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Order on Motion to Intervene (SCOTT TOBERMAN)

Elizabeth E. Long
Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

COPY

SCOTT TOBERMAN, Plaintiff, v. LAROSE LIMITED PARTNERSHIP, *et al.* Defendants, LAROSE LIMITED PARTNERSHIP, *et al.* Counterclaim Plaintiffs, v. SCOTT TOBERMAN, *et al.* Counterclaim Defendants.	*	Civil Action File No. 2007CV131894 (Business Division Two—EL)

FILED IN OFFICE
SEP 10 2007
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

ORDER ON MOTION TO INTERVENE

Houston Casualty Company ("Houston") filed a Motion to Intervene in this action on August 28, 2007, in order to stay this action until the resolution of a pending declaratory suit in federal court between Houston and EAR. In the alternative, Houston requests an extension of time to give EAR additional time to retain counsel and to respond to GEF's pending Motion for Entry of Final Judgment.

O.C.G.A. § 9-11-24 provides for intervention by right (statutory right) or with the permission of the court. A court may permit intervention under O.C.G.A. §9-11-24(b) upon (1) a showing of a conditional statutory right to intervene, or (2) when the applicant's claim or defense shares a common question of law or fact with the main action. "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." O.C.G.A. § 9-11-24 (b). Additionally, O.C.G.A. § 9-11-24(c)

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) days[1] 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.

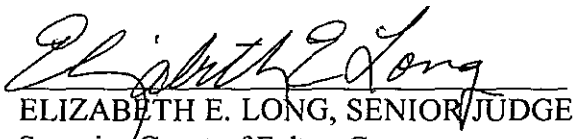
Turning to a consideration of "the delay and prejudice" to the original parties as required by O.C.G.A. § 9-11-24, this Court finds that this case was originally filed by EAR in 2005. EAR unsuccessfully appealed an earlier trial court's order to the Court of Appeals, thus causing a delay in the case. 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

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