

STATE OF NEW YORK
SUPREME COURT

COUNTY OF CORTLAND

JOHN M. RICE, as President of the
CORTLAND PROFESSIONAL FIREFIGHTERS
ASSOCIATION, IAFF LOCAL 2737, and on behalf
of all paid bargaining unit firefighters of the
Cortland Fire Department, similarly situated

Plaintiff,

- against -

RICHARD LATHAM, as Treasurer of the
CORTLAND FIRE DEPARTMENT BOARD OF ENGINEERS,
RICHARD LATHAM, as Treasurer of the
WATER WITCH STEAMER AND HOSE COMPANY,
WILLIAM BUTTINO, as Treasurer of the
EXCELSIOR HOOK AND LADDER COMPANY,
GEORGE FRANCIS, as Treasurer of the EMERALD HOSE
COMPANY, SCOTT FAIRBANKS, as Treasurer of the
ORRIS HOSE COMPANY, JAMES DALEY, as Treasurer
of THE HITCHCOCK HOSE COMPANY, and the CITY OF
CORTLAND,

Defendants.

JUDGMENT

Index No.: 40323
RJI # 2007-146

The issues in this action have come to be heard by this Court at the Cortland County Courthouse, 48 Greenbush Street, Cortland, New York 13045, on December 1, 2008 before Justice Kevin M. Dowd, without a jury. Plaintiff appeared by Nathaniel G. Lambright, Esq., its counsel, and Defendants appeared by Lawrence Knickerbocker, its counsel. The issues were tried and the Court rendered a decision on March 30, 2009 declaring the requirements to be considered "active" for purposes of distribution of moneys pursuant to Insurance Law §§9104 and 9015 (hereinafter "2% tax money distribution"). The Court's Decision and Order declared that "active" firefighters for purpose of the 2% tax money distribution are those firefighters who have completed legally required OSHA, PESH and Cortland Fire

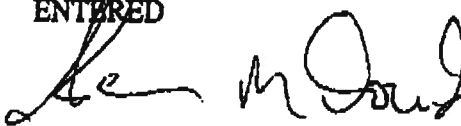
Department training, and completed the required medical certification/physical. The Court held that this definition shall apply to the 2007, 2008 and all future 2% tax distributions, and that plaintiff be awarded costs and disbursements.

NOW, on motion of Nathaniel G. Lambright, attorney for Plaintiff, dated May 29, 2009 and having heard all of the arguments by the Plaintiff and Defendants in this matter, it is

ORDERED, ADJUDGED, AND DECREED, that

The judgment shall be entered in this action in favor of the Plaintiff and against the Defendants in the amount of \$9,248.73 against the Water Witch Steamer & Hose Company, \$3,344.47 against the Orris Hose Company, \$7,502.48 against the Excelsior Hook & Ladder Company, \$6,302.35 against the Emerald Hose Company, and \$4,067.475 against the Hitchcock Hose Company, costs in the amount of \$700.00, disbursements in the amount of \$245.00, and interest on these amounts at the rate provided for by Rules 5002 and 5003 of the CPLR.

ENTERED



JUSTICE KEVIN DOWD, SUPREME COURT
CHENANGO COUNTY

Judgment entered this ____ day of 2009.

Clerk

At a Motion Term of the Supreme Court of the State of New York, held for the County of Cortland at the Court House in Norwich, New York, on the 5th day of June, 2009.

**PRESENT: HON. KEVIN M. DOWD
JUSTICE PRESIDING**

**STATE OF NEW YORK
SUPREME COURT: COUNTY OF CORTLAND**

**JOHN M. RICE, as President of the CORTLAND
PROFESSIONAL FIREFIGHTERS ASSOCIATION,
IAFF LOCAL 2737, and on behalf of all paid
bargaining unit firefighters of the Cortland Fire
Department, similarly situated,**

Plaintiff,

Index # 40323

vs.

RJI # 2007-146

**RICHARD LATHAM, as Treasurer of the
CORTLAND FIRE DEPARTMENT BOARD OF
ENGINEERS, et al**

Defendants.

DECISION AND ORDER

A trial was held on this case, before the Court, on December 1, 2008. After review of the testimony and evidence, as well as the parties' proposed findings of fact and legal memorandum in support of their respective positions, the Court issued a Decision and Order dated March 30, 2009. Plaintiff now moves for a Judgment pursuant to CPLR 5016. In support of the motion, Plaintiff has submitted the Affidavit and Supplemental Affidavit of attorney Nathaniel Lambright, with attached exhibits. In opposition to the

motion, Defendants have presented the Affidavit of attorney Lawrence Knickerbocker. The Court heard oral argument on the motion.

Plaintiff commenced this declaratory judgment action to have the Court declare a definition of "active" firefighter for 2% tax money purposes and order such definition applied for distribution of the 2007, 2008 and all future 2% tax money. The Court determined that the Defendants' own Constitution provided the parameters for the definition of who is an "active member" for 2% tax money purposes. Specifically the Court held that when the per capita distribution is made the only fire department members who will be considered "active" are those firefighters who have completed all legally required OSHA, PESH and Cortland Fire Department training, and completed any required medical certification/physical. These requirements for "active" firefighters, for 2% tax money purposes, were to be applied to the 2007, 2008 and all future 2% tax money distributions.

Plaintiff states that trial exhibits have been utilized to determine the number of "active" firefighters for 2007 and 2008. Copies of the referenced exhibits have been attached to the moving papers. Plaintiff has then calculated the amount of overpayment the volunteer fire companies received. This is the amount for which Plaintiff seeks a judgment. Plaintiff also seeks interest pursuant to CPLR 5002 and 5003.

Defendants argue that the determination of who is an "active" member for 2% tax purposes cannot be made solely upon the trial exhibits. Defendants argue that the Fire Department records from 2005 should also be examined. Defendants also question whether any waivers of recertification were issued by the Chief. Defendants claim that

they have not been given enough time to obtain the records necessary to respond to this motion.

The parties have had the Court's Decision and Order for the same amount of time. Based upon the mandate of that Decision, it would have seemed logical for both parties to begin checking available documentation. If Defendants chose not to that was their prerogative. They cannot now be heard to complain that Plaintiff has not searched for and presented information that Defendants now believe is important to determining who was an "active" firefighter for 2% tax money purposes, but that Defendants did not attempt to obtain.

It is uncontroverted that Plaintiff's determination and calculations are based upon the trial exhibits. Plaintiff has not attempted to introduce any extrinsic proof. Defendants' assertion that the trial exhibits now relied upon by Plaintiff were not relevant at trial is belied by the fact that the Court received them. Not only were they relevant to the issue of how to define "active" member for 2% purposes, those documents also had relevance to the issue of who was "active" which necessarily followed. Defendant could have introduced any documents they believed to be relevant at the time of trial. The Court might even have been persuaded to grant them more time to seek additional documentation for this motion if they could have presented even one piece of evidence in response to this motion that contradicted Plaintiff's position, or at least shown that they had attempted to obtain same.

This action was commenced nearly three years ago. There have been numerous court appearances and conferences. The issues were finite and well defined by both

parties. The Court has sufficient information before it to render a judgment. The Court adopts Plaintiff's submission dated May 19, 2009 as to how many "active" firefighters there were for the 2007 and 2008 2% tax money. The Court also adopts the calculations listed within that document as to the amount of judgment Plaintiff is entitled to against each volunteer company, with the exception of the judgment against the Orris Hose Company. The correct calculation is set forth in the supplemental affidavit date June 4, 2009.

The Court will sign the second proposed judgment submitted by Plaintiff.

This Decision shall constitute the Order of the Court.

Dated: November 10, 2009
Norwich, New York



Justice Supreme Court