

**National Union Fire Insurance Company of
Pittsburgh, Pa. v Xerox Corporation**

2005 NY Slip Op 30030(U)

July 12, 2005

Supreme Court, New York County

Docket Number:

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Charles Edward Ramos

PART 53

0603360/2003

NATIONAL UNION FIRE INS. CO.

VS

XEROX CORP.

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

SEQ 6

DISMISS ACTION

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

*Motion is decided in accordance with
accompanying Memorandum Decision.*

FILED

JUL 19 2005

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/12/05

CHARLES E. RAMOS
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

-----X

NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA.,
Plaintiff,

Index No. 603360/03

-against-

XEROX CORPORATION, PAUL ALLAIRE, G.
RICHARD THOMAN, BARRY ROMERIL,
PHILIP FISHBACH, GREGORY TAYLER,
ANN MULCAHY, EUNICE M. FILTER,
B.R. INMAN, ANTONIA A. JOHNSON,
VERNON E. JORDAN, Jr., YOTARO
KOBAYASHI, RALPH S. LARSEN, HILMAR
KOPPER, JOHN D. MACOMBER, GEORGE
J. MITCHELL, N.J. NICHOLAS Jr., JOHN E.
PEPPER, PATRICIA F. RUSSO, MARTHA R.
SEGER, THOMAS C. THEOBALD and
WILLIAM F. BUEHLER,

Defendants.

-----X

Charles Edward Ramos, J.S.C.:

This is a declaratory judgment action brought to resolve a controversy regarding insurance coverage for numerous securities fraud lawsuits brought by individuals, classes of individuals and regulators against the Xerox Corporation and many of its present and former directors and officers based on their alleged fraudulent reporting of Xerox's finances from 1997 through 2000.

In motion 006, Xerox Corporation moves for an order, pursuant to CPLR 3001, 3211(a)(1) and (a)(7) dismissing the sixth cause of action (based on an improper profits exclusion in the underlying policy), the seventh cause of action (based on an ill-gotten gains exclusion) and the eighth cause of action (based on duty to seek consent for settlements/duty to cooperate) all set forth in the complaint, dated October 24, 2003 (Complaint) on the ground that the court lacks subject matter jurisdiction because

there is no justiciable controversy, and because said claims fail to state causes of action. In motion 007, defendants Paul Allaire, B. Richard Thoman, Barry Romeril, Philip Fishbach and Gregory Tayler seek the same relief as that sought by Xerox.

By decision dated November 10, 2004 (6 Misc 3d 763 [Sup Ct, NY Co 2004]), and order filed January 20, 2005, the court granted in part, and denied in part defendants' prior pre-answer motions to dismiss. Reference is made to the above-mentioned decision for the facts herein.

Defendants now make a second motion to dismiss, seeking to dismiss what remains of the Complaint. The motion purports to be made pursuant to CPLR 3211, and not pursuant to the renewal and reargument provisions contained in section 2221 of the CPLR.

Defendants claim that, because Xerox represents that it will not seek coverage from National Union for either its settlement payment to the SEC or its reimbursement to the individuals who settled with the SEC for their payments to the SEC, what is left of the three remaining causes of action in the Complaint is now moot. Plaintiff disagrees.

The motions are precluded by the single motion rule of CPLR 3211 (e),¹ since defendants already made one pre-answer motion to dismiss the complaint under CPLR 3211 (a) (see Grosso Moving & Packing Co., Inc. v Damens, 233 AD2d 128 [1st Dept 1996]).

¹ CPLR 3211 (e), provides: "(e) Number, time and waiver of objections; motion to plead over. At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted."

Although defendants are precluded from moving to dismiss the Complaint by virtue of the single motion rule, they may still move for summary judgment at the appropriate time after joinder of issue on the same or similar grounds as they have asserted herein (Ancrum v St. Barnabus Hosp., 301 AD2d 474 [1st Dept 2003]).

Accordingly, it is Ordered that both Motion 006 and 007 are denied.

Dated: July 12, 2005



J.S.C.
CHARLES E. RAMOS
100.

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.

FILED
JUL 19 2005
CLERK OF COURT