

**Zietek v Dipietro**

2015 NY Slip Op 31992(U)

August 17, 2015

City Court of Rye, Westchester County

Docket Number: CV14-96

Judge: Joseph L. Latwin

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This opinion is uncorrected and not selected for official publication.

CITY COURT : CITY OF RYE  
WESTCHESTER COUNTY

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GENEVIEVE BERGER ZIETEK,

CV14-96

*Plaintiff,*

*-against-*

DECISION AND ORDER

THEODORE DIPIETRO,

*Defendant.*

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*Appearances:*

Plaintiff *Pro Se*

Defendant by James T. Scalise, Esq., Scarsdale, NY

This is a civil action for breach of contract in connection with the sale of a headstone. This case has had a strange procedural history. A summons and complaint were filed in the Rye City Court on June 9, 2014. Those documents were issued by the plaintiff but were filed with the Court Clerk in the legal backer of a local attorney, Mr. Mann. Apparently, there was some issue with service of those papers. Service was purportedly made on June 9, 2014, but no affidavit of service was filed. The defendant was apparently re-served and an affidavit of service was filed on December 12, 2014.

Despite the delayed service, the defendant mailed an answer to the plaintiff dated July 1, 2014 but did not file it in the Court. Defendant simultaneously served a notice of deposition.

By letter dated September 23, 2014, defendant's attorney wrote to plaintiff indicating that he had spoken to Mr. Mann and was advised that Mr. Mann was not representing the plaintiff. It also adjourned the deposition.

The case having been pending for five months without any activity, the Court, on January 16, 2015 scheduled a status conference for February 23, 2015. Before the conference date, the plaintiff made a motion for a default. A

notice of appearance was filed by Mr. Mann. A notice of appearance on behalf of the plaintiff of another attorney, Mr. Byrne was also filed. That conference was adjourned to March 16, 2015.

On March 6, plaintiff amended her motion for a default.

At the March 16 conference no attorney appeared for the plaintiff. The defendant then filed the earlier served answer. The Court indicated that it would not grant a default judgment under the circumstances in light of the confusion over the plaintiff's representation and since an answer had been served. The Court said it was loathe to enter a technical default<sup>1</sup> and deprive the defendant of his day in Court under those circumstances. The conference was adjourned with the Court advising the plaintiff that she would be well served if she had the assistance of an attorney, either one of the two that had filed a notice of appearance or another attorney. This situation was somewhat clarified two days later when the Court received a letter from Mr. Byrnes saying he no longer represented the plaintiff.

On the next conference day, Mr. Mann appeared and indicated he did not wish to represent the plaintiff. Given Mr. Mann's advanced age, infirmity and expressed desire not to represent plaintiff, the Court relieved Mr. Mann. This left plaintiff without counsel. The Court examined the plaintiff to determine if she had the education, knowledge or experience to represent herself. She didn't. The Court urged plaintiff to obtain counsel and have counsel present at the next conference, but she claimed she was unable to find or afford counsel. The Court warned her of the consequences of proceeding on her own and described some of the substantive and evidentiary hurdles she would face if she proceeded *pro se*. The conference was once again adjourned to May 4.

On May 4, plaintiff appeared without counsel and asked that a default judgment be granted. She asked that the Court give her her money back and award her attorneys' fees. The Court explained that the Court doesn't give her money. She has to obtain a judgment, after an evidentiary trial, and then try to collect that judgment, if any, from the defendant. The Court told the plaintiff that since she was proceeding without an attorney, she could either stipulate to a Preliminary conference schedule or have the Court impose one. After much bickering, she

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<sup>1</sup> The Court could have just as easily dismissed the plaintiff's complaint since the affidavit of service was not timely filed. CPLR 306-b. Instead, it likewise disregarded this technical default in light of the confused history.

stood with the defendant's attorney and worked out a preliminary conference schedule that scheduled this case for trial on September 30.

On July 28, 2015, this Court received a copy of a motion made to the Yonkers City Court to change the venue from Rye to Yonkers. Apparently learning that the Yonkers City Court lacks the power to change venue among City Courts, plaintiff now makes this motion for all the Rye judges to recuse themselves and for a change of venue.

### Venue

No change of venue is permitted by City Courts. Venue means the geographical subdivision of a Court in which an action may be brought. Venue rules are needed only for courts with territorial subdivisions, such as the Supreme Court. County, City (other than New York City Civil Courts), and Justice courts are independent in their municipalities and have no venue provisions. Siegel, *New York Practice* § 116 (4<sup>th</sup> ed.). Not being a court with subdivisions, City courts cannot change venue to another City Court. See, *Idrobo v. Martin*, n.o.r., 2003 WL 22517744 [Nassau County Dist Ct 2003]. Thus, the motion for a change of venue is denied.

### Recusal

“Absent a legal disqualification under Judiciary Law § 14, a Trial Judge is the sole arbiter of recusal. This discretionary decision is within the personal conscience of the court' (*People v. Moreno*, 70 NY2d 403, 405 [1987]). A court's decision in this respect may not be overturned unless it was an improvident exercise of discretion' (*D'Andraia v. Pesce*, 103 AD3d 770, 771 [2013]). Recusal, as a matter of due process, is required only where there exists a direct, personal, substantial or pecuniary interest in reaching a particular conclusion, or where a clash in judicial roles is seen to exist' (*People v. Alomar*, 93 NY2d 239, 246 [1999]). (*People v. Suazo*, 120 AD3d 1270, 1271 [2014]).” *Blue Mtn. Homes, LLC v Betancourt*, 47 Misc3d 144(A) [Appellate Term 9<sup>th</sup> & 10<sup>th</sup> Jud. Dists 2015]

Judiciary Law § 14 says, in relevant part, “A judge shall not sit as such in, or take any part in the decision of, an action . . . to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree.” Plaintiff has not alleged, and the Court knows no fact that any Rye City judge is a party to or has been attorney for, or is related in any degree to any party. Therefore, there is no legal disqualification.

Plaintiff's argument for recusal appears to be that the Court has prejudged the case and cannot be fair and impartial. Plaintiff misreads the Court's guidance for prejudgment. For instance, the Court advised the plaintiff that she might need an expert witness to testify as to whether or not the stone produced by defendant was what was called for in the contract. The Court also advised plaintiff that she would need to marshal her evidence and present it properly or else risk it not being admitted. The Court also advised plaintiff that her demand for attorneys' fees seemed legally deficient since the contract did not provide for attorneys' fees and the action was not brought under a statute that provides for the award of attorneys' fees. None of this should be taken nor was it intended as prejudice. If the Court was prejudiced, it would have been more efficient to let plaintiff wallow in her legal ignorance and suffer the inevitable swift and sure defeat. While the Court will not try the plaintiff's case, justice demands that the Court provide a *pro se* litigant with some measure of guidance so as to prevent them from becoming ensnared in the pitfalls of trying a case.

The plaintiff also seems to have a warped view of the judicial system. She seems to believe that a judgment can be rendered in her favor without permitting the defendant to cross examine plaintiff's witnesses or present its own defense. She constantly complained of the costs and efforts required to bring this case to a just conclusion. When plaintiff complained of the costs and efforts, the Court suggested that she could reduce the burden by bringing the case as a small claims with relaxed evidentiary rules and a simplified procedure. Plaintiff took this as an effort for the Court to share the amount claimed with defendant.

There is no allegation that the Court has prejudged her case or cannot be fair. The Court believes it is not biased and can be fair to both sides. The Court will require adherence to the rules of procedure and evidence. If the plaintiff cannot abide a Court's adherence with the law, she will be disappointed in any Court she would go to. Accordingly, the motion for recusal is denied.

That does not mean plaintiff is stuck with pursuing the case in Rye. The doors to the Courthouse swing both ways. She may discontinue the case in Rye either with prejudice, or with the consent of the defendant, be granted leave to file it in any other Court of competent jurisdiction. CPLR 3217. This Court would have no problem with her doing that. In fact, it would be a relief for this Court not to have to sit through the trial of this case at which, given the history, may have plaintiff stumbling through attempting to prove her case and possibly being further

disappointed and stressed. Of course, refileing in another Court would likely cause a delay of the trial of plaintiff's case.

The Court is sympathetic with the great loss plaintiff suffered but, the loss of her son does not grant her any exception from the due process the defendant is entitled to under our system. It matters not to the Court whether her departed son was a saint or sinner – the only issues for the Court are whether or not the parties complied with their contract and, if they did not, what damages were suffered. Plaintiff injecting her son's merits into this case does nothing but add to her own emotional baggage without helping her case. Regardless of how much plaintiff misses her son, it is beyond the power of this Court to bring him back or send her to him.

What would help plaintiff is the assistance of a dispassionate attorney who can properly assess her case and advise her of its strengths, weaknesses and obstacles that need to be overcome to be successful and provide a guiding hand to her.

Accordingly, it is,

ORDERED and ADJUDGED that the plaintiff's motion for a change of venue be and the same is hereby denied, and it is further

ORDERED and ADJUDGED that the plaintiff's motion for a recusal be and the same is hereby is denied.

August 17, 2015

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JOSEPH L. LATWIN  
Rye City Court Judge

ENTERED

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