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BARBARA HANDSCHU, RALPH DIGIA, ALEX McKEIVER, SHABA OM, CURTIS M. POWELL, ABBIE HOFFMAN, MARK A. SEGAL, MICHAEL ZUMOFF, KENNETH THOMAS, ROBERT RUSCH, ANETTE T. RUBENSTEIN, MICHEY SHERIDAN, JOE SUCHER, STEVEN FISCHLER, HOWARD BLATT and ELLIE BENZONE, on behalf of themselves and all others similarly situated, Plaintiffs, -against- SPECIAL SERVICES DIVISION, a/k/a BUREAU OF SPECIAL SERVICES, WILLIAM H.T. SMITH, ARTHUR GRUBERT, MICHAEL WILLIS, WILLIAM KNAPP, PATRICK MURPHY, POLICE DEPARTMENT OF THE CITY OF NEW YORK, JOHN V. LINDSAY and various unknown employees of the Police Department acting as under-cover operators and informers, Defendants.

71 Civ. 2203 (CSH)

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
NEW YORK**

2003 U.S. Dist. LEXIS 6790

April 21, 2003, Decided

April 23, 2003, Filed

SUBSEQUENT HISTORY: Motion granted by *Handschu v. Special Servs. Div.*, 2003 U.S. Dist. LEXIS 13811 (S.D.N.Y., Aug. 6, 2003)

PRIOR HISTORY: *Handschu v. Special Servs. Div.*, 2003 U.S. Dist. LEXIS 4432 (S.D.N.Y., Mar. 20, 2003)

DISPOSITION: [*1] Application for leave to respond to motion to amend order and judgment granted.

COUNSEL: For Barbara Handschu, Ralph Digia, Alex McKeiver, Shaba OM, Curtis M Powell, Abbie Hoffman, Mark A Sagal, Michael Zumoff, Kenneth Thomas, Robert Rusch, Annette T Rubenstein, Mickey Sheridan, Joe Sucher, Steven Fischler, Howard Blatt, Ellie Benzoni, PLAINTIFFS: Franklin Siegel, Siegel, Deale, Stavis, Cole, and Ratner, Martin R Stolar, Martin Stolar, Jethro M Eisenstein, Profeta & Eisenstein, Paul Chevigny, New York, NY USA.

For Police Department of the City of New York, DEFENDANT: Gail Donoghue, Corporation Counsel of the City of New York, New York, NY USA.

JUDGES: CHARLES S. HAIGHT, JR., SENIOR

UNITED STATES DISTRICT JUDGE.

OPINION BY: CHARLES S. HAIGHT, JR.

OPINION

MEMORANDUM AND ORDER

HAIGHT, Senior United States District Judge:

This memorandum addresses two pending motions in the case.

1. The Motion of Plaintiff Class for Reconsideration of or to Amend the Court's Order and Judgment Entered on April 8, 2003

The Court grants the Corporation Counsel's application for leave to file and serve responsive papers on or before May 16, 2003. Class counsel, [*2] if so advised, may file and serve reply papers on or before May 23, 2003.

The Court will hear oral argument at 2:00 p.m. on May 28, 2003, in Room 17C, 500 Pearl Street.

2. Class Counsel's Motion for Attorney's Fees and

Costs

Class counsel have noticed a motion for recovery of attorney's fees and costs for legal services rendered during the period September 25, 2002 through April 4, 2003. They regard the plaintiff class as the "prevailing party" in the litigation conducted during that period, as that phrase is used in 42 U.S.C. § 1988. That phase of the litigation was generated by the NYPD's desire to amend the Handschu Guidelines in the aftermath of 9/11.

While the Corporation Counsel asks leave to file and serve responsive papers on or before May 30, 2003, it now appears that this motion for attorney's fees is premature, and need not be responded to at this time. That is because of the pendency of the first motion, which serves to reopen consideration of the form the Court's judgment should take. In that motion, class counsel ask the Court to amend the judgment so as to provide that the FBI Guidelines, now incorporated in substance into the NYPD [*3] Patrol Guide, also be made a part of the amended consent decree, "so that it will be clear to the NYPD that these are rules, and that violations of them may be punished as contempt of court." Eisenstein Declaration dated April 16, 2003 at P 16. If the Court grants that relief, the NYPD may appeal the judgment; if the Court denies it, plaintiff class may appeal.

I do no more than recite these obvious procedural realities, without intimating any view on the merits of the motion. But the case must run its resumed course before it can be determined whether the plaintiff class is a "prevailing party," and if so, to what extent, since it is well established that attorney's fees and costs are recoverable under § 1988 only to the extent that a party has succeeded on one or more claims. Failed claims require a discounting of the fees.

Accordingly Corporation Counsel need not respond to this motion at this time. Class counsel may renew it when this phase of the litigation is completed, after appeals, if any. The application must be supported in the manner required by *New York Association for Retarded Children v. Carey*, 711 F.2d 1136, 1147-48 (2d Cir. 1983).

It is SO ORDERED.

[*4] Dated: New York, New York

April 21, 2003

CHARLES S. HAIGHT, JR.

SENIOR UNITED STATES DISTRICT JUDGE