

**Ark Restaurants Corp. v United National Insurance
Company**

2006 NY Slip Op 30370(U)

October 4, 2006

Supreme Court, New York County

Docket Number:

Judge: Marilyn Shafer

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

PRESENT

PART _____

Index Number : 601607/2005
ARK RESTAURANTS CORP.
vs
UNITED NATIONAL INS. CO.
Sequence Number : 001
PARTIAL SUMMARY JUDGMENT

DEX NO. _____
OTION DATE _____
OTION SEQ. NO. _____
OTION CAL. NO. _____

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

Upon the foregoing papers, it is ordered that this motion

denied pursuant to attached Rev

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 10/4/06

HON. MARILYN SHAFER, JSC

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):

[* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 62

-----X
ARK RESTAURANTS CORP, ARK OF THE SEAPORT
INC, and DIAMOND STATE INSURANCE COMPANY,

Plaintiff,

Index No. 601607/05

-against-

UNITED NATIONAL INSURANCE COMPANY

SHAFFER, M JSC

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141B).

Plaintiffs Ark Restaurants Corp., Ark of the Seaport, Inc.,
(together, Ark) and Diamond State Insurance Company (Diamond) move,
pursuant to CPLR 3212 (a), for partial summary judgment declaring
that defendant United National Insurance Company (United) must
defend Ark in the underlying action entitled Vega v Ramirez, et al.
(NY County Index No. 107643/02); declaring that Ark's coverage
under the United policy in the underlying litigation is primary to
its coverage under its policy with Diamond; and declaring that
United must reimburse Ark and Diamond for the legal costs that they
have incurred, and those that they will incur in defending the
underlying action. It is undisputed that the complaint in the
underlying action seeks to hold Ark liable for alleged wrongful
conduct on the part of Empire Protection Services International
(Empire), in work that Empire was performing for Ark.

Ark is an additional insured under a commercial general
liability insurance policy issued by United to Empire, Policy No.

L7134789. Empire is a co-defendant in the underlying action. Ark is also an insured under its own general commercial liability policy, issued by Diamond, Policy No. DSL7125395.

Defendant argues the plaintiffs' motion is premature, inasmuch as critical discovery has not been had, either in this action, or in the underlying action. Defendant points out that crucial questions remain as to the potential liability of Empire in the underlying action. The contract between Ark and Empire has not been produced; the bill of particulars served in the underlying action has not been produced; and depositions in the underlying action have not been completed. The premise of defendant's argument is that, because the additional insured endorsement that United issued to Ark states that Ark is an additional insured "only as respects liability imposed on such additional insured because of an alleged act or omission of [Empire]," the defendant is not obligated to defend Ark, or to pay its defense costs, until such time, if any, that liability is found against Empire.

That premise is untenable in view of the Appellate Division, First Department's decision in BP Air Conditioning Corp. v One Beacon Ins. Group (2006 WL 1843350, 2006 NY Slip Op 06 05297,*1 [1st Dept 2006]), a decision that was issued after defendant's papers were submitted. That decision squarely holds that an additional insured under a commercial general liability policy "is entitled to a defense in an action in which it is uncertain whether any eventual judgment against the plaintiff will be within the scope of the coverage." In light of that holding, none of the

discovery, that defendant contends to be necessary, is relevant to the question of whether defendant is obligated to provide a defense to Ark. Accordingly, plaintiff's motion for partial summary judgment is not premature.

As to the issue of primacy, United points out that the Additional Insured Endorsement of the policy that it issued to Empire provides that:

[i]f liability for injury or damage is ... sought to be imposed on the additional insured because of ... its acts or omissions and those of the named insured, as to defense of the additional insured, this insurance will act as co-insurance with any other insurance available to the additional insured, in proportion to the limits of liability of all involved policies

However, Ark's Diamond policy provides that:

This insurance policy is excess over:

- (2) Any primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

In addition, the Diamond policy provides that "[w]hen this insurance is excess, we will have no duty under [the applicable coverage] to defend the insured against any 'suit' if any other insurer has a duty to defend the insured against that 'suit.'" Id. Accordingly, insurance under the Diamond policy is not "available" to Ark, within the meaning of the United policy, and the United policy is primary.

Accordingly, it is hereby

ORDERED that the motion is granted; and it is further

ADJUDGED and DECLARED that defendant United National Insurance Company must defend Ark Restaurants Corp. and Ark of the Seaport, Inc. in the action entitled Vega y Ramirez, et al (NY County Index No. 107643/02); and it is further

ADJUDGED and DECLARED that the Ark plaintiffs' coverage under the United policy in the underlying litigation is primary to its coverage with plaintiff Diamond State Insurance Company; and it is further

DECLARED and ADJUDGED that United must reimburse the Ark plaintiffs for the legal costs, above the \$2,500 deductible provided for in the United policy, that they have incurred, and those that they will incur in defending the underlying litigation.

Dated: 10/4/06

ENTER:

J.S.C.
HON. MARILYN [unclear], JSC

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