

**Zurich American Insurance Company v Sensient  
Colors, Inc.**

2006 NY Slip Op 30327(U)

February 9, 2006

Supreme Court, New York County

Docket Number: 0600827/2005

Judge: Herman Cahn

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

PRESENT: HERMAN CAIN  
Index Number : 600827/2005

PART 49

ZURICH AMERICAN INS.

vs

SENSIENT COLORS

Sequence Number : 003

DISMISS ACTION

INDEX NO. \_\_\_\_\_

MOTION DATE 6/21/05

MOTION SEQ. NO. 003

MOTION CAL. NO. 15

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

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

**FILED**

Upon the foregoing papers, It is ordered that this motion

FEB 10 2006

COUNTY CLERK  
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION IN MOTION SEQUENCE.....**

Dated: 2/9/06 He Cal  
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: IAS PART 49

-----X  
ZURICH AMERICAN INSURANCE COMPANY,  
SUCCESSOR-IN-INTEREST TO ZURICH  
INSURANCE COMPANY (U.S. BRANCH)

Plaintiff,

Index No. 600827/05

- against -

SENSIENT COLORS INC., F/K/A H. KOHNSTAMM  
& COMPANY, INC., ALLSTATE INSURANCE  
COMPANY, F/K/A NORTHBROOK INSURANCE  
AMERICAN MOTORISTS INSURANCE  
COMPANY, EXECUTIVE RISK INDEMNITY INC.,  
F/K/A AMERICAN EXCESS INSURANCE CO.,  
FEDERAL INSURANCE COMPANY,  
FIDELITY & CASUALTY COMPANY OF NEW  
YORK, FIREMAN'S FUND INSURANCE  
COMPANY HARTFORD ACCIDENT &  
INDEMNITY COMPANY, HIGHLANDS  
INSURANCE COMPANY, INTEGRITY INSURANCE  
COMPANY, INTERSTATE FIRE & CASUALTY  
COMPANY, LIBERTY MUTUAL INSURANCE  
COMPANY, LLOYDS OF LONDON AND BRITISH  
COMPANIES, NEW JERSEY PROPERTY  
LIABILITY INSURANCE GUARANTY  
ASSOCIATION, OLD REPUBLIC INSURANCE  
COMPANY, PINE TOP INSURANCE COMPANY,  
ROYAL INSURANCE COMPANY, TWIN CITY FIRE  
INSURANCE COMPANY, WESTPORT INSURANCE  
CORPORATION, F/K/A PURITAN INSURANCE  
COMPANY, AND XYZ INSURANCE  
CORPORATIONS 1-10

Defendants.

-----X

Herman Cahn, J.

Defendant Sensient Colors, Inc. moves to dismiss the action, pursuant to CPLR  
3001 (declaratory judgment), 327 (forum non conveniens), and 3211(1)(4). In the alternative,

Sensient moves to stay the action, pending the decision on an action commenced by it in the New Jersey Superior Court.

***Background:***

Defendant Sensient Colors, is a New York corporation with its principal place of business in St. Louis, Missouri. It operated a facility in Camden, New Jersey where it manufactured colorants and pigments. In 1994, a flood damaged the facility. Sensient ceased to manufacture products and sold only repackaged materials. By 1998, the facility was abandoned and had been vandalized by trespassers. In March of that year, in light of environmental risks due to the abandonment of the facility, the EPA initiated an emergency removal action, and removed thousands of drums, bags, and containers of hazardous substances. In November of 2001, the EPA removed and disposed of 71,000 tons of contaminated soil.

In November of 2003, Pleasant Gardens Realty Corporation, an owner of property adjacent to the Sensient facility, filed suit in Camden County, New Jersey, against Sensient, alleging that it was damaged because Sensient had released and disposed of hazardous substances.

In June of 2004, the EPA sent Sensient a demand for reimbursement for costs it incurred in removing the contaminated soil and waste material from the facility, totaling \$10,867,466.11.

Plaintiff is incorporated in New York, with its principal place of business in Schaumburg, Illinois. Sensient alleges that Zurich is one of its primary insurers.

Zurich concedes that it issued policies to Sensient's predecessor, H. Kohnstamm & Company, for the term July 1974 through July 1977 and November 1, 1979 through November 1, 1984. The insured's address as listed on the policy is a New York address. In fact,

Sensient concedes that its executive offices were for some time located in New York (Reply Memorandum at 14). Also, Zurich alleges that the policies were negotiated in New York.

On May 6, 2004, Sensient tendered the Pleasant Gardens complaint to Zurich, and on July 22, 2004, Sensient tendered the EPA demand letter to Zurich. Zurich alleges that by November of 2004, it had agreed to defend Sensient in both matters, pending resolution of the insurance coverage issues and without prejudice to its right to contest coverage.

On March 8, 2005, Zurich initiated this action, for declaratory judgment in order to determine whether it was obligated to defend and indemnify Sensient in the underlying matters. It served an amended complaint on May 25, 2005, naming Sensient's other insurers as defendants.

On May 2, 2005, Sensient commenced its action in the New Jersey Superior Court against Zurich and others, *Sensient Colors Inc. v. Allstate Insurance Co., et al.*, (N.J. Super. Ct. Camden Cty., docket no. CAM-L-3695-05), which included a cause of action for declaratory judgment. Subsequently, Sensient filed this motion to dismiss this action and Zurich filed a motion to dismiss the New Jersey action. Sensient argues that the action belongs in the New Jersey Superior Court, while Zurich argues that the action belongs in this court.

On October 17, 2005, the New Jersey court granted Zurich's motion to dismiss, holding that the action is more appropriately heard in this court. A motion for reconsideration was thereafter denied.

**Discussion:**

Zurich commenced this declaratory action prior to plaintiff's filing in New Jersey, by filing its first complaint.<sup>1</sup> Thus, there was no pending action at the time of the commencement of the declaratory action. Additionally, as this action was commenced approximately two months before the New Jersey action, it was apparently not commenced as an attempt to forum shop, by a race to the courts.<sup>2</sup> Moreover, the court notes that a motion to dismiss the New Jersey action was granted. Although that decision is on appeal, the Superior Court has clearly ruled. For all of the above reasons, the court in its discretion does not decline jurisdiction to hear this declaratory judgment action, and denies the motion to dismiss.

**Forum Non Conveniens**

Sensient also moves to dismiss pursuant to CPLR § 327. CPLR § 327 provides that the court may dismiss an action upon finding that "in the interest of substantial justice the action should be heard in another forum" (CPLR § 327(a)). This rule "rests on justice, fairness and convenience" (*Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 479 [1984], *cert denied* 469 U.S. 1108 [1985]). The party challenging the forum has the burden of proof to "demonstrate

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<sup>1</sup> Plaintiff claims that it commenced the action in New Jersey first, arguing that it filed its complaint before Zurich filed its amended complaint. This argument is incorrect. CPLR § 304 provides that "an action is commenced by filing a summons and complaint or summons with notice" (CPLR § 304; *see Reckson Associates Realty Corp. v. Blasland, Bouck & Lee, Inc.*, 230 A.D.2d 723, 725 [2<sup>nd</sup> Dept. 1996] ).

<sup>2</sup> Plaintiff cites *Salomon Brothers v. West Virginia State Board of Investments* as an example of an exception where the court held that a court's maintaining jurisdiction on a certain declaratory action was not proper where there existed an alternative action in a different court, even though that action was commenced after the declaratory action. (*Salomon Brothers v. West Virginia State Board of Investments*, 152 Misc.2d 289 [Sup Ct, New York County 1990], *aff'd* 168 A.D.2d 384 [1<sup>st</sup> Dept. 1990]). That case is different from this case, as there, the declaratory action was commenced only a few days before the other action and was just a race to the courts, and forum shopping (*Salomon* at 292-294).

\* 6 ]

relevant public and private factors which militate against accepting the litigation” (*id.*; *Intertec Contracting A/S v. Turner Steiner International, S.A.*, 6 A.D.3d 1, 4 [1<sup>st</sup> Dept. 2004]). The factors to be considered include the burden on the New York courts, the potential hardship to the defendant, and the unavailability of another forum where the plaintiff could bring the action (*Islamic Republic* at 479). Additionally, the court “may also consider that both parties to the action are non residents and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction” (*id.* [citation omitted]). No individual factor is dispositive, but unavailability of another forum in which the action can be brought is “the most important factor (*id.* at 479-481).

Here, both parties are incorporated in New York, and Sensient conceded that its executive offices were for some time located in New York. As the compensation sought both in the underlying action and in the EPA's are for costs and damages that have occurred in the past and are not ongoing, the issue here is one of pure contract, as to the insurance coverage. Thus, New York has a substantial nexus to this cause of action. Sensient makes much of the fact that the site where this action arose is in New Jersey. Sensient cites *Avnet, Inc. v. Aetna Casualty and Surety Company*, 160 A.D.2d 463, 464 (1<sup>st</sup> Dept. 1990), where the court held that the location of the site is important due to the availability of witnesses. However, in *Avnet*, the sites were located in North Carolina and California. Here, the site is located in New Jersey, a short distance from downtown Manhattan. Sensient has not shown how its New Jersey witnesses will be inconvenienced should the forum be New York. (*See Employers Insurance of Wausau v. American Home Products Corp.*, 207 A.D.2d 1, 3 [1<sup>st</sup> Dept 1994].) Moreover, the New Jersey action has been dismissed, the court there holding that New York is the proper forum. Thus, New Jersey may well not be available to hear this action. Therefore, the factor that Sensient

itself argues is the most important factor, the availability of an alternate forum, is not met. The motion to dismiss on forum non conveniens, is denied.

CPLR § 3211(a)(4)

Sensient also moves to dismiss pursuant to CPLR § 3211(a)(4) on the ground that “there is another action pending . . .”. For the reasons stated above, this branch of the motion is also denied.

Consequently, the motions to dismiss and to stay are denied.

Accordingly, it is

ORDERED that defendant’s motions to dismiss or to stay are denied; and it is further

ORDERED that the clerk shall enter judgment accordingly.

Dated: February 9, 2006

ENTER:

  
\_\_\_\_\_  
J.S.C

**FILED**  
FEB 10 2006  
COUNTY CLERK  
NEW YORK