National Union Fire Insurance Company of Pittsburgh, Pa. v Xerox Corporation
2006 NY Slip Op 30038(U)
May 5, 2006
Supreme Court, New York County
Docket Number:
Judge: Charles E. Ramos
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SCANNED ON 8/3/2006

[* 1]

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

PRESENT: ______________________ *Justice*

PART 53

National Union Fire Ins

INDEX NO. 603320/03

MOTION DATE ______

- v -

MOTION SEQ. NO. 09

Xerox

MOTION CAL. NO. ______

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

was decided on 4/10/06. This decision substitutes for that prior decision which is withdrawn.

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

FILED
AUG 03 2006
NEW YORK COUNTY CLERK'S OFFICE

Dated: 7/27/06

CHARLES E. RAMOS J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

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

FILED
AUG 03 2006
NEW YORK
COUNTY CLERK'S OFFICE

Charles Edward Ramos, J.S.C.:

Sua sponte, this Court withdraws its prior decision dated April 10, 2006 and substitutes the following in its place and stead.

In motion 09, defendants Xerox Corporation, Paul Allaire, G. Richard Thoman, Barry Romeril, Philip Fishbach, and Gregory Tayler (collectively "Xerox") move pursuant to CPLR 2221(d) to reargue their motion to dismiss. In motion 010, Xerox moves pursuant to CPLR 2221(e) to renew its motion to dismiss the action.

Originally, in motion 006, Xerox Corporation moved 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, on the grounds that the court lacks subject matter jurisdiction because there is no justiciable controversy, and because these claims fail to state causes of action. In motion 007, defendants Paul Allaire, B. Richard Thoman, Barry Romeril, Philip Fishbach and Gregory Tayler sought the same relief as that sought by Xerox. By order dated July 12, 2005, the Court denied the motions on procedural grounds; the single motion rule. This was an error. Accordingly, Xerox's motions to renew and reargue its motions to dismiss is granted.

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. Specifically, Xerox sought coverage for seven actions, two by the SEC. Complaint ¶7.

The background of the action is set forth in the decision dated November 10, 2004, and will not be repeated here. By that decision, the Court granted in part, and denied in part defendants' prior pre-answer motions to dismiss. *National Union Fire Insurance Co. Of Pittsburgh v Xerox Corp.*, 6 Misc 3d 763 (Sup Ct, NY County, 2004), affirmed, 807 NYS2d 344, NOC (1st Dept

[* 4]

2006). Specifically, the Court dismissed the first, second, third, fourth and ninth causes of action, leaving the sixth, seventh and eighth. Subsequently, Xerox declared that it will not seek coverage from National Union under the Excess D&O policy at issue here. Affidavit of Maria C. Diaz, January 24, 2005. Specifically, Xerox relinquished its claim to recover the $10 million penalty it paid to the SEC and the $19 million disgorgement its inside directors paid to the SEC which was reimbursed to the inside directors by Xerox. Now, the parties disagree whether anything remains to this action.

In the Sixth cause of action, National Union alleges:

76. In the event that National Union is not entitled to rescind the policy ab initio, there is no coverage with respect to the claims made in the Securities Litigation based on the Federal Primary Policy's improper profit exclusion.

77. The Federal Policy, as Exclusion 6(c), also applicable to the Policy, provides as follows:

> The Company shall not be liable under Insuring Clause for **Loss** on account of any **Claim** made against any **Insured Person**:
>
> > (C) based on, arising from, or in consequence of such Insured Person having gained in fact any personal profit, remuneration or advantage to which such Insured Person was not legally entitled;

78. Plaintiff in the Securities Litigation allege that certain of the individual defendants gained personal profits, remuneration and advantages to which they were not legally entitled, including insider sale of over $50 million of Xerox common stock. Accordingly, there is no coverage for any Loss in the Securities Litigation arising out of any individual's gaining of an illegal profit.

79. With respect to improper profits by Xerox, Endorsement 6 at section 5 of the Federal Primary Policy, applicable to the Policy as well, provides that there is no coverage, other than defense costs, for any claim that alleges that Xerox gained an improper

[* 5]

profit. Said exclusion provides:

> The Company shall not be liable under Insuring Clause 3 for that part of Loss, other than Defense Costs:
>
> (b) which is based upon, arises from, or is in consequence of any Insured Organization having gained in fact any profit or advantage to which it was not legally entitled.

80. Plaintiffs in the Securities Litigation allege that Xerox gained profits and/or advantages to which it was no legally entitled. Accordingly, there is no coverage for any Loss, other than Defense Costs, in the Securities Litigation arising out of Xerox's gaining of an illegal profit or advantage.

In the seventh cause of action, National Union seeks a declaration that defendants' alleged losses, to the extent they represent disgorgement of ill-gotten gains, would not fall within the definition of "Loss" under either the Primary Policy or the Policy, and would therefore not be covered (Complaint ¶¶ 82-83). This cause of action appears to be directed at all defendants.

In the November decision, with regard to the sixth and seventh causes of action, the Court held that:

> Defendants move to dismiss these causes of action primarily on the ground that it is premature.
>
> With respect to the defendants involved in, and who settled, the SEC Actions, whereby they consented to disgorgement of sums, this cause of action is not premature. Specifically, the issues raised by National Union in the sixth and seven causes of action - to wit, whether the money judgments entered, by consent, against Xerox and each of the individuals in the SEC actions (i.e., Allaire, Thoman, Romeril, Fishbach, and Tayler), are barred by the improper profit exclusions in the Policy, or otherwise constitute ill-gotten gains, and are not covered losses under the Policy - are clearly ripe for consideration now [citations omitted].
>
> Accordingly, the motions to dismiss the sixth and seventh causes of action are denied with respect to Xerox, Allaire, Thoman, Romeril, Fishbach, and Tayler,

> to the extent that these causes of action concern the judgments and settlements in the SEC Actions. [footnote omitted]. With respect to all other defendants, even if these causes of action might otherwise state claims, they are premature, and the motion to dismiss these causes of action are therefore granted with respect to said defendants (*see, First State Ins. Co. v J & S United Amusement Corp., supra*).

This statement with regard to premature claims was incomplete as it omitted reference to Xerox, Allaire, Thoman, Romeril, Fishbach, and Tayler, and that the sixth and seventh causes of action were dismissed as to them also, except for the judgments and settlements with the SEC. This was clarified in the order settled on January 13, 2005 which states:

> 3. The motions of defendants Xerox, Allaire, Thoman, Romeril, Fishbach, and Tayler to dismiss the sixth and seventh causes of action are denied to the extent that these causes of action concern the judgments and settlements in the SEC action. In all other respects, the motion of the above named defendants to dismiss the sixth and seventh causes of action is granted.

Having withdrawn its claims for $29 million, Xerox maintains that nothing is left to this action. National Union counters that there are other actions in which $50 million in disgorgement is sought by litigants other than the SEC, but which "concern" the SEC actions. National Union's focus on the word concern is unnecessary. Rather, the complaint defines "the Securities Litigations" in paragraph seven as including seven actions. The relief sought in the complaint is as to the Securities Litigations, not just the SEC actions. In the November decision, this Court dismissed all of the sixth and seventh causes of action as premature leaving only the two SEC actions. Now that those actions are moot, none of the seven securities actions

remain. Clearly, nothing is left to this action.

In the November decision, this Court held with regard to the remaining issue:

> In the eighth cause of action, as clarified, National Union maintains that Xerox breached the duty to cooperate contained in the Policy, by failing to procure National Union's consent in connection with Xerox's settlement of the SEC Action against it. This cause of action adequately states a claim. In denying Xerox's motion to dismiss the eighth cause of action, the court makes no ruling on Xerox's claim that the demand for relief in this cause of action is broader than the relief authorized under the Policy.

Xerox maintains that by withdrawing its claim for coverage, the eighth cause of action becomes moot. As this claim only concerns the SEC actions, and Xerox has withdrawn its insurance claims for those actions, the eight cause of action is dismissed.

Accordingly, it is

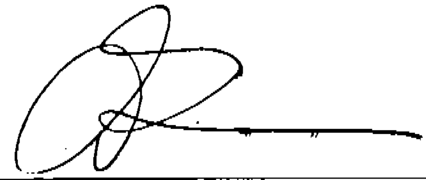
ORDERED that both motions 009 and 010 are granted to the extent of clarifying this Court's decision that the sixth and seventh causes of action were dismissed as to all claims against all defendants other than as to the SEC actions and upon reconsideration are now dismissed as to the SEC actions; and it is further

ORDERED that the eighth cause of action is dismissed.

The clerk is hereby directed to enter judgment dismissing the complaint.

Dated: May 5, 2006

FILED
AUG 03 2006
NEW YORK COUNTY CLERK'S OFFICE



J.S.C.

CHARLES E. RAMOS

[* 8]

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
AUG 03 2006
NEW YORK
COUNTY CLERK'S OFFICE