

FOREST LABORATORIES, INC., Plaintiff-Appellant,
v.
ARCH INSURANCE COMPANY, ET AL., Defendants,
RSUI INDEMNITY COMPANY, Defendant-Respondent.

11797, 600219/10.

Appellate Division of the Supreme Court of New York, First Department.

Decided April 29, 2014.

Reed Smith LLP, New York (John B. Berringer of counsel), for appellant.

Babchik & Young, LLP, White Plains (Jack Babchik of counsel), for respondent.

Before: Gonzalez, P.J., Tom, Saxe, Freedman, Manzanet-Daniels, JJ.

Order, Supreme Court, New York County (Melvin Schweitzer, J.), entered on or about September 14, 2012, which granted defendant RSUI Indemnity Company's (RSUI) motion to dismiss the complaint made pursuant to CPLR 3211(a) (1) and (7), unanimously affirmed, with costs.

The motion court properly determined that the express terms of RSUI's policy providing excess coverage to plaintiff required the previous layer of excess coverage to be exhausted through actual payment of that policy's limit prior to RSUI being required to pay (see e.g. *JP Morgan Chase & Co. v Indian Harbor Ins. Co.*, 98 AD3d 18 [1st Dept 2012], *lv denied* 20 NY3d 858 [2013]).

We have considered plaintiff's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.