

11-3272-cv(L)

Oneida Indian Nation of N.Y. State v. Cnty. of Oneida

# MANDATE

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

## SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 20<sup>th</sup> day of November, two thousand twelve.

PRESENT: RICHARD C. WESLEY,  
DENNY CHIN,  
*Circuit Judges,*  
DAVID G. LARIMER,  
*District Judge.\**

ONEIDA INDIAN NATION OF NEW YORK STATE,  
AKA ONEIDA INDIAN NATION OF NEW YORK,  
AKA ONEIDA INDIANS OF NEW YORK, ONEIDA  
INDIAN NATION OF WISCONSIN, AKA ONEIDA  
TRIBE OF INDIANS OF WISCONSIN,

*Plaintiffs-Appellees,*

ONEIDA OF THE THAMES COUNCIL,

*Plaintiff,*

THAMES BAND OF CANADA (ONEIDA),

*Plaintiff-Counter Defendant,*

UNITED STATES OF AMERICA, NEW YORK

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\* The Honorable David G. Larimer, of the United States District Court for the Western District of New York, sitting by designation.

1 BROTHERTOWN INDIAN NATION, BY MAURICE  
2 "STORM" CHAMPLAIN, VICE CHIEF,

3  
4 *Intervenor Plaintiffs,*

5  
6 -v.-

11-3272-cv (Lead)

11-3275-cv (Con)

7  
8 BOND SCHOENECK & KING, PLLC,

9  
10 *Appellant,*

11  
12 COUNTY OF ONEIDA, NEW YORK, COUNTY OF  
13 MADISON, NEW YORK,

14  
15 *Defendants-Third-Party Plaintiffs,*

16  
17 STATE OF NEW YORK,

18  
19 *Defendants-Counter Claimants.*  
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21  
22 FOR APPELLANT:

Hermes Fernandez, Arthur J.  
Siegel, Clifford G. Tsan, Bond,  
Schoeneck & King, PLLC, Albany,  
NY.

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25  
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27 FOR PLAINTIFFS-APPELLEES:

Michael R. Smith, David A.  
Reiser, Zuckerman Spaeder LLP,  
Washington, DC; Arlinda F.  
Locklear, Washington, DC.

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32 Appeal from the United States District Court for the  
33 Northern District of New York (Kahn, J.; Treece, M.J.).  
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35 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**

36 **AND DECREED** that the decision and order of the United States

37 District Court for the Northern District of New York is

38 **AFFIRMED.**  
39

1 Appellant Bond, Schoeneck & King, PLLC ("BSK") appeals  
2 from a decision and order of the United States District  
3 Court for the Northern District of New York (Kahn, J.;  
4 Treece, M.J.), granting BSK's motion to have the court  
5 recognize its fee pursuant to a retainer agreement with  
6 Plaintiffs-Appellees Oneida Indian Nation of New York and  
7 Oneida Indian Nation of Wisconsin ("Oneidas"). The district  
8 court adopted Magistrate Judge Treece's report-  
9 recommendation and order in its entirety and awarded BSK  
10 \$5,174 for its twelve-year representation of the Oneidas.  
11 The panel has reviewed the briefs and the record in this  
12 appeal and agrees unanimously that oral argument is  
13 unnecessary because "the facts and legal arguments [have  
14 been] adequately presented in the briefs and record, and the  
15 decisional process would not be significantly aided by oral  
16 argument." Fed. R. App. P. 34(a)(2)(C). We assume the  
17 parties' familiarity with the underlying facts, the  
18 procedural history, and the issues presented for review.

19 This Court reviews a district court's decision as to  
20 the amount of an attorneys' fee award for abuse of  
21 discretion. See *Louis Vuitton Malletier S.A. v. LY USA,*  
22 *Inc.*, 676 F.3d 83, 105 (2d Cir. 2012). On appeal, BSK

1 principally argues that the district court erred by  
2 calculating its fee as a percentage of the Oneidas' final  
3 damages award instead of assessing the fee via principles of  
4 quantum meruit.<sup>1</sup> In the alternative, BSK argues that any  
5 percentage-based fee should be applied to the Oneidas' total  
6 "amounts recovered," including the Oneidas' successful  
7 ventures that followed from BSK's Supreme Court victory  
8 establishing federal jurisdiction over the Oneidas' land  
9 claims. *See Oneida Indian Nation of N.Y. State v. Cnty. of*  
10 *Oneida*, 414 U.S. 661 (1974). We affirm for reasons given by  
11 the district court.

12 In 1966, BSK agreed to represent the Oneidas in pursuit  
13 of their land claims against New York State and its  
14 political subdivisions. BSK drafted a retainer agreement to  
15 that effect. As approved by the Secretary of the Interior  
16 (pursuant to 25 U.S.C. § 81), the amended agreement provides  
17 BSK a fee of twenty per cent of the first million dollars in  
18 "amounts recovered" by the Oneidas and ten per cent of any  
19 additional recovery. In the event that the representation  
20 terminated prematurely, the amended agreement entitles BSK

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<sup>1</sup> BSK waived its argument that the firm is entitled to prejudgment interest by failing to object to Magistrate Judge Treece's report-recommendation on this ground. *See Small v. Sec'y of Health and Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989).

1 to "such share in the attorney fee as the court or tribunal  
2 finally determining the Oneidas' claim may determine to be  
3 equitable." BSK successfully represented the Oneidas  
4 through 1978, at which time the firm withdrew due to a  
5 conflict of interest: the Oneidas sought to commence  
6 actions for ejectment against private landowners, a group  
7 which included some BSK attorneys, their families and their  
8 clients.

9 Prior to the conclusion of the Oneidas' litigation over  
10 its land claims in January 2011, BSK moved for the court to  
11 recognize its right to a fee pursuant to the retainer  
12 agreement. Magistrate Judge Treece determined that the  
13 retainer agreement controlled and that BSK was entitled to  
14 an "equitable share in the attorney fee" the firm would have  
15 received had it stayed with the representation through 2011  
16 - the contingency fee. The court reduced BSK's fee by fifty  
17 per cent in light of the firm's withdrawal from the  
18 representation in 1978, more than thirty years before its  
19 conclusion, and further reduced the remaining share by ten  
20 per cent due to BSK's improper representation of conflicting  
21 interests with respect to its former client post-1978. The  
22 court awarded BSK \$5,174, equivalent to nine per cent of the

1 Oneidas' \$57,494 recovery from the two cases BSK brought on  
2 the Oneidas' behalf.

3 Magistrate Judge Treece correctly determined that the  
4 retainer agreement entitles BSK to an equitable share in the  
5 contingency fee the firm would have received absent  
6 withdrawing from the representation. Even if we were to  
7 read this language as ambiguous, both extrinsic evidence and  
8 public policy considerations compel the same result. See,  
9 *e.g.*, *Shaw v. Mfrs. Hanover Trust Co.*, 499 N.E.2d 864, 866  
10 (N.Y. 1986) (placing the burden on attorneys to ensure  
11 clarity in contingent fee arrangements). This is  
12 particularly so in light of the fact that it was apparently  
13 BSK that drafted the Retainer Agreement. See *RLS Assocs.,*  
14 *LLC v. United Bank of Kuwait PLC*, 380 F.3d 704, 712 (2d Cir.  
15 2004).

16 For similar reasons, we reject BSK's alternative  
17 argument that the "amounts recovered" from which it derives  
18 its share include more than monetary damages. See *Matter of*  
19 *Seigel*, 754 N.Y.S.2d 300, 301 (2d Dep't 2002). The retainer  
20 agreement provides for BSK to recover a percentage of  
21 "amounts recovered by the Nation from the State of New York"  
22 or other governmental bodies, "on account of [a] claim" in

1 connection with which BSK represented the Oneidas or  
2 rendered them advice. There is no suggestion in that  
3 language that BSK's fee could be based on the Oneidas'  
4 business revenues, simply because those revenues arguably  
5 have some attenuated relationship with BSK's prior  
6 representation. This conclusion is buttressed by the fact  
7 that BSK's representation of the Oneidas could not have  
8 extended to seeking restoration of title to Indian lands  
9 because of the firm's underlying ethical conflict. The  
10 court did not abuse its discretion in calculating BSK's fee  
11 pursuant to the retainer agreement; an evidentiary hearing  
12 was not necessary for the court to interpret the plain  
13 language of the agreement.

14 For the foregoing reasons, the decision and order of  
15 the district court is hereby **AFFIRMED**.

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18 FOR THE COURT:  
19 Catherine O'Hagan Wolfe, Clerk  
20  
21



A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

