

**Zyngier v Lurie**

2014 NY Slip Op 33494(U)

November 17, 2014

Rye City Court

Docket Number: SC14-60

Judge: Joseph L. Latwin

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CITY COURT : CITY OF RYE  
WESTCHESTER COUNTY

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ALEXANDRE ZYNGIER,

SC14-60

*Plaintiff,*

*-against-*

DECISION AND ORDER

ALAN LURIE and SHORONA LURIE,

*Defendants.*

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Appearances:

Plaintiff *Pro Se*

Defendants *Pro Se*

While the City Court may have limited jurisdiction under the New York State Constitution, Article VI, section 17, that does not mean it cannot be faced with geo-political issues, gender conflicts or theological dilemmas. Such is the case here. In addition to contract law issues, this Court is presented with the question of what is prayer and who decides what prayer is appropriate.

This is a small claims action in which the claimant seeks a refund of the down payment he made to defendants. The defendants counterclaim for the work they performed.

The parties entered into a written agreement whereby the defendants agreed to perform services and provide materials to prepare plaintiff's son for his bar mitzvah for a fee of \$3,500. According to Jewish law, when Jewish boys become 13 years old, they become accountable for their actions and subject to the commandments and laws and thus become a bar mitzvah (a son of the commandments). The bar mitzvah becomes responsible for Jewish ritual law, tradition, and ethics, and is able to participate in all areas of Jewish community life, in particular reading from the Torah, and being counted in determining whether or not there is a minyan – the quorum needed to hold communal prayer. A ceremony is usually held on the Sabbath immediately following the 13<sup>th</sup> birthday. At the ceremony, the bar mitzvah reads from the Torah, and the Haftorah (readings

from the books of the Prophets), and may lead the communal prayer. While the celebration of a bar mitzvah has been accompanied by a celebratory meal, the celebration has morphed in some cases into over-the-top spectacles. This has led some to see the party as the event rather than the ritual.

To prepare to be a bar mitzvah, the boy must be able to read Hebrew and learn the prayers associated with the service. Some learn at home, some attend Hebrew schools, and others are trained by teachers, usually Rabbis and Cantors. Plaintiff chose the latter course.

After the agreement was made, defendants a rabbi and a cantor began performing the services called for under the agreement. Some eight months later, and six weeks before the scheduled ceremony, plaintiff objected to two prayers in the ceremony proposed by defendants. He objected to the prayer for the United States and Israel. That prayer is usually said as a congregation in English, as follows:

*We pray for all who hold positions of leadership and responsibility in our national life. Let your blessing rest upon them, and make them responsive to your will, so that our nation may be to all the world an example of justice and compassion.*

*Deepen our love for our country and our desire to serve it. Strengthen our power of self-sacrifice for our nation's welfare. Teach us to uphold its good name by our right conduct.*

*Cause us to see clearly that the well being of our nation is in the hands of all its citizens; imbue us with zeal for the cause of liberty in our own land and in all lands; help us always to keep our homes safe from affliction, strife, and war. Amen.*

*We pray for the land of Israel and its people. May its borders know peace, its inhabitants tranquility. And may the bonds of faith and fate which unite the Jew of all lands be a source of strength to Israel and to us all. God of all lands and ages, answer our constant prayer with a Zion once more aglow with light for us and for all the world and let us say: Amen.*

The basis for the objection to this prayer is that the bar mitzvah's mother is a Lebanese Christian who lost family members during the wars with Israel, and the father is Brazilian. Claimant said neither parent has an ancestral tie to the United States and the mother felt uncomfortable praying for the perceived

adversary, Israel. Thus, Claimant felt the inclusion of this prayer would tend to politicize the ceremony and be at odds with their personal history.

The second prayer was the Avot v'Imohot, (roughly translated as “our fathers and mothers”). It asks God to remember our ancestors and treat us kindly because of God’s relationship with them. The prayer used to be just the Avot, calling out the names of the patriarchs, Abraham, Isaac and Jacob, but recently, in pursuit of a more welcoming and gender-neutral service, some congregations have added the names of the matriarchs, Sarah, Rebecca, Rachel, and Leah, to the prayer. The prayer as proposed, reads, in substance, with the added words underlined

*Blessed are You, Adonai our God,  
 God of our fathers and mothers,  
 God of Abraham, God of Isaac, and God of Jacob,  
God of Sarah, God of Rebecca, God of Rachel, and God of Leah,  
 the great, mighty and awesome God, transcendent God  
 who bestows loving kindness, creates everything out of love,  
 remembers the love of our fathers and mothers, and brings  
 redemption to their children’s children for the sake of the Divine  
 Name.  
 Sovereign, Deliverer, Helper and Shield,  
 Blessed are You, Adonai, Abraham’s Shield and Sarah’s Helper.*

The claimant objected to this prayer as it could have the potential of highlighting that the bar mitzvah’s mother was not Jewish.

The defendants refused to omit these prayers saying that they had always been a part of the ceremony they proposed and that they were significant, if not essential prayers in the service.

### How are we to pray and who decides what we pray?

One time a Jewish peasant boy, a shepherd from the country, came to the big town to celebrate a holiday. He didn't know how to pray. He could not read Hebrew. He arrived at the town synagogue and watched the congregants praying and singing together. He wondered, "What am I to do since I do not know how to pray?"

The boy stood still for a couple of minutes as the rest of the congregation continued praying and then the young boy stood up and spoke loudly.

"I am going to pray to God in the way I know best. I will whistle to God as I whistle to my flock of sheep."

He began whistling the sweet calling as most shepherds know. The Rabbi and the congregation turned and stared at him. The boy continued whistling with all his might not caring what other people thought.

Now, it happened to be, that this particular holiday, all the heavenly gates were shut but suddenly, because of this pure whistling of the heart, all the gates burst open. The prayers of Israel were finally heard.

*See, Nachlei Binah P. 317 #632 Tehillim Ben Beiti*, attributed to Rabbi Eliezer of Komarno.

The Court is aware that there is no biblical prescription of what prayers are required to be said at a bar mitzvah service. Other than the prayers before and after the reading of Torah and Haftorah, none of the prayers are mandatory, although many traditional prayer are bible based and overwhelmingly offered. A congregant from New York could likely walk into a synagogue anywhere in the world and not find much variation (except that translated prayer would be in the native language, not necessarily in English). Virtually the same prayers would be said in virtually the same order. This is a matter of tradition established over the 5775 years. Naturally, as time and circumstances change, so too may the traditional prayers evolve. For instance, a prayer for healing, Mi Shebeirach, has been added to the liturgy in many synagogues in the last twenty years. The addition of the matriarchs to the Avot is another evolution of the tradition. The prayer for the United States and the prayer for Israel are optional and not universally said. The Avot, while optional, is universally said and the addition of the matriarchs is becoming so.

This Court is not the proper forum, nor is it capable of determining what prayer anyone should say or how it is to be said. The Court has little insight as to whether certain words, heartfelt whistling, or other mode of communication will find favor with any particular deity. That is better left to theologians. Nor will the Court impose any prayer regimen on either the claimant or the defendants. That is their personal choices – not an issue of secular law.

On the other hand, this Court is the proper place to determine questions of law. One of the essential elements of a contract is that there be a meeting of the minds or mutual assent. *Express Industries and Terminal Corp. v. NY State Dep't of Transportation*, 93 NY2d 584, 693 NYS2d 857[1999]. The manifestation of mutual assent must be sufficiently definite to assure that the parties are truly in agreement with respect to the material terms. A court cannot

enforce a contract unless it is able to determine what the parties actually agreed to. *166 Mamaroneck Avenue Corp. v. 151 East Post Road Corp.*, 78 NY2d 88, 571 NYS2d 686 [1991]. If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract. *Cobble Hill Nursing Home, Inc. v. Henry and Warren Corp.*, 74 NY2d 475, 548 NYS2d 920 [1989].

The pertinent term of the agreement obligates the defendant to provide “all liturgical and Torah text for custom prayer book”. There is no discussion as to whom if anyone has final editorial say on the content of the custom prayer book or how any dispute over the content was to be resolved. It appears to not have been contemplated by the parties and not a part of any agreement between them. Thus, the contract lacks the essential element of a meeting of the minds on this issue and the contract must fail. In the absence of any agreement between the parties, the Court cannot make an agreement for the parties.

While the contract fails, that does not leave the defendants without a remedy. The defendants filed a counterclaim seeking remuneration for the services they provided to plaintiff as *quantum meruit*. To state a cause of action to recover in *quantum meruit*, a plaintiff must allege: (1) the performance of services in good faith; (2) the acceptance of the services by the person to whom they are rendered; (3) an expectation of compensation therefor; and (4) the reasonable value of the services allegedly rendered. *Miranco Contracting, Inc. v. Perel*, 57 AD3d 956, 871 N.Y.S.2d 310 [2<sup>nd</sup> Dept., 2008].

There is no dispute that the defendants performed services for the plaintiff as anticipated by the agreement, that the plaintiff accepted those services over a period of 8 months, and the defendants expected to be paid for their services. The defendants testified that they spent 25 hours on the plaintiff’s sons bar mitzvah and that their hourly rate was \$125 per hour, for a total value of \$3,125 – almost 90% of the full contract price. The Court finds this excessive.

Claimant paid defendants a \$1,750 down payment under the agreement. The agreement says “A 50% deposit is payable upon signing this contract. (\$1,750).” From this language, the intent of the parties was that this down payment was due upon the signing. It does not say this down payment is apportionable or refundable. The claimant is entitled to apply the down payment against any sums otherwise due defendants.

It is unfortunate that the parties could not have worked together to fashion agreeable prayers that would have been sensitive to plaintiff’s circumstances and stay in keeping with the tradition. For instance, there appears not to have been any objection to the Kaddish prayers, which end with a plea for

peace over all Israel and the whole world. “He who makes peace in the heavens, may He make peace, for all Israel and the whole world; and let us say, Amen.” Perhaps using similar language that was unobjectionable in the Kaddish could have help to make the occasion one of joy instead of discord.

Providing the parties with substantial justice according to the rules and principles of substantive law (UCCA 1804, 1807; see *Cosme v. Bauer*, 27 Misc3d 130(A), 2010 NY Slip Op 50638(U) [App Term, 9th Jud Dist April 8, 2010]; *Ross v. Friedman*, 269 AD2d 584 [2<sup>nd</sup> Dept 2000]; & *Williams v. Roper*, 269 AD2d 125 [1<sup>st</sup> Dept 2000]) and under a fair interpretation of the evidence (see *Claridge Gardens v. Menotti*, 160 AD2d 544 [1<sup>st</sup> Dept 1990] with this Court having had the opportunity to observe and evaluate the testimony and demeanor of the witnesses and to evaluate the credibility of the witnesses, (*Nobile v. Rudolfo Valetin Inc.*, 21 Misc3d 128[A], 2008 N.Y. Slip Op 51962[U] [App Term, 9th and 10th Jud Dists 2008] (see also, *Vizzari v. State of New York*, 184 AD2d 564 [2<sup>nd</sup> Dept 1992]; *Kincade v. Kincade*, 178 AD2d 510, 511 [2<sup>nd</sup> Dept 1991]; & *Rotem v. Hochberg*, 28 Misc3d 127(A), Slip Copy, 2010 WL 2681875 (Table) [App Term, 9th and 10th Jud Dists, 2010]), the Court finds that the contract fails, plaintiff is entitled to a credit for his \$1,750 down payment, and defendants are entitled to \$2,500 on their counterclaim.

Accordingly, it is,

ORDERED and ADJUDGED that the defendants have judgment against the claimant in the sum of Seven Hundred and Fifty (\$750.00) dollars and that defendants have execution therefor.

November 17, 2014

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JOSEPH L. LATWIN  
Rye City Court Judge

ENTERED

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Mary Jo Garrity

### Appeals

--An appeal shall be taken by serving on the adverse party a notice of appeal and filing it in the Rye City Court Clerk's office. A notice shall designate the party taking the appeal, the judgment or order or specific part of the judgment or order appealed from and the court to which the appeal is taken. CPLR § 5515.

--Pursuant to UCCA § 1701 A. Appeals in civil causes shall be taken to the appellate term of the supreme court, 9th Judicial District.

-- An appeal as of right from a judgment entered in a small claim or a commercial claim must be taken within thirty days of the following, whichever first occurs:

1. service by the court of a copy of the judgment appealed from upon the appellant.
2. service by a party of a copy of the judgment appealed from upon the appellant.
3. service by the appellant of a copy of the judgment appealed from upon a party.

Where service as provided in paragraphs one through three of this subdivision is by mail, five days shall be added to the thirty day period prescribed in this section.  
UCCA § 1703(b).

### Exhibits

Exhibits will be held for 30 days by the Clerk. After that time, they may be destroyed, if not picked up or arrangements for their return are not made