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Final Order and Judgment (LARRIE GRANT PLYMEL)

Alice D. Bonner
Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

LARRIE GRANT PLYMEL, *et al.*,	)(	
	)(	**CIVIL ACTION**
Plaintiffs,	)(	**FILE NO. 2004-CV-84312**
	)(	
v.	)(	
	)(	
TEACHERS RETIREMENT SYSTEM OF GEORGIA, *et al.*,	)(	
	)(	**CLASS ACTION**
	)(	
Defendants.	)(	

FILED IN OFFICE
FEB 29 2008
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

FINAL ORDER AND JUDGMENT

Counsel for the parties appeared at hearings held on October 4 and 5, 2007, and January 16, 2008, to present oral argument and testimony in this case. After reviewing the record of the case, the arguments and evidence presented during the hearings, and the briefs submitted on the issues, the Court finds as follows:

1. FACTS

The Plaintiffs (individually, "Class Members" or collectively, the "Class") are retired educators who are members of the Teachers Retirement System of Georgia ("TRS"), the named Defendant in this action along with certain of its Trustees and Board Members (collectively, the "Defendants"). At retirement, each Class Member elected to participate in an optional retirement plan allowance, which pays a reduced monthly allowance, first to the Member during her lifetime and then to a named beneficiary after the Member's death. O.C.G.A. § 47-3-121. The optional plan benefits were calculated using "option factors" based upon mortality tables adopted by TRS in 1983. TRS

adopted new option factors in 2003 applicable to retirees who retired after February 1, 2003, which resulted in increased benefits payable under the optional plan.

The optional plan is a reduced retirement benefit for the retired teacher with a remaining benefit paid to a named beneficiary upon the teacher's death. The new mortality tables reflected a longer life expectancy, and, if applied to the optional plan would have resulted in increased benefits. The longer the period of time that the Member has to fund the beneficiary's remainder benefit, the cheaper the monthly payments to purchase such benefit should be. Thus, as the life expectancy increased with the new mortality tables, the Member had a longer period of time to purchase the benefit, which resulted in smaller deductions from the Member's monthly benefit amount.

TRS is governed by a complex statutory scheme provided in O.C.G.A. §§ 47-3-1, *et seq.* Among the requirements established in the Code, is that the optional plan allowance must be "actuarially equivalent" to the maximum plan allowance that the Member could have chosen.

Plaintiffs filed this action in April 2004 alleging that TRS unlawfully used an outdated mortality table to calculate participants' monthly benefits and deductions to fund optional plan beneficiary benefits. The trial court granted summary judgment to TRS, and Plaintiffs appealed.

The Georgia Supreme Court concluded that TRS was obligated to use the mortality tables it adopted (and used with the maximum plan) for other retirees in 1982, 1986, 1992, 1996, and 2000 in calculating the deductions for the optional plan participants, and reversed the trial court's grant of summary judgment to TRS. The

case was remanded to the Fulton County Superior Court, and then transferred to the Business Case Division of the Court, where it remains for final determination of the remaining issues.

2. THE GEORGIA SUPREME COURT OPINION

Defendants urge the Court to interpret the Georgia Supreme Court's opinion in Plymel v. Teachers Retirement System, 281 Ga. 409, 637 S.E.2d 379 (2006), as involving a simple issue of contract. Conversely, Plaintiffs contend that the Supreme Court concluded that TRS violated its statutory obligations. The Court's opinion is clear that Defendants, acting as public officials, are bound to the statutory obligations established in O.C.G.A. §§ 47-3-1, *et seq.* governing the Teachers' Retirement System. That duty included providing optional benefits that are "actuarially equivalent" to the maximum plan benefits, and so TRS was "required to use the mortality tables it adopted in 1982, 1986, 1992, 1996, and 2000 to determine actuarial equivalence." Plymel v. Teachers Retirement System, 281 Ga. 409, 414 (2006). The case was remanded to this Court to determine whether the optional-plan and maximum-plan benefits were actuarially equivalent.

The Defendants were and are required by law to follow the directives of the statute with respect to the use of mortality tables, and they have no discretion to do otherwise. The Defendants do not dispute that they did not employ the correct mortality tables in calculating benefits for Members of the Plaintiff Class, and that, as a result, Class Members have received lower monthly benefit payments. In accordance with the opinion of the Georgia Supreme Court in Plymel v. Teachers Retirement System, 281

Ga. 409, the claims of the Plaintiff Class are resolved on their merits against the Defendants and in favor of the Plaintiff Class.[1]

3. STATUTE OF LIMITATIONS

Consistent with the Supreme Court opinion in this case, the Court finds that the Plaintiff Class' statutory claims form the basis of their recovery. This is not a case involving a simple contract where a six-year statute of limitations would apply. In Georgia Masonic Insurance Co. v. Davis, 63 Ga. 471 (1879), the estate of a deceased member of an insurance association, formed in accordance with a Georgia statute, sued for insurance proceeds and faced a statute of limitations defense. The question was whether the deceased's rights were rooted in simple contract or statutory rights. Justice Bleckley wrote, "[t]he deceased, in his life-time, planted a contract, and from that root sprang up a statutory right, the measure of which is found in the charter and by-laws, and to gather the fruits of that right the action is prosecuted. The purpose of the suit is not to burrow after the contract, but to shake the tree which express enactment of the law has made to grow out of it." Id. at 471.

Here, as in Georgia Masonic Insurance Co., each Class Member had an individual contract which incorporated the statutory rights and obligations found in O.C.G.A. §§ 47-3-1, *et seq.* The argument that this case is one of a simple contract is erroneous. Not once during this litigation has a single teacher's contract been put into evidence or reviewed by this Court. Instead, the focus of the last four (4) years of litigation has been on the obligations and rights established in O.C.G.A. §§ 47-3-1, *et seq.* See also, Pierce v. Rhodes, 208 Ga. 554 (1951).

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[1] Consistent with footnote 13 of the Supreme Court's opinion, the Court concludes that the claims of the Plaintiff Class for constitutional violations are moot.

Thus, pursuant to O.C.G.A. § 9-3-22, the Court finds the applicable statute of limitations in this case to be twenty (20) years. ("All actions for the enforcement of rights accruing to individuals under statutes ...or by operation of law shall be brought within 20 years after the right of action has accrued...".) The Plaintiff Class asserts rights accruing under O.C.G.A. §§ 47-3-1, *et seq.*, and they assert claims for breach of their individual contracts, which incorporated those statutes.[2]

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment on the Defendants' statute of limitations defense is **GRANTED**, and the applicable statute of limitations is determined to be twenty (20) years.

4. BREACH ACCRUAL FOR PURPOSES OF CALCULATING THE STATUTE OF LIMITATIONS

Plaintiffs request this Court to find that the statute of limitations accrued on a payment-by-payment basis. See Willis v. City of Atlanta, 265 Ga. App. 640, 645, (2004) (applying the continuing violation doctrine and holding that each inadequate payment constituted a breach). The contract in Willis and in other employment contexts, however, is divisible because the periodic payment due is related to the work performed during the relevant time period. Here, Plaintiffs worked as educators, contributed funds to TRS, and, upon retirement, elected to receive a monthly payment plus a benefit payable to a named beneficiary upon the educator's death. See, e.g., O.C.G.A. § 47-3-121. Plaintiffs' rights accrued only after the educator earned a certain number of service credits (typically 30 years' worth) and reached a certain age (typically 60 years

[2] Although Defendants appeared to drop this argument during the final hearing on January 16, 2008, the Court will address the applicability of the two (2) year wage exception to O.C.G.A. § 9-3-22. The statute governing the calculation of retirement benefits owed by the Teachers Retirement System is not a "law respecting the payment of wages and overtime," and the Members of the Plaintiff Class do not seek to recover "wages" or "overtime" so that the two-year proviso of O.C.G.A. § 9-3-22 does not apply to this case.

old). See, e.g., §§ 47-3-101, 102, 120. Additionally, Plaintiffs fully performed all of their obligations under their contracts before any performance was due by TRS. The Court, therefore, finds that the contracts at issue here are not traditional severable contracts as were those addressed in Willis. Instead, the contracts at issue, in the context of retirement benefits are entire contracts.

O.C.G.A. § 13-16-14, however, establishes an exception to the traditional rule that only one action may lie for an entire contract. "[W]here *breaches occur at successive periods in an entire contract,* an action will lie for each breach..." (emphasis added). See also, O.C.G.A. 13-1-9. The retirement allowance owed by TRS to the Plaintiffs is defined as a benefit to be paid in "monthly installments." O.C.G.A. § 43-3-1(24). Additionally, TRS had the authority over time to adopt new mortality tables and adjust monthly option payments. Thus, each month in which TRS failed to pay Plaintiffs an actuarially equivalent benefit, TRS breached their contractual obligation to Plaintiffs. See, generally Larkins, Ga. Contracts, § 4-12 (2007-2008). In accordance with the foregoing analysis, the Court finds that the statute of limitations accrued on a payment-by-payment basis in this case consistent with O.C.G.A. § 13-6-14.

5. PRE- JUDGMENT AND POST-JUDGMENT INTEREST

O.C.G.A. § 7-4-2 provides that the legal rate of pre-judgment interest is to be seven percent (7%) "where the rate percent is not established by written contract." O.C.G.A. § 7-4-12(b) provides that "[i]f the judgment is rendered on a written contract or obligations providing for interest at a specified rate the judgment shall bear interest at the rate specified..." or else shall be set at the default rate of prime plus three (3) percent. O.C.G.A. § 47-3-24(b) provides that the TRS Board of Trustees "...shall also

determine from time to time the rates of regular interest for use in all calculations required in connection with the retirement system limited to a minimum of 2 percent."

Defendants entered into the record TRS Board of Trustees Administrative Rule 513-5-1-.50, adopted on April 16, 1975, establishing four and one-half percent (4 ½%) as the regular interest rate for member accounts. Plaintiffs did not controvert this evidence. The statutes and regulations governing TRS were incorporated into each teacher's contract upon proper adoption. Defendants have demonstrated that the applicable interest rate was determined by the TRS Board of Directors to be four and one-half percent (4½%) and it shall be the rate of pre-judgment and post-judgment[3] interest applicable in this case in accordance with O.C.G.A. § 7-4-2 and § 7-14-12(b). See, e.g., Chilivis v. Rogers Oil Co., 135 Ga. App. 176, 176 (1975).

Post-judgment interest on all principal amounts owed by the Defendants shall run from the date of entry of this Final Order and Judgment at the rate of four and one-half percent (4½%). As to post-judgment interest, should the Plaintiffs choose to appeal any of the holdings of this Court and appeal is not taken by Defendants, post-judgment interest will not begin to accrue until the date of final judgment on appeal.

6. CLASS REPRESENTATIVE PAYMENTS

Class Representatives, Larrie Grant Plymel and Corinne Monroe are each awarded an amount equal to $75,000.00, as incentive payments in light of their having brought this action and served as active Class representatives throughout its pendency. These payments are in addition to any monies owed to them by TRS by virtue of their being members of the Plaintiff Class. The payments shall be deducted from the Fees

[3] Plaintiffs and Defendants both concede that this action involves "a judgment for a sum certain, or for an amount mathematically determinable..." McClure v. Raper, 277 Ga. 642, 644 (2004) (quoting Brown v. Brown, 265 Ga. 725, 727(1995)).

Fund established in Paragraph 8 of this Order and shall be paid by TRS within thirty (30) days of the date of this Final Order and Judgment.

7. PLAINTIFF CLASS PAYMENTS

As previously set forth in this Order, the prevailing Plaintiff Class is limited to include only those optional retirees, beneficiaries of optional retirees and/or the heirs of any deceased retiree/beneficiary whose claims arose within the twenty (20) year statute of limitations window as calculated on a per-payment breach, through February 1, 2003, the date on which the TRS Board of Trustees applied "actuarially equivalent" benefits for optional retirees.

To these Plaintiffs, TRS is responsible for "back-pay" which consists of the difference between (a) the principal amounts that would have been paid to optional plan retirees and beneficiaries of optional plan retirees[4] during the twenty (20) years before the filing of this action if the Defendants had calculated their retirement benefits using the correct mortality tables and (b) the principal amounts actually paid to such retirees and beneficiaries.

The Defendants are also responsible to the Plaintiff Class for prejudgment interest at the rate of four and one-half percent (4½%) per annum calculated on each monthly component of the principal amounts owed. The Defendants are also required to adjust the future retirement benefits payable to the Members of the Plaintiff Class who are presently receiving or may receive retirement benefits so that those benefits be calculated using the correct mortality tables.

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[4] The phrase "optional plan retirees" includes those persons who chose an optional plan retirement pursuant to O.C.G.A. § 47-3-121.

8. COMMON FUND

This Court, in a separate Attorneys' Fees Order has awarded thirty percent (30%) of the common fund as the Fees Fund from which attorneys' fees, expenses of this litigation, and incentive payments to Class Representatives are to be paid. In addition, TRS is directed to allocate to the Fees Fund any payments already made by TRS pursuant to Paragraph 12 of the Court's Order of October 22, 2007, concerning payments for notice to the Class, and any future notice-related expenses.

The common fund is the sum of the following amounts:

A. All principal amounts, calculated as provided herein, that TRS failed to pay to optional plan retirees who retired at any time on and between August 1, 1983, and January 31, 2003, and whose retirement benefits were based on an incorrect mortality table. These principal amounts shall be calculated for the period beginning April 8, 1984, and ending sixty (60) days after the entry of this Final Order and Judgment (the "Calculation Period"). These principal amounts shall be the difference, calculated on a person-by-person basis, between (i) the retirement benefits properly payable to such persons during the Calculation Period, calculated using the correct mortality table in accordance with the Supreme Court's decision of October 30, 2006, and adjusted for cost of living and any other increases granted and applied during the Calculation Period; and (ii) the retirement benefits paid in fact to such persons during the Calculation Period.

B. All principal amounts, calculated as provided herein, that TRS failed to pay to named beneficiaries of optional plan retirees, which named

beneficiaries began to receive at any time on and between August 1, 1983, and January 31, 2003, and whose benefits were based on an incorrect mortality table as ruled by the Supreme Court of Georgia. These principal amounts shall be calculated for the Calculation Period. These principal amounts shall be the difference, calculated on a person-by-person basis, between (i) the retirement benefits properly payable to such persons during the Calculation Period, calculated using the correct mortality table in accordance with the Supreme Court's decision of October 30, 2006, and adjusted for cost of living and any other increases granted and applied during the Calculation Period; and (ii) the retirement benefits paid in fact to such persons during the Calculation Period.

C. Pre-judgment interest at the rate of four and one-half percent (4½%) per annum on each monthly component of the principal amounts calculated under the foregoing Paragraphs 8(A) and 8(B); provided, however, that the rate of interest on such components shall change to the post-judgment interest rate for the period after entry of this Final Order and Judgment, or, after an appeal consistent with Paragraph 6 of this Order.

D. The difference between (i) the present value of all future retirement benefits expected to be paid (a) to optional plan retirees who retired at any time on and between August 1, 1983, and January 31, 2003, and (b) to named beneficiaries of optional plan retirees, which named beneficiaries began to receive benefits at any time on and between August 1, 1983, and January 31, 2003, all calculated using the correct mortality tables in accordance with the Supreme Court's decision of October 30, 2006; and (ii) the present value of all

future benefits expected to be paid to such persons if the Supreme Court's decision of October 30, 2006 had affirmed rather than reversed the trial court's Order of January 9, 2006. These calculations shall be performed on a person-by-person basis using sixty (60) days after the date of this Final Order and Judgment as the present value date, and the calculations shall employ a discount rate of seven (7) percent.

9. DEFENDANTS' OBLIGATIONS

The Defendants are **ORDERED** and **ENJOINED** to do and specifically perform the following in order to remedy their violation of the rights of the Members of the Plaintiff Class, to prevent further injury to Members of the Plaintiff Class, and to carry out their statutory duties to the Members of the Plaintiff Class:

A. Within one hundred and twenty (120) days of entry of this Final Order and Judgment, TRS shall calculate all amounts under Paragraphs 8(A), 8(B), 8(C), and 8(D) of this Final Order and Judgment and shall provide its calculations to Class Counsel.[5] Class Counsel shall have fifteen (15) days after receipt of the calculations within which to notify TRS that they dispute any of these calculations. Class Counsel shall promptly submit any such dispute to the Court for resolution.

B. Within ninety days (90) days of entry of this Final Order and Judgment, TRS shall make available to Class counsel and to actuaries designated by Class counsel all information and figures necessary to perform

[5] If any retiree or beneficiary for whom calculations are to be performed dies within the sixty (60) day period following entry of this Final Order and Judgment, the Defendants may adjust their calculations for such a retiree or beneficiary in light of that fact.

calculations pursuant to Paragraph 9(A) of this Final Order and Judgment, including but not limited to:

i. All mortality tables adopted by TRS' trustees from 1982 through and including January 31, 2003;

ii. All option factors applied, including the time period of their application, in calculating optional plan retirement benefits at any time during the period beginning August 1, 1983, and continuing to and through January 31, 2003;

iii. All option factors calculated for use in re-calculating optional plan retirement benefits in the period beginning August 1, 1983 in light of the Supreme Court's decision in this case;

iv. All cost of living and other adjustments applied and used at any time since August 1, 1983, for any person receiving optional plan retirement benefits, including the period of application of each such adjustment;

v. The maximum plan retirement benefit that would have been available to each optional plan retiree for whom calculations are to be performed under Paragraph 9(A) of this Final Order and Judgment or for whose beneficiary calculations are to be performed under Paragraph 9(A) of this Final Order and Judgment;

vi. The optional retirement plan chosen by or for each optional plan retiree or beneficiary of an optional plan retiree for whom calculations

are to be performed under Paragraph 9(A) of this Final Order and Judgment;

vii. All payments (and dates of payments) made in fact by TRS to each optional plan retiree or beneficiary of an optional plan retiree for whom calculations are to be performed under Paragraph 9(A) of this Final Order and Judgment; and

viii. Such other documents and things as are reasonably requested by counsel for the Plaintiff Class, which relate to TRS' recalculation and payment of benefits in accordance with the decision of the Supreme Court in this case.

TRS may supplement their disclosures up to one hundred and twenty (120) days of entry of this Final Order and Judgment.

C. TRS shall, within fifteen (15) days of notification by Class Counsel that they do not dispute calculations as provided in Paragraph 9(A) of this Final Order and Judgment, pay to those Members of the Plaintiff Class who are living retirees or beneficiaries the individually calculated amounts owed to them under Paragraphs 8(A), 8(B), and 8(C), minus the percentage figure allocated by the Court's separate Order to pay attorneys' fees, expenses of this litigation and incentive payments ("Attorneys' Fees Order"), and minus any required tax withholding for each such Class Member; provided, however, that if Class Counsel dispute any calculation, TRS shall, within fifteen (15) days of notification by Class Counsel of the dispute, pay any amount that is not disputed.

D. TRS shall, within fifteen (15) days of notification by Class Counsel that they do not dispute calculations as provided in Paragraph 9(A) of this Final Order and Judgment, adjust all future payments to those Members of the Plaintiff Class who are living retirees or living beneficiaries of deceased retirees as of the next payment due after such notification by Class Counsel. The adjustments shall be in the amounts of the differences calculated under Paragraph 8(D) of this Final Order and Judgment (without any reduction to present value), minus the percentage figure allocated by the Court's Attorneys' Fees Order, with such additional amounts to be paid month-to-month in addition to the regularly paid benefit until such time as the retiree dies or is otherwise no longer entitled to receive a benefit; provided, however, that if Class Counsel dispute any calculation, TRS shall, within fifteen (15) days of notification by Class Counsel of the dispute, adjust all future payments as of the next payment due after such notification by Class Counsel to the extent of any amount that is not disputed.

E. If because of the passage of time in connection with payment of amounts owed as calculated under Paragraphs 8(A), 8(B), and 8(C) of this Final Order and Judgment and adjustment of future retirement benefits as calculated under Paragraph 8(D), a gap is created such that one or more months of increments due is not paid, then TRS shall promptly make such payments to the Members of the Plaintiff Class to whom such payments are due.

F. Within thirty (30) days of entry of this Final Order and Judgment, TRS and Class Counsel shall, with the assistance of The Garden City Group, Inc., develop and submit for the Court's review and approval a procedure by

which the legal representatives of deceased retirees and deceased named beneficiaries of deceased retirees may claim funds calculated to be owed under Paragraphs 8(A), 8(B), and 8(C) above. Such procedure shall make use of the information obtained through the mailed and publication notice process provided for in this Court's Order of October 22, 2007, shall provide reasonable assurance that these representatives are legally authorized to receive the funds, and shall be administered promptly by The Garden City Group, Inc., with opportunities for review and input by both the Defendants and Class Counsel. The amounts due to such representatives shall be reduced by the percentage figure allocated by the Court in the separate Attorneys' Fees Order, and by any required tax withholding for each such Class Member. If any dispute shall arise as to the qualifications of a person who claims to be a representative under this subparagraph, such dispute shall be promptly referred to the Court for resolution.

H. TRS shall, within fifteen (15) days of notification by Class Counsel that they do not dispute calculations as provided in Paragraph 9(A) of this Final Order and Judgment, pay thirty percent (30%) of the common fund to the Fees Fund as provided for in the Court's separate Attorneys' Fees Order; provided, however, that if Class Counsel disputes any of the calculations, TRS shall, within this same time period, pay to Class Counsel any amount that is not disputed.

I. TRS shall, within sixty (60) days of the date of this Final Order and Judgment, pay to Class Counsel from the Fees Fund allocated by the Court's Attorneys' Fees Order $233,539.45 for reasonable expenses already incurred. TRS shall also set aside from the Fees Fund $30,000.00 for additional actuarial

service expenses and $60,000.00 for additional class administration costs that Class Counsel have shown that they reasonably expect to incur in the course of implementation of this Final Order and Judgment (together the "Expense Set-Aside"). Within fifteen (15) days of TRS' receipt of invoices, bills, or other reasonable documentation of expenses incurred by Class Counsel as described in this paragraph, TRS shall reimburse Class Counsel for such amounts from the Expense Set-Aside. Such Expense Set-Aside payments may be made before the Fees Fund is released to Class Counsel. At the time of payment of the Fees Funds to Class Counsel, any unused Expense Set-Aside amounts shall be reassigned to the Fees Funds and distributed according to the terms of this Final Order and Judgment and the separate Attorneys' Fees Order, issued herewith.

J. TRS shall, within thirty (30) days of the date of this Final Order and Judgment, pay to The Garden City Group, Inc., from the Fees Fund allocated by the Court by the separate Attorneys' Fees Order, any remaining unpaid amount of its reasonable expenses incurred in connection with implementation of the Court's Order of October 22, 2007, and any reasonable expenses anticipated to be incurred in the course of implementing Paragraph 9(F) of this Final Order and Judgment. The Court hereby authorizes TRS to reimburse The Garden City Group, Inc. from the Fees Fund within fifteen (15) days of TRS' receipt of invoices, bills, or other reasonable documentation for its reasonable expenses thereafter incurred in such implementation, up to $100,000.00 without further order of the Court. If, at the time for distribution of the Fees Fund to Class Counsel, there are still outstanding, unpaid expenses of The Garden City Group,

Inc., the Fees Fund may be distributed to Class Counsel in accordance with the terms of this Final Order and Judgment and the separate Attorneys' Fees Order issued herewith, provided that, Class Counsel are responsible for paying any such remaining expenses.

10. UNCONTESTED CLAIMS

The Court has issued a separate Order regarding the early payment of uncontested claims.

SO ORDERED, this 29 day of February 2008.

Alice D. Bonner

Alice D. Bonner, Senior Judge
Superior Court of Fulton County

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