

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

2014 NY Slip Op 32761(U)

March 25, 2014

Sup Ct, Nassau County

Docket Number: 08330/09

Judge: Stephen A. Bucaria

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

\_\_\_\_\_  
NATIONAL GRID CORPORATE SERVICES,  
LLC,

Plaintiff,

-against-

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

Defendants.

TRIAL/IAS, PART 1  
NASSAU COUNTY

INDEX No. 08330/09

MOTION DATE: Feb. 18, 2014  
Motion Sequence # 007, 008, 009

\_\_\_\_\_  
LeSCHACK & GRODENSKY, P.C., THE  
GRODENSKY LAW GROUP, PLLC, MAURICE  
A. GRODENSKY and STEVEN P. GRODENSKY,

Plaintiffs,

-against-

NATIONAL GRID CORPORATE SERVICES, LLC,

Defendant.

INDEX No. 018172/10

\_\_\_\_\_  
The following papers read on this motion:

Notice of Motion.....	XXX
Affidavit in Support.....	XXX
Memorandum of Law.....	XXXX
Reply Memorandum of Law.....	X

NATIONAL GRID CORPORATE SERVICES, LLC  
LeSCHACK & GRODENSKY, P.C.

Index no. 08330/09  
Index no. 018172

Motion (sequence # 7) by plaintiff National Grid Corporate Services, LLC to exclude testimony and other evidence is **granted** in part and **denied** in part. Motion (sequence # 8) by plaintiff National Grid Corporate Services to quash the trial subpoena dated January 6, 2014 is **denied** with leave to renew. Motion (sequence # 9) by plaintiff National Grid Corporate Services to quash the trial subpoena dated January 19, 2014 is **granted**.

These actions between a law firm and its former client arise from the client's discharging the attorney under a general retainer agreement. Plaintiff National Grid Corporate Services, LLC is a public utility which distributes natural gas to residential and commercial customers. On December 23, 2003, National Grid entered into a legal services agreement with defendant LeSchack & Grodensky, PC. Among the legal services covered by the agreement were actions to recover possession of gas meters from customers who had failed to pay their bills over extended periods of time. The replevin actions were typically prosecuted in the New York City Civil Court and District Court in Nassau and Suffolk County. The legal services agreement covered the period January 1, 2004 through December 31, 2008. Pursuant to a memorandum of understanding dated December 17, 2008, the agreement was extended through June 30, 2009. Pursuant to the memorandum of understanding, LeSchack was to be paid \$71 per replevin action on a "volume" of 22,500 actions, for a total fee of \$1,597,000.

In January 2009, defendant Steven Grodensky and two other LeSchack & Grodensky attorneys left LeSchack and formed their own firm, defendant Grodensky Law Group, PLLC. National Grid discharged LeSchack & Grodensky effective January 28, 2009, allegedly because it was concerned that the law firm no longer had sufficient staff to prosecute the replevin actions in a satisfactory manner. National Grid also accused LeSchack & Grodensky of failing to return its \$150,000 filing fee fund, commingling the filing fee fund with other law firm accounts, and other ethical violations.

In June 2009, National Grid commenced an action against LeSchack & Grodensky (Index No. 8330/09). In its first cause of action in the amended complaint, National Grid sought a declaratory judgment that it terminated the legal services agreement for cause and was under no obligation to pay compensation to LeSchack & Grodensky. In the second cause of action, National Grid sought a judgment for unearned legal fees. In the third cause of action, asserted in the alternative, National Grid sought a declaratory judgment that, if it terminated LeSchack & Grodensky without cause, it's sole obligation was to pay the law firm in quantum meruit. National Grid also asserted causes of action for conversion, unjust enrichment, monies had and received, and breach of fiduciary duty.

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In the action commenced by National Grid, LeSchack & Grodensky asserted a series of counterclaims. In the first counterclaim, LeSchack & Grodensky asserted a breach of contract claim for sums due under the legal services agreement. The second counterclaim, sounding in promissory estoppel, has been dismissed. The third counterclaim is for breach of the implied covenant of good faith and fair dealing in the legal services agreement. The fourth counterclaim for aiding and abetting breach of fiduciary duty has also been dismissed. The fifth counterclaim is for a declaratory judgment that the memorandum of understanding constituted a general retainer agreement as a matter of law.

On September 23, 2010, LeSchack & Grodensky commenced an action against National Grid, Index No. 18172/10. In its first cause of action, LeSchack & Grodensky sought a declaratory judgment that it was entitled to a retaining lien on all “final bill files” handled by the firm. “Final bill,” or collection, matters were handled pursuant to a November 1, 2007 “Collection Services Agreement” entered into between National Grid’s predecessor, Keyspan, and LeSchack & Grodensky. In the second cause of action, LeSchack & Grodensky sought an accounting with respect to payments made by customers directly to National Grid through the law firm’s efforts. In the third cause of action, LeSchack & Grodensky asserted a claim for breach of the collection services agreement. LeSchack & Grodensky also asserted claims for the reasonable value of its legal services and unjust enrichment.

By order of this court dated February 17, 2011, the actions were joined for trial. On November 14, 2012, the Appellate Division held that the memorandum of understanding was a general retainer and that, as a consequence, in connection with its third counterclaim, LeSchack & Grodensky is “not limited to recovery of their fees in quantum meruit” (*Nat’l Grid v LeSchack & Grodensky*, 100 AD3d 721 [2d Dept 2012]).

National Grid moves to exclude testimony and documentary evidence as to damages, should it be determined that the law firm committed misconduct and was discharged for cause. Among the items of misconduct which National Grid alleges, are failing to obtain consent to change counsel, failing to advise National Grid of an alleged sua sponte order substituting Grodensky Law Group as counsel, and transferring the final bill matters *en masse* to Grodensky Law Group without National Grid’s consent.

By order dated October 17, 2013, defendant LeSchack’s motion to withdraw its jury demand was granted. Since the case will be tried non-jury, there is no need to bifurcate the trial or to try the issues of liability and damages separately (22 NYCRR § 202.42).

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Accordingly, National Grid's motion to exclude evidence as to damages, should misconduct be established, is **denied**.

National Grid moves to preclude evidence of the reasonable value of LeSchack's services based upon the firm's failure to keep time or billing records. LeSchack argues that billing records were unnecessary with respect to the replevin actions because it was entitled to a flat fee pursuant to the general retainer agreement. With respect to the final bill matters, LeSchack argues that time records are not necessary when it sues in quantum meruit.

Failure to keep contemporaneous time records does not absolutely preclude an attorney from recovering fees, if other means are available to determine the value of the attorney's services (*Costello v Kiaer*, 278 AD2d 50 [1<sup>st</sup> Dept 2000]). However, a failure to keep time records will be considered in conjunction with all of the other circumstances. National Grid's motion to preclude evidence of the reasonable value of the law firm's services based upon its failure to keep time or billing records is **denied**.

National Grid moves to preclude evidence as to its distribution of electrical power during Hurricane Sandy on the ground that such matters are irrelevant and prejudicial. Hurricane Sandy occurred after LeSchack was discharged as National Grid's attorney. Thus, any complaints or dissatisfaction on the part of National Grid's customers based on the storm are irrelevant to the quality of legal services performed by LeSchack in the replevin or final bill proceedings. National Grid's motion to preclude evidence as to its distribution of electrical power during Hurricane Sandy is **granted**.

National Grid moves to preclude testimony from LeSchack & Grodensky's expert, Grace Moran, Esq, on the question of whether LeShack & Grodensky committed any ethical violations, or in the alternative to preclude expert testimony with regard to the firm's conduct concerning the replevin filing fee fund. National Grid argues that LeSchack has not disclosed in reasonable detail the substance of the facts and opinions on which Ms. Moran is expected to testify pursuant to CPLR § 3101(d). LeSchack's expert disclosure states that Ms Moran is expected to testify as an expert in the field of legal ethics concerning the purpose and management of the replevin filing fee fund, steps taken to address National Grid's untimely reimbursement of the fund, steps taken by LeSchack following National Grid's termination of the general retainer agreement, LeSchack's reliance upon Grodensky Law Group in connection with final bill work, the lease and management services agreement between LeSchack and the Grodensky Law Group, the Rules of Professional Conduct, and other relevant precedent, statutes, and advisory opinions of bar associations.

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LeSchack's expert witness disclosure adequately discloses in reasonable detail the substance of the facts and opinions on which Ms Moran is expected to testify. Expert testimony is normally admissible on the issue of whether an attorney exercised reasonable skill and knowledge, unless the ordinary experience of the fact-finder provides sufficient basis for judging the adequacy of the professional service (*Northrup v Thorsen*, 46 AD3d 780 [2d Dept 2007]). A similar rule applies to expert testimony with regard to the ethical nature of the attorney's conduct. National Grid's motion to preclude expert testimony on whether LeSchack violated the Rules of Professional Conduct is **denied**.

Finally, National Grid moves to preclude testimony as to its advance knowledge as to the attorneys' plans to leave LeSchack and form Grodensky Law Group. By order dated October 26, 2011, the court granted National Grid summary judgment dismissing LeSchack's counterclaim for aiding and abetting breach of fiduciary duty. National Grid argues that the court's determination that there was no evidence National Grid had advance knowledge of the attorneys' departure is law of the case on the present motion. Nevertheless, National Grid's knowledge with respect to the attorneys' plans to start a new firm may be relevant to National Grid's good faith in terminating the general retainer agreement. National Grid's motion to preclude testimony as to its advance knowledge as to the attorneys' plans to leave LeSchack and form Grodensky Law Group is **denied**.

On January 6, 2014, LeSchack served a subpoena duces tecum on National Grid requesting that it produce for the trial approximately 20,000 final bill files which were transferred to National Grid's substituted counsel, Schneider & Associates, PLLC. The subpoena also requests records of payments made to LeSchack & Grodensky, as well as records of payments made directly to National Grid by customers whose accounts had been turned over to LeSchack & Grodensky. National Grid moves to quash the subpoena on the ground that it is overbroad and unduly burdensome.

Pursuant to the voluminous writings exception to the best evidence rule, summaries of voluminous writings are admissible, where the party against whom the summary is offered has access to the original material (*Ed Guth Realty v Gingold*, 34 NY2d 440, 452 [1974]). Summaries of the documents contained in the final bill files, payments made to LeSchack, and payments made directly to National Grid will be of assistance to both the parties and the court. Accordingly, National Grid's motion to quash the subpoena dated January 6, 2014 is **denied**, with leave to renew if the parties are unable to stipulate to summaries of the material requested in the subpoena by the date of trial.

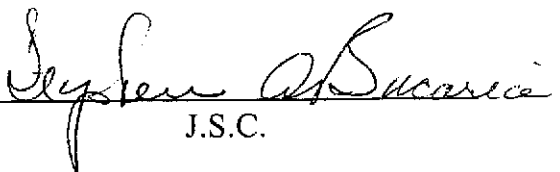
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On January 19, 2014 LeSchack served a subpoena duces tecum on National Grid requesting "documents sufficient to show the amount of annual collections from customers whose accounts were referred to LeSchack & Grodensky, PC between 2004 and 2008 under the Legal Services Agreement...executed December 22, 2003, in connection with...an order of seizure or replevin." National Grid moves to quash the subpoena on the ground that it is overbroad, unduly burdensome, and seeks production of material that could have been requested in discovery. Rather than requiring the production of specific documents, this subpoena is an attempt to obtain post-note of issue discovery. Since there is no unusual or unanticipated circumstance requiring such discovery, National Grid's motion to quash the subpoena dated January 19, 2014 is granted.

So ordered.

Dated MAR 25 2014

  
J.S.C.

**ENTERED**  
MAR 27 2014  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE