

**Albunio v City of New York**

2012 NY Slip Op 33566(U)

April 27, 2012

Supreme Court, New York County

Docket Number: 113037/03

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHULMAN  
Justice

PART 1

CAPTAIN LORI ALBUNIO, ET AL.

INDEX NO. 113037/03

- v -

THE CITY OF NEW YORK,  
ET AL.

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 06

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	PAPERS NUMERED
<del>Notice of Motion/ Order to Show Cause</del> - Affidavits - Exhibits <u>A-G</u>	<u>1</u>
Answering Affidavits - Exhibits <u>A-C</u>	<u>2, 3, 4</u>
Replying Affidavits - <u>Exhibit A</u>	<u>5</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

**FILED**

MAY 01 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: April 27, 2012



**MARTIN SHULMAN** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDGE  SETTLE ORDER/ JUDGE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASONS:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 1

-----X  
CAPTAIN LORI ALBUNIO AND LIEUTENANT  
THOMAS CONNORS,

Plaintiff,

Index No. 113037/02

THE CITY OF NEW YORK, THE NEW YORK CITY  
POLICE DEPARTMENT, INSPECTOR JAMES HALL,  
INDIVIDUALLY AND AS AN EMPLOYEE,  
FREDERICK PATRICK, INDIVIDUALLY AND AS AN  
EMPLOYEE,

**Decision and Order**

**FILED**

Defendants.

MAY 01 2012

-----X  
**Hon. Martin Shulman, J.:**

NEW YORK  
COUNTY CLERK'S OFFICE

Mary D. Dorman, Esq. ("Dorman"), trial and appellate counsel for plaintiffs,  
former NYPD Captain Lori Albunio ("Albunio") and former NYPD Lieutenant Thomas  
Connors ("Connors") (collectively "plaintiffs"), moves by order to show cause ("OSC") to  
enforce her retainer agreements with plaintiffs. Dorman specifically requests that the  
court set forth the terms for distributing the jury awards and statutory attorneys' fees  
award to each plaintiff. Dorman also seeks attorneys' fees incurred in connection with  
this OSC. Albunio and Connors, now represented by new counsel, oppose the OSC.

**Background**

On November 22, 2006, a unanimous jury awarded Albunio and Connors  
damages for lost earnings in the amounts of \$479,473 and \$507,198,<sup>1</sup> respectively, at  
the conclusion of a seventeen day trial on their claims for retaliation and constructive  
discharge from the NYPD. Thereafter, this court denied defendants' motion *inter alia* to

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<sup>1</sup> Dorman's calculations herein (OSC at Exh. F) include statutory Interest on the  
judgments through August 10, 2011, totaling \$781,279.26 for Connors and \$769,958.76  
for Albunio. Plaintiffs do not dispute these figures.

set aside the verdicts in this and a related action jointly tried herewith<sup>2</sup> and granted plaintiffs in both actions statutory attorneys' fees under the New York City Human Rights Law ("HRL") (N.Y.C. Admin. Code § 8-502[f]).<sup>3</sup> Defendants appealed to the Appellate Division, First Department and subsequently to the Court of Appeals, both of which affirmed the verdicts and attorneys' fees awards. See *Albunio v City of New York*, 67 AD3d 407 (1<sup>st</sup> Dept 2009), *affd* 16 NY3d 472 (2011).

Dorman and each plaintiff entered into three (3) separate retainer agreements for the pre-trial and trial proceedings, the appeal to the Appellate Division and the appeal to the Court of Appeals. The initial retainer agreements are dated March 10, 2005 (OSC at Exh. A) and provide in relevant part:

In consideration of the services rendered and to be rendered by you, the undersigned hereby agrees to pay you a nonrefundable retainer fee of two thousand five hundred dollars (\$2,500) upon the execution of this retainer agreement. In the event that this case goes to trial, the undersigned hereby agrees to pay you an additional nonrefundable retainer fee of five thousand dollars (\$5,000). Furthermore, the undersigned hereby agrees to pay you and you are authorized to retain out of any moneys that may come into your hand by reason of the above claim:

**Thirty three and one-third (33 1/3) percent of the sum recovered, whether recovered by suit, settlement or otherwise . . .**

**Such percentage shall be computed on the net sum recovered after deducting taxable costs and disbursements . . . But for the following or similar items there shall be no deduction in computing such**

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<sup>2</sup> *Sorrenti v City of New York, et al.*, NY County Index No. 126981/02 ("Sorrenti").

<sup>3</sup> This court awarded attorneys' fees in the amount of \$279,756 plus disbursements of \$17,070.04 and judgment therefor was entered on November 9, 2007. Dorman's calculations herein (OSC at Exh. F) are based upon recovery of a statutory fee in the amount of \$387,491.52 plus disbursements of \$17,070.04. Though not expressly stated in the OSC, the increase in the statutory fee award presumably reflects accumulated interest on the attorneys' fees judgment.

**percentages: The two aforementioned retainer fees, liens, assignments or claims . . . (Emphasis added)**

In computing Dorman's fee, three (3) issues are raised: 1) how the statutory attorneys' fees award is to be distributed *vis a vis* the contingency fee; 2) whether any deduction is to be made for each plaintiff's \$7,500 retainer fee; and 3) whether Dorman's share under the initial retainers should be reduced by the amount of any fees awarded for work on the two appeals.<sup>4</sup>

### **Statutory Fees**

With respect to the statutory attorneys' fees, Dorman contends that this award should be added to the jury verdicts plus accumulated interest so that her fee would be one-third of this sum. In support of her argument, Dorman cites the retainer's broad language specifying that her fee is to be one-third "of the sum recovered". The "sum recovered", according to Dorman, includes all sums, rather than just the damages award reflected in the verdict. Dorman also claims she explained to plaintiffs that the statutory fee amount would be "added to the pot" and that they did not object. Finally, Dorman notes that plaintiffs' prior counsel's retainer agreement included a provision that their fee was to be the greater of any court-awarded fees or 40% of the verdict (OSC at Exh. B). From this, Dorman argues that the omission of such language from her retainers should have indicated to plaintiffs that she was not taking statutory fees in lieu of the contingency fee, or reducing the contingency fee by the amount of statutory fees.

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<sup>4</sup> After this OSC was submitted, Dorman moved for an award of statutory fees in connection with the two appeals. That motion is presently *sub judice*.

Plaintiffs respond that Dorman's one-third should be based only on the jury verdicts plus interest with the statutory fee award deducted therefrom, thus leaving a balance due to Dorman of the difference between the statutory fees and one-third of the verdicts.<sup>5</sup> Plaintiffs note that the retainer agreements contain no references to statutory fees and deny that they agreed to add the statutory fee award to the jury verdicts. Plaintiffs also rely on a 2009 e-mail from Dorman (Friedman Aff. in Opp. at Exh. B) wherein counsel states: "I will credit the fees awarded to me to that third."<sup>6</sup> Finally, plaintiffs cite federal case law<sup>7</sup> specifically declining to interpret similar retainer agreements as Dorman urges (*see e.g. Bates v Kuguenko*, 100 F3d 961 [9<sup>th</sup> Cir 1996]; *Lowe v Pate Stevedoring Co.*, 595 F2d 256 [5<sup>th</sup> Cir 1979]; *Ross v Douglas County, Nebraska*, 244 F3d 620 [8<sup>th</sup> Cir 2001]).

A fundamental principle of contract interpretation is that agreements are to be construed in accordance with the parties' intent (*see Slatt v. Slatt*, 64 NY2d 966, 967, *rearg. denied* 65 NY2d 785 [1985]). "The best evidence of what parties to a written

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<sup>5</sup> Dorman posits in her OSC that if her construction of the retainer agreements is not upheld then the only alternative construction would entitle her to receive one-third of each judgment plus interest and the entire statutory fee award. A significant portion of plaintiffs' opposition is devoted to refuting a construction of the retainers granting Dorman both the contingency fee and the statutory fee. Plaintiffs cite federal case law prohibiting such awards to counsel outright or permitting such awards only where the retainer agreement expressly allows counsel to recover both. It is unnecessary for this court to address this point since Dorman clearly indicates she is not entitled to keep both.

<sup>6</sup> In reply, Dorman emphasizes that she did not state that the fees would be credited **against** her one-third but rather would be added to it.

<sup>7</sup> In interpreting the HRL's fee award provision New York courts routinely examine federal case law interpreting comparable provisions in federal civil rights laws.

agreement intend is what they say in their writing" (*Slamow v. Del Col*, 79 NY2d 1016, 1018 [1992]). Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms (see e.g. *R/S Assocs. v. New York Job Dev. Auth.*, 98 NY2d 29, 32 rearg. denied 98 NY2d 693 [2002]; *W.W.W. Assocs., Inc. v. Giancontieri*, 77 NY2d 157, 162 [1990]).

Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide (see *W.W.W. Assoc. v. Giancontieri, supra*). A contract is unambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Breed v. Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978], rearg. denied 46 NY2d 940 [1979]). Where a retainer agreement's terms are unambiguous there is no basis for considering parol evidence (see *Slotnick, Shapiro & Crocker, LLP v Stiglianese*, 92 AD3d 482 [1<sup>st</sup> Dept 2012], citing *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569-570 [2002]).

Here, plaintiffs' initial retainers with Dorman are clear and unambiguous. As such, it is unnecessary for this court to consider discussions and e-mail communications between Dorman and plaintiffs. Simply put, nothing in the retainers supports plaintiffs' interpretation mandating that the statutory fee award be deducted from Dorman's one-third of the verdicts plus interest. Viewing the retainer as a whole, this court agrees with Dorman's interpretation. Specifically, the retainer authorizes Dorman "to retain out of **any moneys that may come into [her] hand** by reason of the

above claim" thirty three and one-third percent "of the sum recovered, whether recovered by suit, settlement or otherwise." The only deductions from this sum are expressly stated in the retainer's last paragraph. Notably absent is any deduction for statutory fee awards.

The foregoing notwithstanding, "attorney-client fee agreements are a matter of special concern to the courts and are enforceable and affected by lofty principles different from those applicable to commonplace commercial contracts" (*Matter of Cooperman*, 83 NY2d 465, 472 [1994]). "[C]ourts as a matter of public policy give particular scrutiny to fee arrangements between attorneys and clients, casting the burden on attorneys who have drafted the retainer agreements to show that the contracts are fair, reasonable, and fully known and understood by their clients" (*King v. Fox*, 7 NY3d 181, 191 [2006], quoting *Shaw v. Manufacturers Hanover Trust Co.*, 68 NY2d 172, 176 [1986]).

To this end, a retainer agreement may be unenforceable if it is unconscionable either when entered into, or if it became so in retrospect. *Lawrence v Graubard Miller*, 11 NY3d 588, 595-596 (2008). A contingent fee agreement not unconscionable when entered into will be "unenforceable where the amount of the fee, combined with the large percentage of the recovery it represents, seems disproportionate to the value of the services rendered (citation omitted)." *Id.* at 596. In order to determine whether a contingent fee agreement is unconscionable, the court must analyze "the facts and circumstances surrounding the agreement, including the parties' intent and the value of



the attorney's services in proportion to the fees charged, in hindsight" (*King v Fox*, 7 NY3d at 192).

Plaintiffs do not contend that their initial retainers with Dorman are unconscionable and this court concludes that they were reasonable when entered into and are reasonable in hindsight. The retainers are straight-forward contingent fee agreements providing for counsel to be compensated at the standard rate of one third of any recovery obtained. Nor did they become unconscionable once Dorman prevailed on her application for fees under the HRL. As plaintiffs observe, the retainers contain no mention of statutory fees. As Dorman notes, she was under no obligation to submit a claim for fees. That she did so demonstrates the zealotry that has characterized her representation of Albinio and Connors from its inception.

The bottom line is that Dorman's efforts increased each plaintiff's recovery, as well as her own, by approximately \$129,000.<sup>8</sup> Plaintiffs' proposed distribution of the judgments, interest and statutory fees would result in Dorman's share remaining the same, while increasing each of their own recoveries by approximately \$190,000.<sup>9</sup>

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<sup>8</sup> The fee award of \$387,491.52 divided into thirds equals \$129,163.84.

<sup>9</sup> The record presently before this court does not clearly set forth the amount the parties dispute. This court's own calculation is based on the numbers in the OSC (Exh. F), which are presumed accurate, and does not account for deductions for disbursements. Under plaintiffs' theory, Dorman would be entitled to recover \$517,079.34, representing one-third of \$1,551,238.02 (both verdicts plus interest as of August 2011). After deducting the \$387,491.52 fee award, plaintiffs would owe Dorman a balance of \$129,587.82 (\$64,793.91 each). Deducting this amount from each plaintiff's judgment plus interest, Connors would recover \$716,485.35 (\$781,279.26 - \$64,793.91) and Albinio would recover \$705,164.85 (\$769,958.76 - \$64,793.91). Without the statutory fee award, Connors' two-thirds of the verdict plus interest would be \$520,852.84 and Albinio's two-thirds would be \$513,305.84.

Dorman being under no obligation to seek additional fees, it is unlikely she would have undertaken this additional task without obtaining some benefit for herself as well as plaintiffs.

In analyzing the "facts and circumstances surrounding the agreement, including the parties' intent and the value of the attorney's services in proportion to the fees charged" (*King v Fox, supra*), plaintiffs intended to obtain two-thirds of any sums recovered. Their proposed calculations would result in a recovery of approximately 90%, which clearly was never contemplated when they entered into the retainers.

Finally, it is beyond dispute that Dorman's outstanding representation of plaintiffs resulted in both the significant jury verdicts they obtained as well as the statutory fees later awarded, all of which were upheld after two appeals. Her estimated fee of \$646,234.18 (\$517,079.34 [contingent fee] + \$129,163.84 [one-third of statutory award]) is more than reasonable for this skilled practitioner's many years of work.

### **Non-refundable Retainer Fees**

Plaintiffs also argue that their non-refundable retainer fees of \$7,500 each should be deducted from Dorman's share. Dorman interprets the initial retainers as providing for no such deduction. Plaintiffs contend that the last paragraph of the retainer agreement (quoted above) merely provides that the non-refundable retainer fees will not be deducted from the gross recovery in computing Dorman's contingency fee. Here, plaintiffs argue they are entitled to a \$15,000 credit towards the contingent fee owed to Dorman.

On this point, plaintiffs are correct. The last paragraph of plaintiffs' retainers with Dorman clearly provides that "there shall be no deduction" for the non-refundable retainer fees "in computing [Dorman's] percentage[ ]" (bracketed matter added). However, the retainer agreements are silent as to how the retainer fees are to be applied and what services they cover. Nothing in the retainer supports Dorman's claim that she is entitled to both one-third of the sums recovered and the non-refundable retainer fees. This ambiguity must be construed against Dorman as the agreements' drafter. *Dublrer v Lascher*, 96 AD2d 474, 475 (1<sup>st</sup> Dept 1983). Plaintiffs' argument is the only other logical construction that can be reached. Accordingly, plaintiffs' non-refundable retainer fees totaling \$15,000 must be deducted from Dorman's percentage.

#### **Appellate Fees**

Plaintiffs argue that any statutory fees Dorman recovers for her work on the two appeals should also be deducted from her recovery. Nothing in any of the three separate retainer agreements supports such a construction. Both appellate retainer agreements clearly and unequivocally provide that Dorman would recover nothing if unsuccessful on appeal. However, if successful, the retainers entitle Dorman to apply for additional statutory fees for her appellate work and keep the entire amount recovered. In the event that no fees are awarded or the fees awarded are less than \$20,000, plaintiffs agreed to pay Dorman \$20,000 or the difference between the fees awarded and \$20,000.

Contrary to plaintiffs' arguments, determination of this motion need not await this court's decision on Dorman's application for appellate fees. The parties entered into

three separate and distinct fee agreements for the three phases of this litigation. There is no support for plaintiffs' claim that appellate fees should be considered in calculating Dorman's recovery under the initial retainers.

Finally, although Dorman's OSC requests counsel fees, costs and disbursements in connection with this application, this court finds no supporting authority for such relief, nor does Dorman cite any authority. For all of the foregoing reasons, it is hereby

ORDERED that Dorman's OSC is granted to the extent that Dorman is entitled to one third of the statutory fee award in addition to the contingency fee and her recovery shall not be reduced by any statutory fee award for work on the appeals; and it is further

ORDERED that the portions of Dorman's OSC seeking attorneys' fees incurred in connection with this OSC and pertaining to plaintiffs' non-refundable retainer fees are denied, and the retainer fees shall be deducted from Dorman's recovery.

This constitutes this court's Decision and Order. Courtesy copies of same have been provided to counsel for the parties.

Dated: New York, New York  
April 27, 2012



HON. MARTIN SHULMAN, J.S.C.

**FILED**

**MAY 01 2012**

**NEW YORK  
COUNTY CLERK'S OFFICE**