

**National Grid Corp. Servs., LLC v LeSchack &
Grodensky, P.C.**

2011 NY Slip Op 32916(U)

October 26, 2011

Supreme Court, Nassau County

Docket Number: 08330/09

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

NATIONAL GRID CORPORATE
SERVICES, LLC,

Plaintiff,

INDEX No. 08330/09

MOTION DATE: Sept. 16, 2011
Motion Sequence # 003, 004

-against-

LeSCHACK & GRODENSKY, P.C. and
MAURICE A. GRODENSKY,

Defendants.

The following papers read on this motion:

Notice of Motion.....	XX
Affidavit/Affirmation in Opposition.....	XXX
Reply Affidavit/Brief.....	XX
Memorandum of Law.....	XXXX

Motion by plaintiff National Grid Corporate Services, LLC (“National Grid”) for an order pursuant to CPLR 3212 granting it partial summary judgment on its second Amended Complaint declaring that its termination of the parties’ Memorandum of Understanding (“MOU”) and Legal Services Agreement (“LSA”) was for cause or, in the alternative, a declaration that defendants’ recovery is limited to quantum meruit is **denied**. Plaintiff’s motion for summary judgment dismissing defendants’ counterclaims is **granted** in part and **denied** in part.

Motion by defendants LeSchack & Grodensky, P.C. (“L&G”) and Maurice A.

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Grodensky for an order pursuant to CPLR 3212 granting them summary judgment dismissing the second Amended Complaint in its entirety and awarding them \$1,597,500 as and for contractual damages plus interest as provided by law on their counterclaim is **denied**.

National Grid engaged L&G to perform various legal services including obtaining orders of seizure to recover utility meters from customers who failed to pay their bills. National Grid alleges that defendants' negligent and reckless acts and omissions caused three of L&G's attorneys to resign, thereby frustrating the purpose of their retainer agreement and justifying its termination. National Grid further alleges that L&G and Grodensky commingled escrow funds and withheld monies owed it. National Grid asserts claims for breach of contract, conversion, unjust enrichment, money had and received, breach of fiduciary duty and punitive damages.

Defendants allege that in terminating them, National Grid breached their agreement and that it in fact played a role in the resignation of three of L &G's attorneys. Defendants assert counterclaims for breach of contract, promissory estoppel, breach of the covenant of good faith and fair dealing, and breach of fiduciary duty.

On its motion, National Grid seeks a declaration that it terminated the agreement with the defendants for cause, thereby defeating the defendants' breach of contract claim or, in the alternative, that the defendants are limited to recovery in quantum meruit. National Grid also seeks dismissal of the defendants' counterclaims.

On their motion, defendants seek summary judgment dismissing National Grid's complaint as well as summary judgment and an award of contractual damages on their counterclaim for breach of contract.

The facts pertinent to the determination of these motions are as follows:

For many years, L&G represented National Grid and its predecessors in replevin actions in which it procured orders of seizure enabling National Grid to recover utility meters from non-paying customers. L&G also handled a variety of other matters for National Grid, including "Right of Access Orders," consumer complaints before courts and state agencies, communicating with customers concerning premises access, settlement negotiations, and other billing matters. The parties' last long-term legal services agreement, or "LSA," was entered into on December 22, 2003. In that agreement, L&G agreed to provide National Grid

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and its affiliated utility companies with legal services from January 1, 2004 through December 31, 2008. The LSA contemplated that L&G would handle as many as 32,700 matters a year during the term of the agreement for a total fee of \$12 million dollars.

L&G had to be available for additional matters and, in fact, in 2008, handled over a total of 41,000 matters. The LSA provided that “the charge for handling those matters [would] be on a retainer basis.” It provided under “compensation” that the “fee for said representation [would] be on an annual retainer basis.” National Grid was also required to reimburse L&G for all costs associated with the replevin actions including index fees, postage and process server costs for which L&G billed National Grid separately. The same retainer amount was paid each year regardless of the number of replevin matters handled by L&G, with the exception that if the number of referrals fell below 15,375 annually, L&G would be paid on a non-retainer basis.

In the event either party failed to perform any of its terms, as a prerequisite to termination, the LSA required a 30-day notice of default and right to cure. It also contained a merger clause and precluded modification absent a duly executed writing. It required National Grid to deposit with L&G “the **additional sum** of \$100,00 as and for a filing fee fund to be used to pay court filing fees (emphasis added),” which funds were to continue on deposit with L&G during the term of the agreement but remain National Grid’s and be refunded at the termination of the agreement. This Replevin Fund was a distinct account at L&G. Other clients’ funds were not deposited into it.

Throughout the duration of the LSA, National Grid paid L&G the annual retainer fee although the number of matters referred varied significantly. Throughout the duration of the LSA, L&G invoiced National Grid separately for costs such as filing fees, postage, process servers fees, etc., which costs were considerable and in some years exceeded \$1 million dollars. Nevertheless, National Grid frequently paid L&G in lump sum payments, either to the Replevin Fee Fund or L&G’s operating account. In mid-2007, National Grid changed its method of payment which resulted in an additional delay in payment, from approximately 10 days to approximately 30 days.

When the LSA was drawing to a close, National Grid undertook exploration of its options regarding future legal services including a Request for Proposals (“RFP”). It became “apparent [to National Grid] that it was more complex to secure a new, long term legal service agreement for replevin services with a new law firm . . . to step in and timely and

satisfactorily perform the required services.” (McCarty, Affidavit in Support, p. 4, ¶ 15).

On December 17, 2008, National Grid and L&G entered into a memorandum of understanding (“MOU”), extending their LSA for a six month period, from January 1 through June 30, 2009. The MOU provided that the “referral volume” for that period would be 22,500. The MOU further provided that the “cost per referral” would be \$71, for a total amount payable of \$1,597,500. This amount was to be paid in two payments, one on January 15 and the second on April 15, 2009. The MOU further provided that L&G would be requested to participate in the “upcoming request for proposal process” and was invited to submit a proposal in response to such process. Finally, the MOU provided: “[t]he foregoing reflects the full agreement of the Parties with regard to the extension of the [LSA] and except as provided herein all other terms of the [LSA] remain unchanged.”

On January 13, 2009, three of L&G’s attorneys, Michael Marlin, Dean Brown and Harold Brin, resigned. National Grid maintains that, as a result of the resignations, National Grid’s Vice President of Customer Financial Services lost confidence in L&G’s ability to meet its contractual obligations under the MOU. National Grid therefore froze the first payment due under the MOU which was being processed. On January 20, 2009, National Grid requested that L&G adjourn all replevin matters in anticipation of retaining new counsel. L&G objected in a letter by Mr. Grodensky expressing the firm’s steadfast intent to honor its agreement. By letter dated January 22, 2009, National Grid terminated the LSA and the MOU effective January 28, 2009.

L&G alleges that it had immediately engaged two competent attorneys to replace the attorneys who left and that it advised National Grid by letter dated January 23rd that its ability to satisfactorily perform its obligations remained unchanged. L & G engaged Steven P. Grodensky, a former L&G attorney and Corporate Secretary, and Walter Belling as a per diem attorney. With defendant Maurice Grodensky, that left three attorneys available to handle National Grid’s legal matters, as well as the manager of its Replevin Department, non-attorney Elliot Fishman.

L&G in fact continued to handle some 25,000 final billing matters during the ensuing year and half following its termination. The three attorneys who left L&G went to work for the law firm that ultimately replaced L&G in servicing National Grid following the termination of the parties’ agreement.

National Grid additionally alleges that following its termination of L&G, it learned

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that L&G had financial problems, including inability to pay its employees. National Grid also claims that it had ethical concerns about L&G's affording access to National Grid's confidential files to outside counsel. National Grid further alleges that following its termination of L&G, it learned that L&G had commingled the law firm's operating revenues, Grodensky's personal funds and its Filing Fee Fund account, in breach of their agreement as well as the rules of professional conduct (See 22 NYCRR § 1200). National Grid seeks to recover for those violations as well.

Tracey McCartney, Vice President of Customer Financial Services at National Grid, Andrew Adriance, a "special projects person" at National Grid, and Robert Gould, National Grid's Operations Collections Manager, testified at their examinations-before-trial that poor performance by L&G was not the cause of its termination of their agreement. Prior to the termination of the agreement, no court appearances were missed; no replevin files were mishandled; and the quality of L&G's work was not affected.

On its motion for summary judgment, National Grid seeks a declaration with regard to its first and second causes of action that it terminated L&G for cause rendering L&G's breach of contract claim without merit or, in the alternative, a declaration with regard to its third cause of action that L&G is only entitled to recover in quantum meruit. National Grid also seeks dismissal of all of the defendants' counterclaims.

On its motion for summary judgment, L&G seeks an award of contractual damages as well as dismissal of National Grid's claims premised upon its alleged commingling of personal, operating and replevin fee funds.

Where there is a contractual relationship between a lawyer and a client, the client has the right to terminate the attorney-client relationship at any time, with or without cause. Atkins & O'Brien, L.L.P. v ISS Intern. Service System, Inc., 252 AD2d 446, 447-448 (1st Dept. 1998), citing Matter of Cooperman, 83 NY2d 465, 472 (1994). When a client discharges an attorney after some services have been performed but prior to the completion of the services for which the fee was agreed upon, the discharged attorney is entitled to recover the reasonable value of services rendered in quantum meruit. Atkins & O'Brien, L.L.P. v ISS Intern. Service System, Inc., supra, at p. 448, citing Matter of Cooperman, supra, at p. 473. The discharge of the attorney by the client does not constitute a breach of the contract, because it is a term of such contract, implied from the peculiar relationship which the contract calls into existence, that the client may terminate the contract at any time with or without cause (Id).

However, “[t]here have, traditionally, been two recognized exceptions to this general rule, i.e., where ‘the attorney in entering into such a contract has changed his position or incurred expense, or . . . where an attorney is employed under a general retainer for a fixed period to perform legal services in relation to matters that may arise during the period of the contract.’” Atkins & O’Brien, L.L.P. v ISS Intern. Service System, Inc., *supra*, at p. 448, citing Martin v Camp, 219 N.Y. 170, 1786 (1916), and citing Ehrlich v Rebco Ins. Exchange, Ltd., 198 AD2d 58 (1st Dept. 1993); Kaplan v Heinfling, 136 AD2d 34 (1st Dept. 1988) *app den.*, 72 NY2d 810 (1988); *see also*, 1 B Carmondy-Wait § 3:354, 3:522.

Because the 2004-2008 legal services agreement required L & G to perform standardized legal services for a fixed period at a set fee, it was a general retainer agreement. The 6 month memorandum of understanding was clearly intended as a “stop gap” measure, pending the awarding of a long term legal services contract through the “request for proposal process.” Nevertheless, because the MOU contemplated L & G’s provision of standardized legal services for a definite period at a set fee, it also constituted a general retainer agreement. Therefore, if National Grid terminated the agreement without cause, the termination would constitute a breach of contract, entitling L & G to recover for services performed at the contract rate, as well as out-of-pocket damages in the form of expenses incurred in anticipation of performance of the contract.

Based upon the documents submitted to the court, there is a question of fact as to whether National Grid in good faith had a reasonable basis to doubt L& G’s capacity to perform the legal services covered by the MOU competently or whether National Grid simply wanted to award the legal services contract to other counsel at a reduced cost. In the former case, the termination would be with cause, in the latter case, the termination would not. Accordingly, plaintiff’s motion for summary judgment with respect to the claims asserted in the complaint is **denied**. Defendants’ motion for summary judgment dismissing plaintiff’s claims for declaratory judgment and breach of contract and summary judgment on defendants’ counterclaim for breach of contract is similarly **denied**.

National Grid may have contributed to the commingling of funds by L&G by paying all charges - - replevin filing fees, postage, process server fees and bills - - by way of one check, as well as precipitating more filings than there were replevin fee funds available to cover them. Nevertheless, contrary to L&G’s position, there is an issue of fact as to whether the entire balance of the replevin fee fund was returned to National Grid. While Fishman’s report indicated that only \$100,000 was deposited into the Replevin Fee Fund on January 1, 2004, his analysis is silent with respect to any existing balance on January 1, 2004 and does

not rebut National Grid's interpretation of "additional sum of \$100,000 . . ." Fishman conceded at his examination-before-trial that his analysis did not address the balance prior to January 1, 2004. Furthermore, Marlin testified at his examination-before-trial that he believed the \$100,000 deposit was in addition to the then existing \$50,000 balance. Furthermore, the proposed LSA for 2009-2013 which was prepared by L&G referred to a \$75,000 filing fee fund deposit "in addition to the sum of \$150,000 previously deposited (emphasis added) . . ." In fact, Mr. Marlin asked someone at National Grid if they were okay with the filing fee fund being raised from \$150,000 to \$300,000. Thus, the court determines that there are issues of fact regarding L&G's handling of the replevin filing fee fund, specifically, whether the \$100,000 deposited when the final LSA was entered was in addition to an existing sum which has not been refunded. Accordingly, defendants' motion for summary judgment dismissing National Grid's claims sounding in conversion, unjust enrichment, money had and received and breach of fiduciary duty is also **denied**.

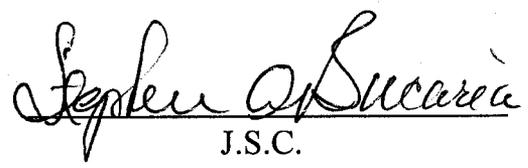
An action for promissory estoppel may be maintained only in the absence of an express contract. In view of the MOU, plaintiff's motion for summary judgment dismissing defendants' counterclaim based on promissory estoppel is **granted**.

Defendants claim that attorney Marlin attempted to procure National Grid's contract for himself and/or the other attorneys that left L&G prior to their departure. However, there is no evidence that the departing attorneys were aided, abetted, supported or involved with National Grid prior to leaving L&G. The evidence establishes that no one at National Grid knew about the attorneys' departure until after it occurred. Plaintiff's motion for summary judgment dismissing L&G's counterclaim for aiding and abetting breach of fiduciary duty is **granted**.

However, L&G's counterclaim for breach of the covenant of good faith and fair dealing presents an issue of fact. L & G argues that National Grid precluded it from participating in the RFP process when it terminated L&G at the inception of the MOU. Plaintiff's motion for summary judgment dismissing defendants' counterclaim for breach of the covenant of good faith and fair dealing is **denied**.

So ordered.

Dated OCT 26 2011


J.S.C.

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