NOT FOR PUBLICATION **CLOSED**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ROBERTO LIMA, Plaintiff, v. NEWARK POLICE DEPARTMENT, et al., Defendants.	Civ. Docket No. 08-426 (FSH) **ORDER** February 22, 2010

HOCHBERG, District Judge

This matter having come before the Court upon Plaintiff's Request for Judgment dated December 23, 2009, and the parties' responses; and

it appearing that Newark sent an Offer of Judgment in this case with an email conveying the Offer that stated:

> "Counsel, Attached is an Offer of Judgment from the City of Newark and Garry McCarthy. This offer is, however, as to all defendants and all claims. The City makes this offer with the intention and expectation that, if accepted, this litigation will be resolved in its entirety.";[1] and

it appearing that Newark's attached Offer of Judgment stated:

[1]This email, conveying the Offer of Judgment, is viewed by the court as part of the objective language presented to the Plaintiff in the making of the Offer of Judgment on November 8, 2009.

> "Pursuant to Rule 68 of the Federal Rules of Civil Procedure, Defendants City of Newark (and improperly pled "Newark Police Department"), and Garry McCarthy, hereby offers to allow Judgment to be entered against these defendants in this action in the amount of $55,000, including all of Plaintiff's claims for relief against all defendants, including those not represented by this counsel. This offer of judgment is made for the purposes specified in Federal Rule of Civil Procedure 68, and is not to be construed as either an admission that any of the defendants are liable in this action, or that the Plaintiff has suffered any damage..."; and

it appearing that Plaintiff accepted this Offer of Judgment with a statement that simply said:

> "The Plaintiff, Roberto Lima, hereby accepts the Offer of Judgment served on him by Defendants Newark Police Department and Garry McCarthy on November 8, 2009, pursuant to Rule 68 of the Federal Rules of Civil Procedure."; and

it appearing that under the Supreme Court's ruling in *Marek*, a Defendant can make a single lump sum offer to settle a case as long as it is inclusive of costs;[2] and

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[2]The Court in *Marek v. Chesney* stated "The critical feature of this portion of [Rule 68] is that the offer be one that allows judgment to be taken against the defendant for both the damages caused by the challenged conduct and the costs then accrued. In other words, the drafters' concern was not so much with the particular components of offers, but with the judgments to be allowed against defendants. If an offer recites that costs are included or specifies an amount for costs, and the plaintiff accepts the offer, the judgment will necessarily include costs; if the offer does not state that the costs are included and an amount for costs is not specified, the court will be obliged by the terms of the Rule to include in its judgment an additional amount, which in its discretion...it determines to be sufficient to cover the costs. In either case, however, the offer has allowed judgment to be entered against the defendant both for damages caused by the challenged conduct and for costs. ... If defendants are not allowed to make lump-sum offers that would, if accepted, represent their total liability, they would understandably be reluctant to make settlement offers. As the Court of Appeals observed, 'many a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorney's fees in whatever amount the court might fix on motion of the plaintiff.'" 473 U.S. 1, 6-7 (1985) (internal citations omitted).

it appearing that the Third Circuit has interpreted the Court's holding in *Marek* to mean that there must be an express waiver of a claim for attorneys' fees and that "silence will not suffice;"[3] and

it appearing that Newark was not silent as to costs, but rather used three different phrases to state that the offer was a lump sum, single offer to cover all claims in the case and end the litigation while specifically disclaiming any liability:

(1) "Judgment to be entered against these defendants in this action in the amount of $55,000, including all of Plaintiff's claims for relief against all defendants, " in the Offer of Judgment, explicitly covers Prayer for Relief subpart (c) in the Complaint which claims the following relief: "(c) attorney's fees and costs associated with this action";

(2) "This ... is not to be construed as either an admission that any of the defendants are liable in this action, or that the Plaintiff has suffered any damage," in the Offer of Judgment is a statement that disclaims plaintiff as a "prevailing party" under *Buckhannon* principles;

(3) "...if accepted, this litigation will be resolved in its entirety," in the email conveying the Offer, further confirms that Newark's offer precludes additional litigation regarding whether Plaintiff is a "prevailing party" to earn an attorney's fee award;

The Court finds that, taken together, these three specific phrases in the context of an Offer of Judgment (with conveying email) clearly and expressly waive a separate attorneys' fee claim,

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[3] *Ashley v. Atlantic Richfield Co.*, 794 F.2d 128, 139 (3d. Cir 1986); s*ee also Lazarska v. County of Union*, No. 04-02602, 2006 WL 2264455 at *3 (D.N.J. Aug. 8, 2006) ("Beginning with *El Club del Barrio*, the Third Circuit has repeatedly held that only an express and clear waiver will preclude the plaintiffs' possibility of recovering statutorily authorized attorney's fees and costs.").

if accepted by plaintiff. While the Assistant Corporate Counsel in the employ of Newark might have been well advised to have researched in advance the Third Circuit case law and employ the precise language approved by the Circuit for Offers of Judgment that are intended to be inclusive of legal fees and costs, this Court finds that the language used by the City of Newark clearly put the Plaintiff on notice that the Offer of Judgment, if accepted, satisfied the claim for attorneys' fees and precluded a separate application for attorneys' fees;[4] and

it appearing therefore that the Offer of Judgment, as accepted, is inclusive of costs and fees;[5]

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[4] As stated above, first, because a claim for attorneys' fees was included as one of the four claims for relief in the "Prayer for Relief" section in the Plaintiff's Complaint in this case, the phrase "all of Plaintiff's claims for relief against all defendants" in the Offer of Judgment must include attorneys' fees.

Second, an application for attorneys' fees in this case would require significant additional litigation to determine whether, under the standards developed in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001) and *Truesdell v. Philadelphia Housing Auth.*, 290 F.3d 159 (3d Cir. 2002), Lima would be considered a "prevailing party" entitled to an award of attorneys' fees in this case. In light of Newark's express disclaimer of liability in the Offer of Judgment and the modest sum in the Offer of Judgment, as compared with the huge cost of the litigation, what occurred here may not amount to a shift in the legal relationship between the parties. Such necessary additional litigation on the issue of "prevailing party" was clearly precluded by Newark's phrase "...if accepted, this litigation will be resolved in its entirety."

Third, unlike the single, broad "boilerplate" waiver in the settlement agreement in *Torres v. Metropolitan Life Insurance Co.*, 189 F.3d 331 (3d Cir. 1999), this Offer of Judgment, with three separate phrases written into the offer and conveyance by the Defendant, specifically and clearly, upon acceptance, waived the Plaintiff's right to seek separate attorneys' fees because costs were included in the amount of the judgment offered.

[5] It is well known that municipal entities can only act with the approval of City Councils, which must authorize specific amounts to settle cases. The totality of the language used in the Offer of Judgment and conveying email, read in light of this reality as to how collective municipal entities must govern, buttresses the conveyance of a single lump sum to include all costs. It would not be reasonable to receive such an offer and think that counsel for Newark would offer $55,000 to settle the entire litigation and yet bind the City to agreement that would expose it to a contingent liability for attorneys' fees of potentially over $300,000. Indeed, per

IT IS on this 22nd day of February, 2010,

ORDERED that Plaintiff's December 23, 2009 Request for Judgment in the amount of $55,000 is **GRANTED**; and it is further

ORDERED that Plaintiff's December 23, 2009 Request to File an Application for Attorneys' Fees is **DENIED** because, as stated above, the Offer of Judgment included attorneys' fees.

/s/ Faith S. Hochberg
Hon. Faith S. Hochberg, U.S.D.J.

Marek, the City should not be asked to do so. *See supra* note 2. Fortunately, Plaintiff himself has not incurred these fees thanks to the *pro bono* attorneys who have brought this case.