

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

KANSAS ASSOCIATION OF PRIVATE)
INVESTIGATORS, et al.,)
)
Plaintiffs,)
)
vs.)
)
JOSEPH J. MULVIHILL, et al.,)
)
Defendants.)

Case No. CV198-203CC

Division No. 1

ORDER AND JUDGMENT

Following remand after the decision of the Missouri Court of Appeals in *Kansas Association of Private Investigators v. Mulvihill*, 159 S.W.3d 857 (Mo. App. W.D. 2005), the Court scheduled this cause for a status conference on August 15, 2005. At that time counsel for the Plaintiffs and the Defendants appeared. A hearing was set for September 20, 2005, for the purpose of hearing evidence and arguments relative to whether any residual monies in this case should be paid over to either the Plaintiffs or the Defendants. The September 20, 2005, hearing was rescheduled to October 7, 2005; the hearing was then rescheduled to November 14, 2005; and the hearing was again rescheduled to December 2, 2005.

On December 2, 2005, a hearing was held before the Court. The Plaintiffs appeared by attorney Douglas S. Laird and the Defendants appeared by attorney James F. Ralls. The Court reiterated that the issue for hearing was whether any residual monies in this case should be paid over to or for the benefit of the Plaintiffs or Defendants. The Court advised that it would, however, consider evidence that counsel had been prepared to present with respect to others who should be considered as distributees of any residuary funds.

The Court took judicial notice of the prior evidence and findings in this case.

Counsel for the Plaintiffs then presented the Affidavit of John W. Ellis. Counsel for the Defendants indicated that the Defendants did not agree with the statements in the Affidavit, but agreed that if Mr. Ellis was called as a witness, he would testify as set forth in the Affidavit. Counsel for the Defendants then indicated that he would not object to the introduction of the Affidavit into evidence. The Court therefore admitted the Affidavit into evidence. The Plaintiffs did not present any further evidence.

The Defendants called Major Ritter of the Kansas City Police Department to testify. He has been with the Department for 23 years and recently became chief financial officer of the Department. He has also served as a lobbyist in Jefferson City for the Kansas City Police Department. The Defendants did not present any further evidence.

The Court then heard arguments of counsel and took the cause under advisement.

The Court, after considering the record in this case and the evidence and arguments of counsel presented on December 2, 2005, makes the following findings and conclusions:

1. No evidence was presented that there are any Plaintiff class members who have filed a claim form as required by the Court's prior orders and who have not received a refund of the invalid license fees previously paid. No evidence has been presented that there are any Plaintiff class members who have been identified and who have been located that have not received a refund of the invalid license fees previously paid. The Court finds and concludes that there are no Plaintiff class members who have a vested right to any refund of the invalid license fees. The Court therefore concludes that funds now held or that may hereafter be received and held in this case under the authority of this Court should not be distributed to or for the benefit of the Plaintiff class members.

2. Because there are no Plaintiff class members who have any vested rights to any remaining funds, no part of those funds are subject to the provisions of the Uniform Disposition of Unclaimed Property Act, Sections 447.500 through 447.595, RSMo. In any event, the Court's powers in this type of a situation to make a disposition of the residuary funds prevails over the provisions of that Act. Furthermore, the State Treasurer is without authority to require that the monies be paid over to her pursuant to that Act. *Farmer v. Kinder*, 89 S.W.3d 447 (Mo. banc 2002); *In re Ancillary Adversary Proceeding Questions*, 89 S.W.3d 460 (Mo. banc 2002); and *Van Gamert v. Boeing Company*, 739 F.2d 730 (2nd Cir. 1984).

3. With respect to Plaintiff Kansas Association of Private Investigators (the "Kansas Association"), the Court finds from the Affidavit of Mr. Ellis that the Kansas Association is a Kansas corporation. Mr. Ellis is a resident of Kansas and is the President of the Kansas Association. The Court finds that the Kansas Association has more connections and activities in the State of Kansas than it does in the State of Missouri. The Court further finds from the Ellis Affidavit that it is the position of the Kansas Association itself that any residual funds be used for benefit of persons or entities within Missouri. The Ellis Affidavit further recites that it was the intent of the Kansas Association to create a Missouri entity to receive distribution of the funds. That has not been done, though there has been more than adequate time to do so. The Court concludes that the Kansas Association is not an appropriate recipient of any residuary funds which are now held or may be hereafter held under the authority of this Court in this case.

4. The Court further finds from the Ellis Affidavit that it is the position of the Kansas Association that only "[i]f the amount available after final payment of legal fees is greater than \$200,000" should any distribution be made to the Kansas Association or to an entity formed by or controlled by it. The record before this Court indicates, and the Court so finds, that

there is now at most \$796.56 within this Court's jurisdiction available for distribution. See Report of Fund Commissioner filed with the Court on October 8, 2005. Consequently, the Court concludes that for the additional reason that there is not "available after payment of legal fees" more than "\$200,000," neither the Kansas Association nor any entity formed by or controlled by it is an appropriate recipient of any residuary funds which are now held or may hereafter be held under the authority of the Court in this case.

5. The Court further finds that in addition to refunds of invalid licenses made to Plaintiff class members, a total of \$164,906.81 has been disbursed through October 22, 2004, from the funds in this case to counsel for the Plaintiffs for their fees and expenses and therefore for the benefit of the Plaintiff class members and for the Plaintiff Kansas Association. For this further reason, the Court concludes that no further funds which are now held or may hereafter be held under the authority of the Court in this case should be distributed to or for the benefit of the Plaintiff class members or the Plaintiff Kansas Association.

6. With respect to the Kansas City Board of Police Commissioners (the "Board" or the "Defendants") being an appropriate recipient of any residuary funds, the Court has considered the testimony of Major Ritter and the arguments of counsel for the Board. The Court finds that the testimony of Major Ritter was directed to suggesting recipients other than the Board. In particular, Major Ritter identified two possible recipients of any residuary funds – the Police Athletic League ("PAL") and the Police CARE Team. He indicated that neither of those possible recipients were under the control of the Board. He explained that PAL was a community outreach program directed to mentoring urban youth in Kansas City through athletic programs. He indicated the purpose of the Police CARE Team was to provide assistance to surviving family members of police officers.

7. The Court of Appeals in its decision of April 5, 2005, discussed the *Van Gamert* case and reasoned:

“In *Van Gamert*, the Second Circuit found that the trial court did not abuse its discretion in allowing the unclaimed funds to revert to Boeing, the defendant, with the requirement that Boeing publish notice of the fund in its annual report and pay any valid claims in perpetuity. 739 F.2d at 731, 737-38. The court found that Boeing had breached private contractual duties, not a duty to the public, and that Boeing had acted without malice or bad faith and was complying with the existing law and could not have known that it had greater duties. *Id.* at 736-37.

In our case, the Board similarly acted without malice or bad faith; it simply failed to fully comply with the rules regarding notice to increase fees charged for licenses. So it could be appropriate to return the unclaimed funds to the Board, with a proviso that the Board must be ready to pay any late filed claims. We are not saying that the trial court must return the funds to the Board, we are simply saying that the trial court *may* consider that option when it holds a hearing on remand.” (159 S.W.3d at 861, emphasis by the Court of Appeals).

While the Court of Appeals in its April 5, 2005, Opinion indicated that this Court “**may**” consider distribution of residuary funds to the Board, the Court of Appeals very clearly did not require this Court to consider the Board nor did it require any residuary funds to be paid over to the Board.

8. The Court is cognizant of that part of the Court of Appeals Opinion which holds that the Board is not as a matter of law disqualified from receiving residuary funds and that the Court may exercise its discretion in determining whether or not to distribute any residuary funds to the Board. This Court therefore exercises its discretion. The Court has considered the record made on December 2, 2005, made by the Board. The Court has also again considered the entire record in this case. The Court has considered and finds that expenses which would normally have been the responsibility of the Board were paid from the funds held in this case and that

payment was made from funds in this case on January 29, 2004, to the Riederer Law Firm, counsel for the Board, in the amount of \$31,995 for fees and expenses for the benefit of the Board. The Court concludes after considering the evidence and presentations made by counsel on December 2, 2005, and the record in this case, that the following findings and conclusions set forth in its March 29, 2004, Order and Judgment should be and are hereby readopted:

“In reviewing the Court file in this case, the Court has concluded that delays and expenses in this case after the mandate from the Court of Appeals was received on February 20, 2001, were in large measure caused by the Board’s agents and representatives. In the Court’s original Judgment entered on October 25, 1999, the Court had directed the Board to prepare a Potential Claimant Listing. The Court of Appeals affirmed that Judgment ***. It was not, however, until August 29, 2002, that a Potential Claimant List was actually filed with the Court. On October 11, 2002, the Court ordered that the Board mail a Notice and Claim Form by regular mail to each potential claimant on the Potential Claimant Listing and extended the claims bar date until October 31, 2003. A year passed, however, and the Board still had not mailed out copies of the Notice and Claim Form to the potential claimants on the Potential Claimant Listing. The Court had to enter another Order on October 20, 2003, directing that copies of the Notice and Claim Form to those on the Potential Claimant Listing with a deadline of November 30, 2003, be established to mail copies of the Notice and Claim Form and the claims bar date being extended to February 29, 2004. On November 28, 2003, the Board finally mailed copies of the Notice and Claim Form to those on the Potential Claimant Listing.

While the Court is cognizant of the difficulties faced by the Board in assimilating the Potential Claimant List, the delay was inordinate. Furthermore, the task was complicated by current computerized records of names and addresses of licenses not being preserved during the period of October 25, 1999, through December of 2000.

Logic dictates the conclusion that if there had been prompt compliance with the Orders of the Court relative to assimilation of a Potential Claimant List and a mailing of Notices and Claim Forms, more claims would have been filed inasmuch as there would have been fewer Notices and Claim Forms returned as undeliverable. Furthermore, potential claimants would have more

records available pertaining to the time period involved upon which they might base a claim had the Notices and Claim Forms been sent earlier.

* * *

The Court also notes that funds have already been disbursed from the Claim Fund to cover certain expenses of the Board with respect to the administration of the claims process and other expenses after the original Judgment, though such disbursements were not ones that the Court was required to approve.”

The Court in the exercise of its discretion concludes that no further consideration should be given to disbursing to the Board or for its benefit any residual funds which are now or may hereafter be held under the authority of this Court in this case.

9. If there are any residual funds for distribution, the Court finds and concludes that the two organizations suggested by the testimony of Major Ritter, the Police Athletic League (“PAL”) and the Police CARE Team, are appropriate entities under the law of this case as set forth in the Court of Appeals Opinion of April 5, 2005. Consequently, if there are any funds which are available for distribution in this case, those entities will be considered as being entities along with any others that are hereafter identified as being eligible to receive any such residual funds.

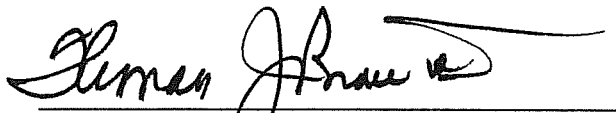
10. Questions remain for later consideration relative to what residuary funds are now available or may hereafter be available and within the control of this Court. From the Report of the Fund Administrator filed herein on October 8, 2005, the Court finds that there are now at most \$796.56 in funds which are now held in this case under the authority of this Court, and the actual amount available may be less when bank service charges are considered. The record in this case does not reflect any actions by the parties to recover any other funds. Whether any funds can be recovered which were disbursed pursuant to this Court’s Order and Judgment of

March 29, 2004, would appear to be doubtful – particularly because of the passage of time and the expenditures of those funds by the recipients. The Court further notes that there was no appeal from this Court’s Judgment of April 7, 2004, in which this Court determined that “the Fund Administrator is absolved of all liability with respect to the disbursement set forth in the Report, and that said disbursements are not subject to recoupment.” Such would appear to be a further impediment to recovery of any of those funds.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, as follows:

1. That no residual funds in this case which are now or hereafter come under the authority of this Court shall be paid over to or for the benefit of the Plaintiff class members in this case.
2. That no residual funds in this case which are now or hereafter come under the authority of this Court shall be paid over to or for the benefit of the Plaintiff Kansas Association.
3. That no residual funds in this case which are now or hereafter come under the authority of this Court shall be paid over to or for the benefit of the Defendants.
4. That pursuant to the provisions of Missouri Supreme Court Rule 74.01(b) the Court finds that there is no just reason to delay the finality of the adjudications set forth in the foregoing paragraphs 1, 2 and 3 and therefore those adjudications are determined to be final for purposes of appeal.

Dated and entered this 22nd day of March, 2006.



Thomas J. Brown III
Circuit Judge