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United States District Court, S.D. New York.

Paul JOLLY, Plaintiff,
v.
Thomas COUGHLIN, Robert Greifinger, and Satish Kapoor, Defendants.

No. 92 CIV. 9026(JGK). | Jan. 19, 1999.

Attorneys and Law Firms

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Opinion

OPINION AND ORDER

KOELTL, District J.

***1** The plaintiff, Paul Jolly, filed this action pursuant to 42 U.S.C. § 1983, seeking damages and injunctive relief for violations of his constitutional rights. His claims arose out of his confinement in medical keeplock for over three years, without exercise and with only one shower per week, after he refused to take a tuberculosis screening test which was required as part of the tuberculosis screening program instituted by the New York State Department of Correctional Services ("DOCS"). After several years of vigorously contested pre-trial proceedings, the case was tried to a jury from November 17 to December 9, 1997. The jury returned a verdict in the plaintiff's favor as to two of the three defendants, Thomas Coughlin and Robert Greifinger, and awarded the plaintiff $30,000 in damages. However, on February 27, 1997, prior to the beginning of the trial, the defendants had made an offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure in the amount of $30,360, or $360 more than the plaintiff ultimately recovered at trial. The defendants have now filed a motion for costs under Rule 68 and the plaintiff has filed a cross-motion pursuant to Rule 54 of the Federal Rules of Civil Procedure for costs and for an award of attorneys' fees under 42 U.S.C. § 1988.

I.

The facts underlying these motions are generally not in dispute and are fully set out in this Court's prior opinion in *Jolly v. Coughlin,* 894 F.Supp. 734 (S.D.N.Y.1995) and in the subsequent opinion of the Court of Appeals for the Second Circuit, 76 F.3d 468 (2d Cir.1996). To summarize, as an inmate incarcerated within the DOCS system, the plaintiff was required to take a tuberculosis ("TB") screening test as part of the DOCS' TB screening program. During the initial years of this program, a prisoner who refused to submit to the test was placed in medical keeplock in which the prisoner was not allowed any out-of-cell exercise and was only allowed out of his cell for one ten-minute shower per week. In December 1991, the plaintiff, a Rastafarian inmate, refused to take the TB test because he believed that the test violated his religious convictions. Without a hearing and without notice, he was placed in medical keeplock for over three years, and, with the exception of his weekly shower and infrequent periods of recreation offered on a sporadic (and accidental) basis, the plaintiff remained locked in his cell for that entire period.

In December 1992, the plaintiff filed this action *pro se,* seeking immediate release from medical keeplock. (Karlan Aff. in Support of Motion ¶ 2 (hereinafter "Karlan Aff."); Hathaway Affidavit in Support of Motion ¶ 2 (hereinafter "Hathaway Aff.") .) In the fall of 1994, Gibson, Dunn & Crutcher ("GD & C") entered an appearance as counsel for the plaintiff. (Karlan Aff. ¶ 5.) Several months later, on March 8, 1995, the plaintiff served a second amended complaint, alleging claims under 42 U.S.C. § 1983 for violations of his First, Eighth, and Fourteenth Amendment rights, the Religious Freedom Restoration Act of 1993, and state law, and seeking declaratory and injunctive relief as well as compensatory damages, costs, and attorneys' fees. The complaint named seven defendants: Thomas A. Coughlin, III, Commissioner of DOCS during the period of the plaintiff's confinement in medical keeplock; Dr. Robert B. Greifinger, Deputy Commissioner and Chief Medical Officer of DOCS during the relevant period; Dr. Satish Kapoor, Facility Health Services Director at Sing Sing Correctional Facility; John P. Keane, Superintendent of Sing Sing; Charles Greiner, Deputy Superintendent of Sing Sing; Philip Coombe, Jr., Acting Commissioner of DOCS; and, Walter Kelly, Superintendent of Attica Correctional Facility.

***2** In February 1995, the plaintiff moved for a preliminary injunction, seeking his release from medical keeplock. By Opinion and Order dated August 14, 1995, this Court granted the plaintiff's application for a preliminary

injunction. *See Jolly,* 894 F.Supp. at 748–49. That decision was subsequently affirmed by the Court of Appeals on February 7, 1996. *See Jolly,* 76 F.3d at 483. By stipulation dated March 8, 1996, the parties agreed to permanent injunctive relief. (Karlan Aff. ¶ 14; Hathaway Aff. ¶ 3.) As a result of his successful request for a preliminary injunction, the plaintiff was awarded attorneys' fees in the amount of $161,995.00 and costs and disbursements of $20,340.29. *See* December 12, 1996 Order, adopting Report and Recommendation Of Magistrate Judge Bernikow, attached as Ex. A to Karlan Reply Aff.

On February 27, 1997, pursuant to Rule 68 of the Federal Rules of Civil Procedure, the defendants[1] served a second offer of judgment in the amount of $30,360.00.[2] (Ex. A to Karlan Aff. & Ex. A to Hathaway Aff.) The offer stated:

> Pursuant to Rule 68 of the Federal Rules of Civil Procedure, defendants hereby offer to allow judgment to be taken against them in this action, in the amount of thirty-thousand and three hundred sixty dollars ($30,360.00), together with costs accrued to date. This offer of judgment is made for the purposes specified in Rule 68, and is not to be construed either as an admission that defendants are liable in this action, or that plaintiff has suffered any damage.
>
> The plaintiff did not accept this offer. Between February 7, 1996 and February 27, 1997, the plaintiff contends that he accrued $104,451.75 in attorneys' fees plus $18,245.53 in costs. (Karlan Aff. ¶ 22; Karlan Reply Aff. ¶ 5 & Ex. C.)

As the case approached trial, the parties retained and deposed numerous expert witnesses, deposed fact witnesses and the parties, and generally conducted extensive discovery. On June 18, 1997, this Court denied both parties' motions for summary judgment and the plaintiff's motion for sanctions. Following the Supreme Court's decision in *City of Bourne v. Flores,* 117 S.Ct. 2157 (1997), the Court dismissed the plaintiff's Religious Freedom Restoration Act claim. In addition, before the trial began the plaintiff dismissed his First Amendment claim and his claims against Keane, Kelly, Greiner, and Coombe, leaving only Coughlin, Greifinger, and Kapoor as defendants for trial. *See* January 14, 1998 Stipulation and Order, filed January 15, 1998.[3]

Ultimately, the case was tried to a jury from November 17, 1997, to December 9, 1997. On December 16, 1997, the jury reached its verdict, finding defendants Coughlin and Greifinger liable for violating the plaintiff's Eighth and Fourteenth Amendment rights and awarding the plaintiff $5,000 on his Eighth Amendment claim and $25,000 on his Fourteenth Amendment claim. The jury found defendant Kapoor not liable for any of the constitutional violations suffered by the plaintiff. Following trial, the plaintiff moved for a declaratory judgment, which the Court denied on January 14, 1998. *See* Tr. of Hearing of Jan. 14, 1998 at 16–22.

***3** The defendants have now filed a motion for costs and attorneys' fees pursuant to Rule 68 and the plaintiff has filed a cross-motion for attorneys' fees and costs pursuant to Rule 54 and 42 U.S.C. § 1988. The defendants contend that because the offer of judgment for $30,360 was more favorable than the judgment the plaintiff ultimately obtained, the $30,000 jury verdict, they are entitled to costs following the date of the offer of judgment, February 27, 1997. Although they agree that the plaintiff is entitled to fees from the date of the last award, February 7, 1996, until February 27, 1997, the defendants argue that the offer of judgment cuts off the plaintiff's right to costs and attorneys' fees after the offer of judgment. The defendants also contend that they should recover their attorneys' fees as part of their costs. On the other hand, the plaintiff has moved for attorneys' fees and costs pursuant to 42 U.S .C. § 1988, arguing in his motion for attorneys' fees and in response to the defendants' motion that he is entitled to $780,411.00 in attorneys' fees and $116,251.96 in costs from February 7, 1996 through the conclusion of this case, or $896,662.96 in total. To avoid the effect of the Rule 68 offer of judgment, the plaintiff contends that the offer was not valid because it was ambiguous, and that the offer of judgment is not "more favorable" than the "judgment finally obtained." The plaintiff also asserts that even if the Rule 68 offer was valid, the defendants cannot recover their attorneys' fees. Finally, the parties raise objections to each other's proposed costs and attorneys' fees, and, in particular, the defendants contend that the plaintiff's fees should be limited by the fee cap imposed by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(d).

II.

Title 42, United States Code Section 1988 provides that, "[i]n any action or proceeding to enforce a provision of section[ ] ... 1983 ... of this title, ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs ...." The jury's verdict in the plaintiff's favor makes him a "prevailing party" and as a result he is entitled to recover his reasonable attorneys' fees as part of the costs assessed against the defendants.

While not disputing the plaintiff's status as a prevailing party, the defendants maintain that their Rule 68 offer of judgment cuts off the plaintiff's right to attorneys' fees and costs from the date the offer was made. Pursuant to Rule 68, "[a]t any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken

against the defending party for the money or property or to the effect specified in the offer, with costs then accrued." Rule 68 also provides that, "[i]f the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." In *Marek v. Chesny,* 473 U.S. 1 (1985), the Supreme Court construed the word "costs" in Rule 68 as including "all costs properly awardable under the relevant substantive statute or other authority." *Id.* at 9. Thus, for purposes of a § 1983 action, because a prevailing party could recover attorney's fees "as part of the costs" under 42 U.S.C. § 1988, "such fees are subject to the cost-shifting provision of Rule 68." *Id.* The Supreme Court recognized in adopting such a definition of costs that the results to plaintiffs who reject Rule 68 offers could be harsh, particularly in the context of suits for violations of civil rights under statutes such as § 1983, in which prevailing plaintiffs would otherwise recover their attorneys' fees as part of their costs. As the Court explained, "application of Rule 68 will require plaintiffs to 'think very hard' about whether continued litigation is worthwhile; that is precisely what Rule 68 contemplates." *Id.* at 11.

***4** In this case, on its face, the defendants' February 27, 1997 offer is $30,360, or $360 more than the plaintiff recovered at trial. The defendants therefore contend that since the judgment the plaintiff obtained is $360 less favorable than the Rule 68 offer, the plaintiff must pay all the costs incurred after the offer of judgment was made. The defendants claim that the plaintiff is liable for the defendants' costs incurred after February 27, 1997 and must bear all of his own costs including reasonable attorneys' fees after that date and cannot recover them from the defendants. The plaintiff seeks to avoid this result by attacking the validity of the offer of judgment as well as by arguing that the judgment actually obtained cannot properly be compared to the offer and that the judgment actually obtained is more favorable than the offer of judgment. The plaintiff also argues that, in any event, the defendants' attorney's fees are not properly shifted to the plaintiff under Rule 68.

A.

The plaintiff first argues that the defendant's offer of judgment is "defective on its face" because the phrase "$30,360, together with costs accrued to date" is ambiguous. The plaintiff contends that this language does not clearly indicate whether the $30,360 offer includes the plaintiff's costs and attorney's fees incurred to date. In addition, the plaintiff asserts that the offer is ambiguous because it is unclear whether it included an admission of liability and whether it was on behalf of all seven of the defendants in the action at that time. However, none of these purported ambiguities renders the offer ambiguous.

"Offers of judgment pursuant to Fed.R.Civ.P. 68 are construed according to ordinary contract principles .... '[I]f a writing, or the term in question, appears to be plain and unambiguous on its face, its meaning must be determined from the four corners of the instrument without resort to extrinsic evidence of any nature .... [I]f the term in question does not have a plain meaning it follows that the term is ambiguous." ' *Goodheart Clothing Co., Inc. v. Laura Goodman Enterprises, Inc.,* 962 F.2d 268, 272 (2d Cir.1992) (internal citations omitted) (quoting John D. Calamari & Joseph M. Perillo, *Contracts,* 166–67 (3d ed.1987); *accord Stewart v. Professional Computer Ctrs., Inc.,* No. 97–2463, 1998 WL 337907, at *2 (8th Cir. Jun. 26, 1998); *Erdman v. Cochise County, Arizona,* 926 F.2d 877, 880 (9th Cir.1991) (settlement agreements should be interpreted as would any contract, except that a waiver or limitation on attorney's fees in the Rule 68 offer must be clear and unambiguous). Moreover, ambiguities in the contract will be construed against the drafter. *Webb v. James,* Nos. 97–2287, 97–2574, 1998 WL 334434, at *5 (7th Cir. Jun. 22, 1998).

First, the phrase "$30,360, together with costs," in the offer is not ambiguous, but clearly means $30,360 plus costs (including attorney's fees) accrued to date. It is true that other courts have noted the potential ambiguity in the phrase "with costs" because "the word 'with', depending on its usage, can indicate accompaniment, combination or inclusion. It is not synonymous with 'including." ' *Kyreakakis v. Paternoster,* 732 F.Supp. 1287, 1292 (D.N.J.1990); *see also Christian v. R. Wood Motors, Inc.,* No. 91–CV–1348, 1995 WL 238981, at *10 (N.D.N.Y. Apr. 21, 1995) ("Thus, in the context of this particular case, the phrase 'with costs' does not have a 'definite and precise meaning." '); *Boorstein v. City of New York,* 107 F.R.D. 31, 34 (S.D.N.Y.1985) (finding that the phrase "inclusive of attorney's fees with costs" was unclear). However, although in some circumstances the phrase "with costs," may be ambiguous, the phrase "$30,360, together with costs" as used in this case is not ambiguous. The addition of the word "together" plainly indicates that costs would accompany the settlement amount offered, thereby limiting possible constructions of the word "with" to a single meaning and precluding the interpretation that the specific amount offered ($30,360) included costs. Moreover, the plaintiff has not cited any case in which the phrase "together with costs" has been found ambiguous, and, indeed, several courts have interpreted the phrase "together with costs" to indicate that costs are to be added to the specific settlement offer, without questioning the phrase's meaning. *See, e.g., Fisher v. Kelly,* 105 F.3d 350, 352 (7th Cir.1996) (offer of "$7,500, together with costs accrued to date"; costs included attorney's fees but were properly not awarded because the plaintiff was not a prevailing party); *Said v. Virginia Commonwealth*

Univ./Medical College of Virginia, 130 F.R.D. 60, 63 (E.D.Va.1990) (offer of $5,000 "together with costs accrued to date" indicates that total payment to plaintiff who accepted the offer would be $5,000 plus costs and attorney's fees); *Shorter v. Valley Bank & Trust Co.,* 678 F.Supp. 714, 719 (N.D.Ill.1988) (offer of "$125,000 together with costs accrued to this date" did not incorporate attorney's fees into $125,000 figure). Accordingly, the phrase "$30,360, together with costs" is unambiguous—had the plaintiff accepted the offer, he would have been entitled to $30,360 plus costs.[4]

***5** Had the plaintiff accepted the offer, he would have been entitled to a judgment in the amount of $30,360 plus costs which, under § 1998 includes attorney's fees. The exact amount of the costs would be fixed by the Court which is perfectly consistent with one of the forms of offers of judgment approved in *Marek. See Marek,* 473 U.S. at 6.

It is also clear that the term "costs" as used in the defendant's offer of judgment must be read to include attorney's fees. Under *Marek,* the term "costs" is defined as "all costs properly awardable under the relevant substantive statute or other authority." *Marek,* 473 U.S. at 9. Under 42 U.S.C. § 1988, a plaintiff as a prevailing party in a § 1983 action can recover attorneys' fees as part of costs. *See id.* For this reason, in this case the term "costs" is not ambiguous because costs under Rule 68 would include attorneys' fees under 42 U.S.C. § 1988, the relevant substantive statute. *See Webb,* 1998 WL 334434, at *5; *see also Foster v. Kings Park Central School District,* 174 F.R.D. 19, 24 (E.D.N.Y.1997).

The plaintiff's second argument, that the offer of judgment was ambiguous with respect to whether the defendants admitted liability, is also foreclosed by the language of the offer. The second sentence in the offer of judgment reads, "This offer of judgment is made for the purposes specified in Rule 68, and is not to be construed either as an admission that defendants are liable in this action, or that plaintiff has suffered any damage." On its face, this is an express denial of liability.[5] This is not a case like *Lish v. Harper's Magazine Foundation,* 148 F.R.D. 516 (S.D.N.Y.1993), in which Judge Lasker found ambiguous a sentence denying liability in an offer of judgment based on the circumstances of that case. Specifically, the defendant had maintained that, despite the apparent plain language of its offer of judgment, the sentence at issue *did* constitute an admission of liability, and therefore, a copyright declaratory judgment in the plaintiff's favor was "not more favorable" than the defendant's Rule 68 offer allegedly admitting liability. *Id.* at 518. However, Judge Lasker denied the defendant the "benefits of Rule 68" because the plaintiff's counsel had indicated to the defendant's counsel his belief that the offer was without any admission of liability, and since the defendant was on notice of the different interpretation, the defendant was required to amend the offer. *Id.* at 519. The plaintiff has presented no evidence of any extrinsic confusion in this case that would create an ambiguity in the plain language of the offer.[6]

Third, the plaintiff asserts that the offer was ambiguous because it was apparently made by only five of the seven defendants in the case, Coughlin, Greifinger, Keane, Greiner, and Kapoor, but not by defendants Coombe and Kelly. These two defendants were added as defendants in the plaintiff's second amended complaint which was filed on March 8, 1995. (Karlan Aff. ¶¶ 6–7.) The plaintiff argues that because two of the defendants were absent from the caption on the Rule 68 offer, it was unclear whether an accepted offer would be binding against all of the defendants. However, the language of the offer itself refers to "defendants" and was submitted by counsel from the Attorney General's Office of the State of New York, which represented all seven of the defendants. Thus, the fact that defendants Coombe and Kelly were not listed in the caption of the offer of judgment does not create an ambiguity in the offer. Moreover, the defendants represent—and the plaintiff does not dispute—that the defendants relied upon the plaintiff's own incorrect caption in his second amended complaint to create the caption for the offer of judgment.

***6** Accordingly, the defendants' February 27, 1997 offer of judgment was not ambiguous and is a valid offer of judgment pursuant to Rule 68.

B.

The plaintiff next asserts that the judgment actually obtained cannot be compared to the Rule 68 offer from the seven defendants, both because the plaintiff voluntarily dismissed defendants Keane, Greiner, Kelly and Coombe prior to trial and because the jury found defendant Kapoor not liable to the plaintiff after trial. In support of this argument, the plaintiff relies primarily on *Johnston v. Penrod Drilling Co.,* 803 F.2d 867 (5th Cir1986), in which the Court of Appeals for the Fifth Circuit found that a joint offer of judgment made by two defendants prior to trial was not comparable to a dollar judgment obtained by the plaintiff against only one of the two defendants, Penrod Drilling Company ("Penrod"), where the other defendant, B.J. Hughes Corporation ("Hughes"), settled prior to trial. *Id.* at 870. The defendants' joint Rule 68 offer in that case was for $7,500, and Johnston, the plaintiff, settled with Hughes prior to trial for $3,500. *Id.* at 869. Following a trial, the jury found Penrod liable to Johnston for $6,526.80 in damages, an amount which had been reduced because of Johnston's contributory negligence. *Id.* Penrod attempted to recover its post-offer costs pursuant to Rule 68. The

Court first rejected the plaintiff's argument that the settlement amount should be added to the verdict, because the "sum to be compared to the offer is clear: 'the judgment finally obtained." ' *Id.* at 870. The Court next determined that the judgment against Penrod could not be compared to the joint offer because the settlement and the dismissal of one of the defendants could have affected the damages award and could have changed the "character and dynamics of [the] trial." *Id.* Specifically, the addition of a second defendant could have altered the jury's perception of the extent of Johnston's contributory negligence. *Id.* The Court was "also persuaded that the equities tip in favor of Johnston; it is simply not fair to automatically shift the costs to him after he managed to obtain more in settlement and judgment than the defendants offered him." The Court of Appeals noted that because Penrod could have made successive offers of judgment, it had a remedy when the co-defendant settled. *Id.*

The facts of this case are very different from those in *Johnston* and illustrate why the judgment obtained at trial in this case is properly compared to the Rule 68 offer of judgment. While the *Johnston* Court relied upon the fact that the plaintiff recovered as a whole more than the offer of judgment, and therefore that the equities tipped in his favor, this is not the case here. The plaintiff, who made a tactical decision to dismiss four defendants and failed to prove his case with respect to defendant Kapoor, recovered less than the offer of judgment. Thus, the plaintiff should not be able to avoid the effect of a valid Rule 68 offer because of his own tactical decisions at trial and a jury's verdict that was not fully in his favor. Moreover, the subtraction of the defendants from this case would not have an impact on the plaintiff's damages, since the jury awarded the plaintiff compensatory damages for his own injuries and there was no issue of contributory negligence as there was in *Johnston.*[7]

***7** The question of whether an offer of judgment is properly comparable to the judgment finally obtained must be decided on the individual facts of each case. On the facts of this case, the otherwise valid offer should not be disregarded because the plaintiff dismissed four defendants immediately prior to trial and did not prove his case with respect to a fifth defendant. Both the offer of judgment and the verdict present easily comparable sums and the comparison is not confused by the fact that verdict was ultimately obtained against only two of the defendants and several defendants were dropped from the case. To find otherwise would greatly limit the effectiveness of Rule 68 offers as a settlement tool because it would give plaintiffs an incentive to join numerous defendants only to drop one or two prior to trial to avoid the effect of a Rule 68 offer. *See, e.g., Stewart v. County of Sonoma,* 634 F.Supp. 773, 776 (N.D.Cal.1986) (after three defendants were dismissed prior to trial, the Court rejected the plaintiff's argument that a Rule 68 offer was not comparable to a verdict becase "any other interpretation, aside from being strained and illogical, would open a large gap in the rule and introduce considerable uncertainy over just when a judgment finally obtained is or is not more favorable.") This is particularly the case here, where the defendants were dismissed so close to trial (and not formally dismissed by stipulation and order until after trial) that the remaining defendants could not make an additional offer of judgment. *See* Fed.R.Civ.P. 68.

Accordingly, the February 27, 1997 Rule 68 offer of judgment is properly compared to the judgment finally obtained by the plaintiff.

C.

The plaintiff next argues that he is entitled to costs and attorneys' fees for the period after the defendants' February 27, 1997 Rule 68 offer because the "judgment finally obtained" was actually "more favorable than the offer." The plaintiff contends that various rulings this Court made in connection with the jury charge in this case, as well as the verdict in the plaintiff's favor, have precedential value and should be considered far more valuable than the jury's monetary award. In addition to the jury verdict, the plaintiff points to a decision which the Court read into the record detailing the reasons why certain jury charges would be given. In its ruling, the Court determined that the jury should be instructed that the deprivation of out-of-cell exercise in this case constituted a sufficiently serious deprivation of a basic human need to satisfy the objective test under the Eighth Amendment analysis, and that the law with respect to a prisoner's right to out-of-cell exercise was clearly established. (Trial Transcript, attached as Ex. C to Karlan Aff. ("Tr.") at 1850–51.) The Court also determined that the plaintiff was entitled to an instruction that, as a matter of law, the denial of a hearing to the plaintiff in connection with his long-term confinement in medical keeplock was a violation of his Fourteenth Amendment right to procedural due process. (Tr. at 1856–67.)

***8** However, Rule 68 makes no provision for the comparison of those aspects of the case that are not reflected in the judgment. The Rule specifically states that the offer must be "more favorable than the judgment actually obtained." This requires a comparison only between the offer and the judgment obtained, and not between the offer and any other relief that may have resulted from the litigation process. *See, e.g., Spencer v. General Electric Co.,* 894 F.2d 651, 663, 664 (4th Cir.1990) (Rule 68 requires court "to compare the offer of 'judgment' to the 'judgment finally obtained' by the offeree"; "a trial court should consider only the terms of

the 'judgment finally obtained' by the offeree, and nothing more."). The cases on which the plaintiff relies all reflect some additional relief in addition to (or in lieu of) a monetary award that is reflected in the judgment finally obtained. *See Lish,* 148 F.R.D. at 520 (declaration of copyright violation with concomitant declaration of copyright ownership and validity); *Chestnut Hill Gulf, Inc. v. Cumberland Farms, Inc.,* 749 F.Supp. 331, 333 (D.Mass.1990) (injunctive relief included in judgment), *rev'd on other grounds,* 940 F.2d 744 (1st Cir.1991). Such non-monetary relief as injunctions and declaratory judgments may be considered in the comparison between the offer and the final judgment since such relief becomes part of the judgment. *See, e.g., Local 32B–32J, Service Employees Int'l Union v. Port Authority of New York and New Jersey,* 180 F.R.D. 251, 253 (S.D.N.Y.1998).[8]

Finally, the plaintiff claims that the vindication of his constitutional rights through the jury's verdict, in conjunction with the monetary damages, is more favorable than the $30,360 offer of judgment which lacked an admission of liability. While the plaintiff's desire to seek such vindication is important, his ultimate success on the merits of his constitutional claims is not relevant to the Rule 68 comparison. In general, Rule 68 only applies where a plaintiff prevails and obtains a judgment in his favor. *See Delta Airlines, Inc. v. August,* 450 U.S. 346, 352 (1981); *In re Water Valley Finishing, Inc.,* 139 F.3d 325, 328 (2d Cir.1998). If the judgment in the plaintiff's favor were obtained after a trial, the judgment would take the form, in part, of a finding of liability against the defendants. Thus, if an admission of liability were a factor considered in the Rule 68 comparison between the offer of judgment and the ultimate judgment obtained, an admission of liability by the plaintiff would become a *de facto* requirement of every offer of judgment since every judgment finally obtained by the plaintiff after a trial would necessarily contain a finding of liability. There is no basis in either Rule 68 or the decisions interpreting Rule 68 for such a requirement to be imposed upon offers of judgment. Rule 68 does not require that offers of judgment included admissions of liability. *See Mite v. Falstaff Brewing Corp.,* 106 F.R.D. 434 (N.D.Ill.1985). It is of course possible for offers to be made without such admissions and for judgments to be entered without such concessions. Indeed consent judgments without admissions of liability are quite common. Moreover, requiring a clear admission of liability in every offer of judgment would also reduce the effectiveness of Rule 68 as a tool to encourage the settlement of all lawsuits. *Cf. Marek,* 473 U.S. at 10; *Delta Airlines, Inc.,* 450 U.S. at 352.

***9** In sum, the Rule 68 offer of judgment is this case is valid and unambiguous. This result comports with the policy of Rule 68, to encourage settlement of litigation, particularly "in those cases in which there is a strong probability that the plaintiff will obtain a judgment but the amount of recovery is uncertain." *Delta Airlines, Inc.,* 450 U.S. at 352. The defendants' offer of judgment of $30,360 is more favorable than the judgment finally obtained by the plaintiff of $30,000. Therefore, the plaintiff must bear its own costs and must pay the defendants' costs incurred after February 27, 1997, the date of the offer. *See* Fed.R.Civ.P. 68.

III.

Although the defendants' offer of judgment pursuant to Rule 68 prevents the plaintiff from recovering his attorneys' fees and costs following February 27, 1997, the date of the offer, the defendants do not dispute that the plaintiff is entitled to recover his attorneys' fees and costs for the period between February 6, 1996 and February 27, 1997. However, the defendants argue that the attorneys' fees provisions of the Prison Litigation Reform Act of 1995 ("PLRA"), contained in 42 U.S.C. § 1997e(d), should be applied to reduce the plaintiff's award of fees. The defendants also quarrel with various entries in the time records submitted by the plaintiff's counsel and certain costs incurred by the plaintiff.

A.

The defendants contend that the plaintiff's attorneys' fee award should be limited pursuant to 42 U.S.C. § 1997e(d).[9] That section, if applied in this case, would (a) apply 25 percent of the plaintiff's judgment of $30,000 to the amount of attorneys' fees awarded against the defendant; (b) limit the total amount of attorneys' fees that the plaintiff could recover from the defendants to 150 percent of the judgment, or $45,000; and, (c) reduce the hourly fees for the plaintiff's counsel to no greater than 150 percent of the hourly rate for court-appointed counsel under 18 U.S.C. § 3006A, or $112.50 per hour.[10] The defendants argue that the statute should be applied to the entirety of the fee award in this case, or, in the alternative, to all work performed after the effective date of the PLRA, April 26, 1996.[11]

In *Blissett v. Casey,* 147 F.3d 218 (2d Cir.1998), the Court of Appeals for the Second Circuit identified four possible permutations for the application of the fee limitations of the PLRA in cases where the plaintiff's attorneys performed work before the PLRA became effective but the award was made after that date. The Court rejected the first approach that it suggested—that the PLRA be applied to all awards of fees entered after the effective date of the PLRA—because retroactive application "would produce serious injustice in numerous

cases.... [H]ad Congress intended so unfair a result, upsetting legitimate expectations based on the pre-existing law, it would have explicitly so provided." *Blissett,* 147 F.3d at 220. The Court also suggested three other alternatives:

> ***10** Second, the PLRA could be held not to apply if the plaintiff's attorneys filed their appearance (or began the representation) before the enactment.... Third, the PLRA might be applied to post-enactment work but not to work done before its enactment.... Finally, the question could be left to the discretion of the district court in the individual case, to be decided on the basis of such factors as the extent of the services performed before enactment, and the extent of reliance by plaintiff and his attorneys on the pre-PLRA fee regime.

Id. at 220 (internal citations omitted). However, the Court of Appeals did not decide which of these three possibilities would govern since the defendants had only urged the Court to adopt a rule of complete retroactivity, an argument which the Court rejected. *See id.* at *3.

In determining the extent of the application of § 1997e(d) to pending cases, the Court applies the analytical framework set forth by the Supreme Court in *Landgraf v. USI Film Products,* 511 U.S. 244 (1994). The Supreme Court explained in *Landgraf* that a court's "first task is to determine whether Congress has expressly prescribed the statute's proper reach." *Id.* at 280. Second, if there is no express prescription, "the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* If the statute operates retroactively, the "presumption against retroactive legislation" prevents the application of the statute absent clear congressional intent favoring such a result. *Id.*

With respect to the first question in the *Landgraf* analysis—whether Congress has expressly prescribed the statute's reach—the Court of Appeals in *Blissett* answered this question in part. The Court of Appeals determined that "retroactive application [of 42 U.S.C. § 1997e(d)] ... would produce serious injustice in numerous cases .... We believe that, had Congress intended so unfair a result, upsetting legitimate expectations based on the pre-existing law, it would have explicitly so provided." Thus, the Court of Appeals has found that the express language of the statute does not prescribe the statute's application to all awards of fees. With this possibility rejected, there is no basis in the statutory language for finding that Congress has expressly determined the applicability of § 1997e(d). *See also Muhammad v. Coughlin,* No. 91 Civ. 6333, 1998 WL 382000, at *7 (S.D.N.Y. July 9, 1998) (§ 1997e(d) "does not answer the retroactivity question").

With respect to the second step in the *Landgraf* analysis, it is clear that the application of § 1997e(d) in the circumstances of this case would have a plain retroactive effect. Gibson, Dunn & Crutcher agreed to represent the plaintiff in the fall of 1994, over one and a half years before the effective date of the PLRA. (Karlan Aff. ¶ 5.) From the outset, GD & C zealously represented the plaintiff, obtaining a preliminary injunction that resulted in his release from keeplock while developing the case for trial. Given the complexity of this case, and the vigor of the opposition, the plaintiff's counsel would have anticipated receiving reasonable attorneys' fees as determined under 42 U.S.C. § 1988 which otherwise would have applied without the limitations of the PLRA. *See, e.g., Dailey v. Societe Generale,* 915 F.Supp. 1315, 1326 (S.D.N.Y.1996), *affirmed in relevant part,* 108 F.3d 451 (2d Cir.1997); *Muhammad,* 1998 WL 382000, at *8. Although GD & C did receive attorneys' fees through February 6, 1996 following the plaintiff's successful application for a preliminary injunction, it would have been reasonable for them to expect to receive such fees after that date at similar rates following the completion of trial should they be successful. While the defendants argue that GD & C could have decided not to represent the plaintiff after the effective date of the PLRA, given the PLRA's prescribed limitations on attorneys' fees available for counsel representing incarcerated plaintiffs, GD & C had an in-depth familiarity with the issues necessary to prosecute the case which had been obtained over a considerable period of time, had significantly advanced the case, and had the resources available to pursue the case. For GD & C to have moved to be relieved as the plaintiff's counsel prior to the resolution of the case would have been unreasonable, and, since such relief is in the Court's discretion, it may not have been granted given the fact that substantial proceedings in this case had already transpired before the effective date of the PLRA. Thus, like Judge Preska in *Muhammad,* the Court finds that "it would result in a 'serious injustice' to adopt a rule of partial retroactivity in this case" and applies the fourth option for the application of the PLRA set forth in *Blissett. Muhammad,* 1998 WL 382000, at *8. Accordingly, on the facts of this case, given the significant services performed by the plaintiff's counsel prior to the effective date of the PLRA as well as the reliance by the plaintiff's counsel on the pre-PLRA fee regime, the PLRA does not apply retroactively to limit the fees that the plaintiff's counsel can recover. *See Blissett,* 1998 WL 337260, at *2.[12]

B.

***11** Because the plaintiff is entitled to recover his attorneys' fees pursuant to 42 U.S.C. § 1988 notwithstanding the Prison Litigation Reform Act, the next step is to determine the appropriate fee award in this case for the period from February 6, 1996 to February 27, 1997, the date of the Rule 68 offer. In order to determine what constitute "reasonable" attorneys' fees, the starting point is the "lodestar" figure, which is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate for attorneys and paralegals. *Kirsch v. Fleet Street, Ltd.,* 148 F.3d 149, 172 (2d Cir.1998) (quoting *Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983)); *Murphy v. Lynn,* 118 F.3d 938, 952 (2d Cir.1997), *cert. denied,* 118 S.Ct. 1051 (1998); *Cruz v. Local Union Number 3,* 34 F.3d 1148, 1159 (2d Cir.1994); *Dailey,* 915 F.Supp. at 1326. The "lodestar" amount "should be 'in line with those [rates] prevailing in the community for similar services of lawyers of reasonably comparable skill, experience, and reputation." ' *Cruz,* 34 F.3d at 1159 (quoting *Blum v. Stenson,* 465 U.S. 886, 896 n. 1 (1984)). The fee applicant bears the burden of submitting contemporaneous time records that support the hours worked and rates claimed. *Cruz,* 34 F.3d at 1160; *New York State Ass'n for Retarded Children, Inc. v. Carey,* 711 F.3d 1136, 1147 (2d Cir.1983); *Dailey,* 915 F.Supp. at 1327. There is a "strong presumption" that the lodestar is reasonable. *Lunday v. Albany,* 42 F.2d 131, 134 (2d Cir.1994); *Dailey,* 915 F.Supp. at 1327. A party that asks the court to depart from the lodestar amount bears the burden of proving that such a departure is necessary to the calculation of a reasonable fee. *Grant v. Martinez,* 973 F.2d 97, 101 (2d Cir.1992), *cert. denied,* 506 U .S. 1053 (1993).

Here, given the Court's rulings with respect to the validity of the Rule 68 offer of judgment, it is not possible to make a fee determination without additional submissions from GD & C. The plaintiff requests fees of $104,451.75 for the period between February 7, 1996 and February 27, 1997. Specifically, the plaintiff seeks $415–$450 per hour for Mitchell A. Karlan, a partner at GD & C; $265–$295 per hour for Leslie E. Moore, a fifth year associate; $220–$270 per hour for Simone R. Procas and Hillary S. Zilz; $235 per hour for Thomas Sheehan; $110–$235 per hour for Rachel Goslins; $250 per hour for Karina P. Houghton and Preetinder S. Bharara; $130–$200 per hour for Shari A. Brandt, a first year associate; $220 per hour for Pauline H. Yoo; $80 per hour for Megan Hay, a paralegal; $106.39 for Richard D. Neznamy; $100 for Barbara A. Seiler, a paralegal; $90 for J.V. Baldwin; $50 for M. Taylor; and, $45 for Mitzie Whyte. Although the plaintiff has specified the overall amount it seeks for the relevant period, $104,451.75, it is not possible from the records provided to determine the appropriate fees since GD & C's billing records were produced in anticipation of recovering fees from February 6, 1996 until the end of the case. Many of the attorneys are listed as having a range of hourly rates, and it is not apparent from the billing records submitted by GD & C when the rates changed. Of course, the attorneys at GD & C who worked on this case would be entitled to higher rates as their experience increased, but it is impossible to determine from the billing records when the higher rates would be appropriately applied.

***12** GD & C also failed to provide resumes for several of the attorneys to allow the Court to judge their experience and did not describe the positions of the non-attorney staff members for whom fees are sought, although it is possible to infer from the billing records the respective positions and experience of each of these individuals. For these reasons, the plaintiff is directed to submit within ten days of this Opinion and Order more detailed information regarding the rates of the attorneys for whom fees are sought and when those rates changed, information regarding the experience of those attorneys for whom fees are sought (or, if such information is not available, their hourly rates and their level of experience during the relevant period), and a description of the positions of the GD & C staff for whom fees are sought. The determination of fees and costs will be referred to a Magistrate Judge for a Report and Recommendation.

IV.

Finally, the defendants' seek to recover from the plaintiff their costs and attorneys' fees incurred after February 27, 1997, the date of their Rule 68 offer of judgment. The plaintiff does not dispute that if the Rule 68 offer of judgment is valid, the defendants are entitled to recover their costs after the date of the offer. However, the plaintiff maintains that the defendants are not entitled to recover fees under Rule 68. Under Rule 68, a prevailing plaintiff who rejects an offer of judgment that is more favorable than the judgment finally obtained must pay the costs incurred after the offer of judgment, including the defendant's costs. *See, e.g., United States v. Trident Seafoods Corp.,* 92 F.3d 855, 859 (9th Cir.1996), *cert. denied,* 117 S.Ct. 944 (1997); *Crossman v. Marcoccio,* 806 F.2d 329, 333 (1st Cir.1986), *cert. denied,* 481 U.S. 1029 (1987). "Costs" under Rule 68 are defined pursuant to the underlying substantive statute, which, in this case, permits an award of attorney's fees to the prevailing party. *See Marek,* 473 U.S. at 9 ("costs" means "all costs properly awardable under the relevant substantive statute or other authority."); 42 U.S.C. § 1988. However, although fees are generally awarded to a prevailing

plaintiff under § 1988, a prevailing defendant may only recover such fees if the action was "frivolous, unreasonable, or groundless, or ... the plaintiff continued to litigate after it clearly became so." *LeBlanc–Sternberg v. Fletcher,* No. 96–6289, 1998 WL 248615, at *4 (2d Cir. May 13, 1998) (quoting *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n,* 434 U.S. 412, 422 (1978)). Thus, aside from the fact that a defendant eligible to receive costs under Rule 68 cannot be considered prevailing—since a defendant may recover costs under Rule 68 only if the plaintiff obtains a judgment in his favor—a defendant entitled to costs under Rule 68 would only be able to recover attorneys' fees if the action were "frivolous, unreasonable, or groundless." If the action were not "frivolous, unreasonable, or groundless," the defendant would not be entitled to attorneys' fees under § 1988 and thus there would be no fees to shift to the plaintiff as part of the "costs" under Rule 68. *See O'Brien v. City of Greers Ferry,* 873 F.2d 1115, 1120 (8th Cir.1989); *Crossman,* 806 F.2d at 334; *Spruill v. Winner Ford of Dover, Ltd.,* No. CIV. A. 94–685, 1998 WL 186895, at *8 (D.Del. Apr. 6, 1998); *Denny v. Hinton,* 131 F.R.D. 659, 665 (M.D.N.C.1990), *aff'd sub. nom Denny v. Elliott,* 937 F.2d 602 (4th Cir.1991); *Cf. Trident Seafoods Corp .,* 92 F.3d at 860.[13]

***13** Here, the defendants are not entitled to recover attorneys' fees. First, since only prevailing parties may recover attorneys' fees under § 1988, defendants Coughlin and Greifinger are not entitled to such fees as part of their costs under Rule 68. Additionally, these defendants would not be entitled to attorneys' fees under § 1988 because it cannot be said that the plaintiff's action was "frivolous, unreasonable, or groundless." Indeed, the plaintiff prevailed at trial against these defendants, and the jury verdict in the plaintiff's favor indicates that his claims had significant merit.

Defendant Kapoor was a prevailing party. However, Rule 68 does not apply to a defendant who has obtained a judgment in his favor. *See Delta Air Lines, Inc.,* 450 U.S. at 351. Defendant Kapoor may nevertheless recover his costs pursuant to Federal Rule of Civil Procedure 54(d)(1) as a prevailing party as a matter of course. He may also recover attorneys' fees under § 1988 if the *Christiansburg* standard is satisfied with respect to the claims against him, i.e. if the action was "frivolous, unreasonable, or groundless." However, an action is not frivolous if the plaintiff has survived a motion for summary judgment and a motion for judgment as a matter of law at trial. *See LeBlanc–Sternberg,* 1998 WL 248615, at *5 ("Nor may a claim properly be deemed groundless where the plaintiff has made a sufficient evidentiary showing to forestall summary judgment and has presented sufficient evidence at trial to prevent the entry of judgment against him as a matter of law.") In the present case, although the plaintiff was unsuccessful in his claims against Kapoor, those claims did have sufficient merit to survive a motion for summary judgment and a motion for judgment as a matter of law at trial. Accordingly, Kapoor cannot recover attorneys' fees under § 1988.

Therefore, defendants Coughlin and Greifinger are entitled to costs under Federal Rule of Civil Procedure 68 and defendant Kapoor is entitled to costs under Federal Rule of Civil Procedure 54(d) from the date of the offer of judgment.[14] The defendants are not entitled to attorneys' fees. The final determination of the defendants' costs will be referred to a Magistrate Judge in the first instance for a Report and Recommendation.

V.

Following the submission of these motions, the plaintiff moved for an extension of time pursuant to Federal Rule of Appellate Procedure 4(a)(5) to appeal *pro se* from the judgment entered in this case. The amended judgment was entered on March 18, 1998, and the plaintiff's letter was dated April 15, 1998, although it was not received by the Pro Se Office of this Court until April 22, 1998. *See* Motion for an Extension of Time to File a Notice of Appeal dated Apr. 15, 1998. The plaintiff alleges that his attorneys informed him that they would appeal, but that they never filed the appeal as they said they would. In a letter dated June 15, 1998, the plaintiff requested that GD & C be relieved due to a conflict of interest, that the attorneys' fees application "be held in abeyance (until this Appeal has been decided)," and that all communications relevant to the appeal be sent to the plaintiff. In a second letter dated July 7, 1998, the plaintiff reiterated his previous requests and also requested the Clerk's Office to forward to him all necessary documents for review to perfect the appeal. Finally, the plaintiff, in a third letter dated July 28, 1998, reiterated his request that the Court hold the attorneys' fees motion in abeyance pending the appeal.

***14** First, Mr. Jolly's request to have GD & C relieved as his counsel and to proceed *pro se* is granted. There are few proceedings left in this Court—primarily final determinations with respect to certain aspects of costs and fees, and GD & C informed the plaintiff that they would not represent him on appeal. GD & C has represented the plaintiff zealously and skillfully over a long period, but if the plaintiff no longer wishes to be represented, he should be permitted to proceed *pro se.*

Second, the plaintiff's request for an extension of time to file a notice of appeal from the March 18, 1998 amended judgment of this Court is granted. Pursuant to Federal Rule of Appellate Procedure 4(a)(5), a court may extended the time for filing a notice of appeal upon a showing of excusable neglect or good cause, upon a

motion filed no later than thirty days after the thirty days allowed under Federal Rule of Appellate Procedure 4(a)(1) for an appeal. Here, the plaintiff alleges that he mistakenly believed that his counsel would file a notice of appeal. *See* Motion for An Extension of time to File a Notice of Appeal, dated April 15, 1998. Mr. Karlan, on behalf of GD & C, states that although GD & C advised Mr. Jolly that it would not represent him on an appeal, it is possible that he was confused by GD & C's intention to file a motion for declaratory relief on his behalf. *See* Letter from Mitchell Karlan dated June 26, 1998. The Court finds that Mr. Jolly's mistaken understanding that his counsel, GD & C, would file a notice of appeal constitutes good cause for his failure to do so. His request for an extension of time was timely, since it was well within the thirty day period after the expiration of the initial time to appeal. Accordingly, the plaintiff's motion to extend his time to appeal is granted. Since GD & C has indicated that it will not represent the plaintiff in any appeal that he wishes to take, and the plaintiff in any event no longer seeks to be represented by GD & C, the plaintiff may appeal *pro se.* The Clerk of the Court will be directed to file a notice of appeal on the plaintiff's behalf immediately, and certainly within ten days of the entry of this Order, as required by Fed. R.App. 4(a)(5). GD & C should provide the plaintiff with a copy of this Opinion and Order and all documents pertaining to the case in its possession to enable Mr. Jolly to prosecute his appeal.

However, pursuant to Federal Rule of Appellate Procedure 4(a)(4), a notice of appeal filed after the entry of judgment but before disposition of a motion for attorney's fees under Rule 54 "is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any [motion for attorney's fees under Rule 54] requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal." Therefore, while Mr. Jolly's notice of appeal should be filed, that appeal will be ineffective, i .e. stayed, until the attorneys' fees motions are decided by this Court.[15] For this reason, the motion to hold the attorneys' fees applications in abeyance pending the appeal is denied, since those motions must be decided prior to Mr. Jolly's appeal being effective. Moreover, should Mr. Jolly wish to appeal from the Court's final decision regarding the attorneys' fees and costs motions, he should file an amended notice of appeal pursuant to Federal Rule of Appellate Procedure 3(c).

***15** To summarize, Mr. Jolly's motion to proceed *pro se* before this Court is granted and GD & C is relieved of any further representation of Mr. Jolly. Mr. Jolly's motion for an extension of time to appeal is granted, and the Clerk of the Court is directed to file Mr. Jolly's notice of appeal immediately. GD & C should provide Mr. Jolly with all documents pertaining to the case to assist in his appeal. Finally, Mr. Jolly's request to hold the fee applications in abeyance pending the outcome of the appeal is denied.[16]

CONCLUSION

For all of the foregoing reasons, the plaintiff's motion for attorneys' fees and costs is granted to the extent that the plaintiff may recover fees and costs incurred prior to February 27, 1997, the date of the offer of judgment. The plaintiff's motion for attorneys' fees and costs after the offer of judgment on February 27, 1997 is denied. The defendants' motion for costs after the offer of judgment on February 27, 1997 is granted. The defendants' motion for attorneys' fees incurred after the offer of judgment on February 27, 1997 is denied.

Gibson, Dunn & Crutcher is directed to serve and file their supplemental submission on the issue of attorneys' fees within ten days of this Opinion and Order. The defendants may respond one week after the plaintiff's submission is served. The determination of the plaintiff's fees and costs and the defendants' costs will be referred to the Magistrate Judge for a Report and Recommendation.

With respect to Mr. Jolly's various applications, Mr. Jolly's motion to proceed *pro se* is granted. Mr. Jolly's motion for an extension of time to appeal is granted, and the Clerk of the Court is directed to file Mr. Jolly's notice of appeal immediately. GD & C should provide Mr. Jolly with a copy of this Opinion and Order and all documents pertaining to the case to assist in his appeal. Finally, Mr. Jolly's request to hold the fee applications in abeyance pending the outcome of the appeal is denied.

SO ORDERED.

Footnotes

1 The plaintiff contends that the offer of judgment was made solely on behalf of five of the seven defendants in the case—Coughlin, Greifinger, Keane, Greiner, and Kapoor—because the caption of the offer of judgment listed only these five defendants. However, as discussed more fully below, it is plain that the offer of judgment was made on behalf of all seven defendants in the case, and not just on behalf of the five defendants listed in the caption to the offer.

2 The defendants' first offer of judgment was for $50. (Hathaway Aff. ¶ 4.)

3 The case went to trial against only defendants Coughlin, Greifinger, and Kapoor in their personal rather than official capacities. While the parties indicated that they would provide a stipulation dismissing the case against the remaining defendants, the stipulation was only submitted and signed after trial, on January 18, 1998. *See* Tr. of Hearing of Jan. 14, 1998 at 11.

4 Moreover, the fact that there was no confusion in this case as to the meaning of the offer is highlighted by a statement made by plaintiff's counsel in this case, Gibson Dunn & Crutcher ("GD & C"), in the related case of *Williams v. Greifinger,* No. 95 Civ. 0385 in a reply memorandum of law in further support of plaintiff Williams' motion for attorneys' fees submitted on November 12, 1997. In support of Williams' argument that the offer of judgment drafted by the defendant in that case failed to follow the formalities required of Rule 68 offers, GD & C argued that the fact that the "defendant was more than capable of extending a formal Rule 68 offer is evidenced by the Offer of Judgment in *Jolly,* drafted by defendant's same defense lawyers and served contemporaneously ... That offer had a caption, an effective date, offered 'to allow judgment to be taken against [defendants],' specified that the monetary offer was *in addition to 'costs accrued to date,'* and *expressly rejected liability.*" (March 20, 1998 Hathaway Aff. Ex. A at 8.) Although not dispositive of the issue of ambiguity, it is relevant that the plaintiff's attorneys, several months before the motion for fees was filed and just before the jury trial started in this case, demonstrated a clear understanding of the meaning of the defendants' Rule 68 offer in this case and have now taken a position that directly contradicts their arguments made in conjunction with the motion in *Williams* regarding the February 27, 1997 offer of judgment.

5 As explained in note 3 above, that there was no ambiguity with respect to the issue of admission of liability is supported by the position plaintiff's counsel adopted while representing plaintiff Williams in *Williams v. Greifinger.* In that case, GD & C, on behalf of Williams, stated that the Rule 68 offer in this case "expressly rejected liability." (March 20, 1998 Hathaway Aff. Ex. A at 8.)

6 Moreover, the defendants properly note that when the offer of judgment was made, the parties were in the process of briefing the defendants' motion for summary judgment as well as the plaintiff's motion for sanctions with respect to the defendant's summary judgment motion. Thus, unlike what transpired in *Lish,* here the defendants gave no indication that they conceded liability or made any other communication that would create extrinsic confusion resulting in an ambiguity regarding an otherwise unambiguous denial of liability.

7 Nor is this case like *Gavoni v. Dobbs Houses, Inc.,* No. 95 C 1749, 1997 WL 639052 (N.D.Ill.1997), in which the Court found that an unapportioned offer of $10,000 to three plaintiffs could not be compared to the judgment finally obtained since the jury returned a verdict in favor of each of the plaintiffs individually in the amounts of $2,000, $2,000, and $2,500. Since it was impossible to tell whether the amount each plaintiff received from the jury was less favorable than what they each would have received from the unapportioned $10,000 offer divided among them in an undetermined manner, the Court determined that the "[b]y failing to make an offer of judgment in a definite sum for each plaintiff, defendant prevented the offer of judgment from having any effect once it was rejected." *Id.* at *3. However, the amount of the offer in this case can be easily compared to the judgment the plaintiff ultimately obtained without the need to apportion the offer or the verdict. There was obviously only one plaintiff and the entire offer was to go to him. Thus, while an unapportioned offer to multiple plaintiffs might create confusion as to the issue of whether a judgment finally obtained is more favorable than the unapportioned offer, there is no such difficulty under the circumstances in this case, where the plaintiff received an unapportioned offer from multiple defendants.

8 It should also be noted that the jury verdict was delivered against two defendants, Coughlin and Greifinger, who are no longer officers of DOCS, and the judgment was against these parties in their personal rather than official capacities. *See* Tr. of Jan. 14, 1998 Hearing at 16–19. Moreover, to the extent the plaintiff's argument is that the plaintiff is protected by the jury verdict and the Court's rulings from being forced to endure medical keeplock again, the plaintiff's protection comes from the permanent injunction to which the parties agreed as well as from the fact that the DOCS' TB policy has been changed.

9 42 U.S.C. § 1997e(d) provides in relevant part:

> (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that—
>
> (A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title; and
>
> (B) (i) the amount of the fee is proportionately related to the court ordered relief for the violation; or
>
> (ii)the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.
>
> (2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid for by the defendant.
>
> (3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, for payment of court-appointed counsel.
>
> ....

10 *See Chatin v. State of New York,* No. 96 Civ. 420, 1998 WL 293992, at *2 n. 5 (S.D.N.Y. Jun. 4, 1998) (calculating a rate of $112.50 per hour as 150% of the $75 hourly rate for Criminal Justice Act attorneys in the Southern District of New York).

11 April 26, 1996, the date that the President signed the Act into law, is the effective date of the Act because Congress did not provide such a date. *See Blisset v. Casey,* 147 F.3d 218, 219 n. 1 (2d Cir.1998).

12 The Court of Appeals for the Sixth Circuit has held that § 1997e(d) only applies to suits brought after the statute was enacted. *See Hadix v. Johnson,* 143 F.3d 246, 255–56 (6th Cir.1998). *But see Inmates of D.C. Jail v. Jackson,* 158 F.3d 1357, 1361 (D.C.Cir.1998) (the fee cap in § 1997e(d) applies to work performed in pending cases after the effective date of the PLRA); *Madrid v. Gomez,* 150 F.3d 1030, 1040 (9th Cir.1998) (the fee cap in § 1997e(d) applies to fee awards made after the effective date of the PLRA). The Supreme Court recently granted certiorari on this issue. *See Johnson v. Hadix,* 119 S.Ct. 508 (Nov. 16, 1998) (granting certiorari).

13 The defendants argue that the result in *Jordan v. Time, Inc.,* 111 F.3d 102 (11th Cir.1997) indicates that there is a conflict among the Circuits regarding the availability of attorneys' fees under Rule 68 and urge the Court to adopt its rule. In *Jordan,* the Court of Appeals for the Eleventh Circuit reversed the district court's refusal to award attorneys' fees in a copyright case where the defendant's offer of judgment was greater than the judgment the plaintiff obtained. *Id.* at 105. Because the "language contained in Rule 68 is mandatory" the district court could not rely on its "equitable discretion" to deny such fees and costs. *Id.* Moreover, because the Copyright Act, 17 U.S.C. § 505, includes attorneys' fees as part of costs awarded to the prevailing party, the plaintiff would have to pay the defendant's attorneys' fees. *Id.*

However, *Jordan* is perfectly consistent with the result reached in this case and in the many other cases discussed above which have found that a § 1983 defendant may not recover attorneys' fees in the Rule 68 context unless the § 1983 action was "frivolous, unreasonable, or groundless." Because the definition of costs under Rule 68 looks to the underlying substantive statute, a defendant's entitlement to recover attorneys' fees as part of costs under Rule 68 would necessarily depend on the underlying statute. *Jordan* is a case arising under the Copyright Act, which provides that the prevailing party may recover attorneys' fees. 17 U .S.C. § 505. The *Jordan* court did not address whether there were any limitations on the recovery of attorneys' fees by prevailing defendants under the Copyright Act and whether those limitations would apply in that case.

Here, by contrast, in a § 1983 suit, it is well-established that a prevailing defendant cannot recover attorneys' fees under § 1988 unless the plaintiff's action was "frivolous, unreasonable, or groundless." Since Rule 68 costs are defined in terms of the underlying substantive statute, and § 1988 has been interpreted to allow attorneys' fees to defendants in the limited circumstance of a frivolous action, the defendants in this case can only recover their attorneys' fees if the action were frivolous. Because it cannot be said that this action was frivolous, the defendants are not entitled to attorneys' fees.

14 Kapoor has not requested his costs accrued prior to February 27, 1997, and, as such, he has waived his entitlement to such costs.

15 To the extent required by Fed.R.Civ.P. 54(d)(2) and 58, and Fed. R.App. P. 4(a)(4), the Court orders the pending motions for attorney's fees be treated as timely motions under the Federal Rules of Civil Procedure having the same effect as motions under Federal Rule of Civil Procedure 59.

16 The defendants suggest that the plaintiff's fee application should be denied since it was made without Mr. Jolly's approval. However, the application was timely made and pursued when GD & C was counsel for Mr. Jolly and counsel for the plaintiff represents that the application was authorized pursuant to earlier agreements with Mr. Jolly concerning the terms under which GD & C would represent him. *See* July 6, 1998 Karlan Letter. Moreover, the plaintiff does not dispute Mr. Karlan's statement that GD & C was authorized pursuant to his earlier agreement with GD & C to file an application for fees. If there are any disputes on this issue they may be raised with the Magistrate Judge.