Dept. 2006).

*B. Discovery Motions*

Plaintiffs' motion with respect to Sturges' Combined Demands and Twomey's Notice of Discovery and Inspection, both dated April 3, 2006, is moot, as the demands were withdrawn at the argument of the motion on September 21, 2006. The cross-motions relating to the demands are moot as well. The court scheduled a discovery conference for September 29, 2006, at 1 p.m., and the balance of the discovery disputes between the parties will be resolved at that time.

*C. The Motions for Sanctions*

The motions by all parties for sanctions are denied. The motion by plaintiff for a default judgment was bordering on frivolous, as answer was served timely by first class mail, albeit a different type of first class mail, and plaintiff failed to offer the requisite proof of service in support of the motion. Moreover, it appears that the pursuit of the default by plaintiffs' lawyer was motivated by a desire to have the case decided on a technicality rather than on the merits. Plaintiffs' claim that Mohr submitted false statements to the court is an overstatement. Mohr stated that she served her client's answer by first class mail, which was true, even if it was first class parcel post. The statements fall in the category of zealous advocacy of her client's position, rather than malice or harassment. Defendants' discovery demands were improper, but plaintiff would have made a motion for the default judgment anyway, and defendants withdrew their demands. Accordingly, it is

ORDERED that plaintiffs' motions for a default judgment and for sanctions are denied; and plaintiffs' motion to strike the April 3, 2006, discovery demands of Sturges and Twomey are denied as moot in light of the withdrawal of the demands; and it is further

ORDERED that Twomey's cross-motion is granted solely to the extent that plaintiffs' are

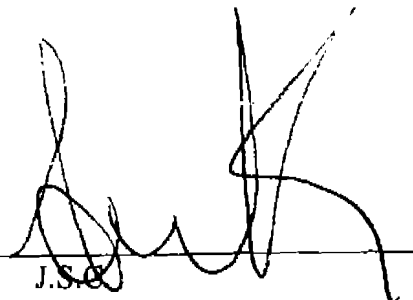
directed to accept Twomey's answer to the amended complaint and counterclaims, lated April 14, 2006, and the remaining discovery demands will be dealt with at a discovery conference; and it is further

ORDERED that Sturges cross-motion is denied in its entirety; and it is further

ORDERED that the parties shall appear for a conference on September 29, 2006, at 1 p.m., to resolve the remaining discovery issues, as previously directed upon the argument of these motions.

Dated: September 29, 2006

ENTER:

  
J.S.C.

**FILED**  
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