

IN THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI
IN THE FIRST JUDICIAL DISTRICT

FILED
MAR 24 2010

EDDIE JEAN CARR, CHANCERY CLERK
BY _____ J.C.

JIM HOOD, ATTORNEY GENERAL :
ex rel. STATE OF MISSISSIPPI, :
 :
Plaintiff, :
 :
v. :
 :
MICROSOFT CORPORATION, :
 :
Defendant. :

Civil Action No. G2004-1542

MEMORANDUM OPPOSING INTERVENTION

Plaintiff's counsel respectfully file this memorandum opposing the State Auditor's motion to intervene pursuant to Mississippi Rule of Civil Procedure 24(a) and 24(b). That motion should be denied.

I. The Auditor's Request to Intervene is Untimely

The Auditor claims he must intervene to protect an interest purportedly harmed by the Retention Agreement (between the Attorney General and Plaintiff's counsel) and the Settlement Agreement with Microsoft. As set forth in our petition to approve fees and overrule quasi-objection, the Auditor's theory of "harm" is at odds with controlling law. However, the Court need not reach that issue to deny the motion to intervene. Rather, the Auditor's request for intervention should be denied because it comes:

1. More than 5 years after the Retention Agreement was signed;
2. More than 5 years after the Plaintiff's counsel filed suit against Microsoft; and
3. More than 8 months after this Court's June 11, 2009 order approved the Settlement Agreement.

“Regardless of whether intervention of right or permissive intervention is sought, in either case the request must be timely.” *City of Tupelo v. Martin*, 747 So.2d 822, 826 (Miss. 1999) (denying untimely request for intervention). The Auditor has known or reasonably should have known the terms of the Retention Agreement –which, at a minimum, is accessible to the Auditor and the public on the Attorney General’s web site yet never sought in this Court or otherwise to protect any interest allegedly harmed by that agreement during the years in which Plaintiff litigated against Microsoft. Likewise, when the Settlement Agreement was presented to the Court last June, the Auditor knew there was a 30-day appeal period for anyone to challenge the settlement’s terms before any settlement funds were received from Microsoft. Still, the Auditor raised no challenge in this Court during the appeal period.

In other words, for several years the Auditor did nothing to protect the interest he now claims, long after the fact, needs protecting. Having slept on whatever rights he may have had, the Auditor should not be allowed to intervene after the hard work has been done and the State and its citizens have received the full benefit of that work.

“As the language of Rule 24 suggests, a trial court has considerable discretion in ruling on a motion to intervene.” *City of Tupelo*, 747 So.2d at 826; *In re Hood v. State of Mississippi*, 958 So.2d 790, 808 (Miss. 2007) (“the question of whether an application for intervention is timely is largely committed to the discretion of the trial court, and its determination will not be overturned on appeal unless an abuse of discretion is shown”); *Guaranty National Ins. Co. v. Pittman*, 501 So.2d 377, 380 (Miss. 1987). Courts determine the timeliness of a request for intervention by looking at 4 factors:

1. the length of time the intervenor actually knew or reasonably should have known of his interest before he petitioned to intervene;

2. the prejudice that the existing parties to the litigation may suffer as a result of the would be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest;
3. the prejudice that the would be intervenor may suffer if intervention is denied;
and
4. the existence of unusual circumstances militating either for or against a determination that the application is timely.

Guaranty National Ins. Co, 501 So.2d at 382; *Stallworth v. Monsanto Co.*, 558 F.2d 257, 264-66 (5th Cir.1977). Each of these factors militate against intervention in this case.

First, the relevant length of time is measured from the point at which "the would-be intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene. The language is clear that actual knowledge is not required." *Hood*, 958 So.2d at 807-8. In this case, the Auditor knew or reasonably should have known, about his purported interest in this case for more than five years before he requested permission to intervene. The Attorney General's filing of the complaint was a matter for public record and the Retention Agreement is available on the Attorney General's website. The Retention Agreement sets out a standard contingent fee arrangement in which the Attorney General's counsel gets paid out of the ultimate recovery, if any, achieved in the lawsuit. The Retention Agreement lacks any requirement of a special legislative appropriation to pay counsel. Thus, the Auditor knew or should have known of the alleged interest he now seeks to protect no later than when the original complaint was filed in August 2004. His failure to seek to intervene to protect his purported interest for sixty-five months - more than five years - is inexcusable and his current motion is untimely.

Equally inexcusable is the Auditor's failure to challenge the Settlement Agreement last Spring. The Settlement Agreement was approved by this Court on June 11, 2009. The Auditor knew the exact terms of the Settlement Agreement, as his June 18, 2009 letter to Mr. Hazzard states: "the Office of the State Auditor has recently been made aware of the settlement negotiated between Microsoft Corporation and the State of Mississippi. A copy of the executed "Settlement Agreement" between the parties has been reviewed by this Office." Moreover, the Auditor also knew last year of the purported interest he seeks to protect this year, because his June 2009 letter also states that he believes any payment to lawyers must be made through special legislative appropriation and that "was clearly not accomplished by the Microsoft Settlement Agreement."

The Settlement Agreement itself included a mechanism for anyone to come to court and challenge its terms. Indeed, the agreement required that no money would be paid to the State or its lawyers by Microsoft until after the time to challenge the Court's June 11th order had run or, if challenges were filed, until after those challenges were decided, appealed, and finally resolved by the courts.

Notwithstanding this explicit mechanism to challenge the Settlement Agreement, the Auditor let the time to challenge and appeal that agreement pass without filing anything with this Court. The Auditor has no viable excuse for not intervening during the prescribed appeal period and his belated request to intervene, seven months after the fact, is untimely.

Second, the prejudice to Attorney General caused by the Auditor's failure to act promptly is considerable. The Attorney General's office has several lawsuits underway

in which outside counsel are working under identical or substantively similar retention agreements. By waiting to challenge the payment of contingent fees until after the fees are earned, the Auditor intentionally undermines the Attorney General's ability to retain counsel (all of whom stand to earn nothing absent a favorable settlement or verdict) to actively pursue claims that the State's chief legal officer deems meritorious. As a result, by impeding the Attorney General's ability to retain qualified counsel, the Auditor prejudices the Attorney General's duty and ability to protect the State's interests.

The Auditor's attempt to play a double game -- challenging the Settlement and Retention Agreements only after the State has received the benefit of those agreements -- also prejudices the Attorney General's ability to settle cases. If the Auditor had challenged the Settlement Agreement during the appeal period in 2009, Microsoft's obligation to pay would have been postponed or extinguished because the agreement had to be approved in all material respects to trigger the payment obligations. Knowing that a timely challenge would prevent the State from collecting \$40 million at a crucial time for the state budget last July, the Auditor made a calculated decision not to intervene. Now, by attempting to challenge the settlement long after Court approval, the Auditor raises the possibility that this settlement could be unwound and undermines the Attorney General's ability to settle other cases by creating real uncertainty that negotiated settlements will hold together, even after presentment to and approval by a court.

Further, retained counsel spent over \$1.7million out of their pockets and several million dollars worth of their time on the Attorney General's and the public's behalf in reliance on a contract with the State's highest law enforcement officer. If the Auditor had sought to intervene at the outset of the case, the issues the Auditor now wants to raise

could have been resolved before the lawyers' time and money were spent. In fact, if the Auditor had prevailed in 2004, the time, money, and effort would not have been spent. Thus, the Auditor's failure to act in a timely manner significantly prejudices the Attorney General's ability to retain counsel to represent the State by casting a cloud over whether they will ever be able to recover for their efforts.

Third, in contrast to the prejudice that untimely intervention would cause the Attorney General, any potential prejudice to the Auditor occasioned by denying his belated motion is slight. The Auditor's June 18, 2009 letter to Mr. Hazzard states that "the State Auditor does not contest the fair and reasonable compensation of private counsel for the State of Mississippi in the Microsoft matter, but . . . simply require[s] that these same attorneys make application to the Legislature for approval of its fees and payment through legislative appropriation." The Auditor's objection is not that the fee established by the Settlement Agreement is unfair or unreasonable, or that the work performed doesn't justify the fee, but only that the same fee should be paid through a different mechanism. Therefore, denying the Auditor's untimely request to intervene will, as a practical matter, not prejudice his position, because he does not contest that the State owes the same amount for fees and expenses established by the Settlement Agreement approved by this Court.

Fourth, there is an unusual circumstance in this case that militates against intervention. The Auditor's February 6, 2010 motion to intervene is sixteen paragraphs long; thirteen of those paragraphs reference the *Langston* case. In his request for relief, the Auditor states that if permitted to intervene he will ask the court to hold this case in abeyance pending Judge Kidd's resolution of the *Langston* case. Five days after the

Auditor filed his motion Judge Kidd rendered that possibility moot. On February 11, 2010, Judge Kidd denied the Auditor's motion for summary judgment in *Langston* and granted the Attorney General's summary judgment motion. In addition to agreeing with the Attorney General that settlement monies paid to outside counsel are not public funds, Judge Kidd ruled that "the State Auditor has waived its right to lodge any objection. Having relaxed and, in essence, agreed to the settlement, the State Auditor cannot now raise objections." Here, as in *Langston*, the State Auditor accepted the Settlement Agreement by not bringing a timely objection in this Court during the appeal period established by this Court. By doing so, the Auditor agreed to the Microsoft settlement even though he had ample notice and opportunity to object. Thus, his motion to intervene is not timely and should be rejected.

II. Even if the Auditor's Request to Intervene Was Proper He Could Not Meet the Standard to Obtain Relief from Judgment Under Rule 60

As explained above, the Auditor's motion to intervene is untimely under any standard, and therefore the Court is well within its discretion to deny the motion. However, assuming for argument's sake that the Auditor was granted permission to intervene, that would not change the fact that he could not set aside this Court's June 11 order approving the Settlement Agreement.

Mississippi Rule of Civil Procedure 60(b) provides six grounds upon which "the court may relieve a party or his legal representative from a final judgment, order, or proceeding" ¹ Those grounds are as follows:

- (1) fraud, misrepresentation, or other misconduct of an adverse party;

¹ A trial judge's decision to grant relief under Rule 60(b) is subject to review under an abuse of discretion standard. See, e.g., *M.A.S. v. Mississippi Dept. of Human Services*, 842 So.2d 527, 530 (Miss. 2003) (citing *Telephone Man, Inc. v. Hinds County*, 791 So.2d 208, 210 (Miss. 2001); *Moore v. Jacobs*, 752 So.2d 1013, 1015 (Miss. 1999)).

- (2) accident or mistake;
- (3) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;
- (6) any other reason justifying relief from the judgment.

Miss. R. Civ. P. 60(b). Motions predicated on subsections (1)-(3) must be made “not more than six months after the judgment, order, or proceeding was entered or taken.” Here, that six-month window closed on December 11, 2009, so any such motion would be time-barred. Moreover, subsection (5) has no bearing on the present case.

Therefore, the only conceivable grounds upon which the Auditor could seek relief from the order approving the Settlement Agreement (if he were allowed to intervene) are subsections (4) and (6). However, any motion based on subsections (4) or (6) also would fail. First, any such motion “shall be made within a reasonable time,” Miss. R. Civ. P. 60(b), and for the reasons discussed above the Auditor – who knew of the Settlement Agreement and its terms at the time it was approved – cannot meet this standard. Second, as a matter of substance, the Auditor cannot demonstrate the order approving the Settlement Agreement is void or any other reasons justifying relief from that order.

A judgment is void if “the court that rendered it lacked jurisdiction of the subject matter of the parties, or if it acted in a manner inconsistent with due process of law.” *Bryant, Inc. v. Walters*, 493 So.2d 933, 938 (Miss. 1986). The Auditor has not, and

cannot, make any such allegation here. The State sued Microsoft under Mississippi Code §75-24-19 which awards “investigative costs and reasonable attorney’s fees.” See Amended Complaint, ¶ 114. The State also sued seeking punitive damages for allegations of civil conspiracy. See *id.* at ¶118. A party’s costs and fees may be recovered on a showing of conduct warranting punitive damages, or as provided by statute. See *Boling v. A-1 Detective & Patrol Service, Inc.*, 659 So. 2d 586, 589 (Miss. 1995). This Court had subject matter jurisdiction to address the attorneys’ fees and costs in its final judgment. Therefore, the Auditor cannot move for relief from the final judgment under the theory that the judgment is void.

The Auditor also cannot identify any other reason justifying relief from the final judgment. “Relief under Rule 60(b)(6) is reserved for extraordinary and compelling circumstances.” *Briney v. United States Fid. & Guar. Co.*, 714 So.2d 962, 966 (Miss. 1998). The Auditor had ample, procedurally proper opportunities to seek to intervene in this action while it was being litigated, and to challenge the Settlement Agreement before the appeal time expired. The Auditor chose to do none of these things, because any of these procedures would have delayed the State’s receipt of its \$40 million in cash from Microsoft, perhaps indefinitely. That may have been a politically astute choice, but it does not amount to an extraordinary or compelling circumstance under the law. Rule 60(b) should not be used by litigants as “an escape hatch” in cases where the movant has had “procedural opportunities afforded under other rules” yet has failed to pursue them. *City of Jackson v. Jackson Oaks Ltd. P’ship*, 792 So.2d 983, 986 (Miss. 2001). That is precisely the case here.

Accordingly, even if the Auditor were granted permission to intervene – which he should not be, given the untimeliness of his motion – he ultimately could not succeed in disturbing this Court’s order approving the Settlement Agreement and the payment of fees to Plaintiff’s counsel.

CONCLUSION

For all of the foregoing reasons, Plaintiff’s counsel respectfully request that the Court deny the Auditor’s motion to intervene and enter the Proposed Order attached hereto.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day delivered, a true and correct copy of the attached and foregoing document to the following persons:

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This the 22nd day of March, 2010.


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