

Georgia State University College of Law
Reading Room

Georgia Business Court Opinions

9-10-2007

Order on Motion to Intervene (SCOTT
TOBERMAN)

Elizabeth E. Long
Superior Court of Fulton County

Follow this and additional works at: <https://readingroom.law.gsu.edu/businesscourt>

Institutional Repository Citation

Long, Elizabeth E., "Order on Motion to Intervene (SCOTT TOBERMAN)" (2007). *Georgia Business Court Opinions*. 127.
<https://readingroom.law.gsu.edu/businesscourt/127>

This Court Order is brought to you for free and open access by Reading Room. It has been accepted for inclusion in Georgia Business Court Opinions by an authorized administrator of Reading Room. For more information, please contact mbutler@gsu.edu.

establishes the appropriate procedures for intervention requiring that the motion to intervene be accompanied by a pleading setting forth the applicant's claim or defense.

Houston advances no unconditional or conditional statutory right to intervene and no common question of law or fact. Additionally, Houston did not include pleadings setting forth its claim or defense in this action with its motion to intervene.

On May 10, 2007, Houston agreed to defend EAR under a reservation of rights. In July, 2007, after the second group of EAR lawyers provided by Houston was permitted withdraw, the Court granted EAR's request to postpone for an additional sixty (60) days¹ the hearings on EAR's motions for judgment on the pleadings and to dismiss claims of certain counterclaimants. During the July conference on the second motion to withdraw, GEF Partnerships informed the Court and EAR that it intended to move for final judgment, to request supersedeas bond, and to request an expedited hearing on those issues. At EAR's request, the Court agreed that EAR would have thirty (30) days to respond to any such motions. On July 26, 2007, GEF Partnerships moved for entry of supersedeas bond and final judgment, which was set for a hearing on September 11, 2007. Houston knew or should have known of the September 11th date from EAR or by review of the relevant orders available in the public record. This Motion to Intervene, however, was not filed until August 28, 2007.

Houston relies upon Richmond v. Georgia Farm Bureau Mutual Insurance Company, 140 Ga. App. 215 (1976), to support its contention that O.C.G.A. § 9-11-24 authorizes intervention by an insurance carrier and a stay of the main case pending final resolution of the declaratory judgment action. Richmond, however, was not a case that evaluated the appropriateness of an

1. The motions were originally scheduled for hearing on June 19, 2007, but were rescheduled for July 11, 2007 when McGuire Woods withdrew its representation of EAR and the other plaintiffs and counterclaim defendants. During the hearing on September 11, 2007, the Court will reschedule a hearing for the pending EAR motions.

intervention by an insurance carrier and a stay of the main action. Instead when deciding other, related issues, the Court in Richmond recommended “best practices” for insurance carriers who dispute coverage, which include providing a defense under an agreed to reservation of rights agreement, or, in the alternative, to provide notice to the insured of the reservation of rights, taking steps necessary to prevent prejudice to the insured, and seeking immediate declaratory relief, including a stay. 140 Ga. App. 215, 219. Houston did not immediately seek intervention in this action. Its delay alone distinguishes the Court of Appeals’ recommendations in Richmond.

According to the briefs, the pending declaratory judgment action in federal court was filed by EAR in December 2005. Houston did not answer until November 2006. Although, Houston has filed a motion for summary judgment in the case, no hearing date has been obtained. Thus, Houston appears not to have sought immediate relief in the declaratory judgment action.

Turning to a consideration of “the delay and prejudice” to the original parties as required by O.C.G.A. § 9-11-24, this Court finds that this case was originally filed by EAR in 2005. EAR unsuccessfully appealed an earlier trial court’s order to the Court of Appeals, thus causing a delay in the case. In May, 2007, GEF Partnerships obtained a partial summary judgment. Houston has indicated that EAR’s failure to provide potential counsel with assurances to pay invoices in the event that Houston is successful in the declaratory judgment action is contributing to the failure to obtain counsel in this case.

Alternatively, Houston asks for an extension of time to allow EAR to obtain another lawyer. The Court has already provided EAR with two (2) extensions of time to secure counsel, which were requested and agreed to by EAR. According to Houston’s Motion, the current

problem in obtaining replacement counsel is EAR and Mr. Toberman's refusal to provide payment assurances separate from insurance representation.

Accordingly, this Motion to Intervene is hereby **DENIED**, and the request for an extension of time is hereby **DENIED**.

SO ORDERED this 10th day of September, 2007.


ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

Copies to:

Christine H. Hall
Kathleen M. Murley
Cruser & Mitchell, LP
Counsel for Houston Casualty Co.
Peachtree Ridge, Suite 750
3500 Parkway Lane
Norcross, GA 30092
(404) 881-2622
(404) 881-2630 *fax*

Anthony Cochran, Esq.
Chilivis, Cochran, Larking & Bever, LLP
3127 Maple Dr. N.E.
Atlanta, Georgia 30305
(404) 233-4171

Greg Shinall, Esq.
Dina Rollman, Esq.
Sperling & Slater, P.C.
55 West Monroe Street
Suite 3200
Chicago, Illinois 60603
(312) 368-5937
Debra Wilson, Esq.

Schreeder, Wheeler & Flint, LLP
1600 Candler Building
127 Peachtree Street, N.E.
Atlanta, GA 30303-1845
(404) 681-3450

Gary Marsh, Esq.
McKenna Long & Aldridge, LLP
303 Peachtree Street, NE,
Suite 5300
Atlanta, GA 30308
(404) 527-4150

Toberman Entities
Attn: Scott K. Toberman
3525 Piedmont Road
Building 5, Suite 10
Atlanta, Georgia, 30305
(770) 850-3100

Scott K. Toberman
2875 Wyngate Road
Atlanta, Georgia 30305
(770) 850-3100