

**New York City Tr. Auth. v McCulloch Orthopaedic
Surgical Servs., PLLC**

2023 NY Slip Op 32577(U)

July 26, 2023

Supreme Court, New York County

Docket Number: Index No. 452229/2020

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES

PART 59

Justice

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NEW YORK CITY TRANSIT AUTHORITY,
Petitioner,

INDEX NO. 452229/2020

MOTION DATE 07/26/2023

MOTION SEQ. NO. 001

- v -

MCCULLOCH ORTHOPAEDIC SURGICAL SERVICES,
PLLC,

DECISION + ORDER ON
MOTION

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 12, 13, 14, 15, 16,
17, 18, 19, 20, 21, 22, 23, 25

were read on this motion to/for VACATE - DECISION/AWARD
ORDER

Upon the foregoing documents, it is

ORDERED that on the petition to vacate and the cross petition
to confirm the master arbitrator's awards dated February 5, 2020
and February 10, 2020, a trial is directed on the issues of policy
exhaustion and priority of payment; and it is further

ORDERED that the Clerk of the General Clerk's Office is
directed to assign this matter to an appropriate Part for trial
upon receipt of a copy of this order with notice of entry and the
filing of a note of issue and a certificate of readiness and the
payment of appropriate fees; and it is further

ORDERED that petitioner shall serve a copy of this order with
notice of entry within thirty (30) days of entry upon the attorneys

for the respondent, and upon the Clerk of the Court and the Clerk of the General Clerk's Office; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website); and it is further

ORDERED that the determination on the petition and cross petition are held in abeyance and shall be made after the hearing on whether the subject policy had been exhausted prior to the underlying arbitration.

DECISION

In Nyack Hosp v General Motors Acceptance Corp, 8 NY3d 294 (2007), the Court of Appeals stated that:

the priority-of-payment regulation came into play on October 20, 2003 when the insurer received the requested hospital records, which established verified claims aggregating more than \$50,000. At that point, the insurer should have paid the hospital ahead of any other unpaid verified claims for services rendered or expenses incurred later than the services billed by the hospital, up to the policy limits.

See Matter of Ameriprise Ins Co v Kensington Radiology Group, PC, 179 AD3d 563 (First Department, 2020), affirming the decision of the Appellate Term, First Department, that affirmed the decision of the Civil Court denying petitioner's motion to vacate the master arbitrator's award and confirming the award, having set the matter

down for a framed hearing on "whether the policy limit was exhausted before petitioner became obligated to pay respondent's claims".

See also Allstate Fire & Casualty Insurance Company v Branch Medical, P.C., 74 Misc3d 134(A), *1 (App Term, First Department, 2022), wherein the Appellate Term, First Department, affirmed the vacatur and denied confirmation of the master arbitrator's award, based upon the frame hearing

on the issue of policy exhaustion. . . [and whether] the policy had been exhausted on [the date of respondent's verified claims] by payments of no-fault benefits to other health care providers. . . before petitioner was obligated to pay the claim at issue here.

Furthermore, as argued by respondent at bar, in a recent decision, the Appellate Division, First Department pronounced:

Country-Wide was not precluded from raising the issue of policy exhaustion before the court, even if it was not before the arbitrators in the underlying arbitration.

Country-Wide submitted an affidavit from its No-Fault Litigation/Arbitration supervisor, attesting that the instant claims file of Refill's assignor, Ms. Rosas, reflects that the policy has been exhausted beyond its \$50,000 limit. The affidavit also contains a ledger reflecting the dates that claims by various medical providers were paid, which exhausted Ms. Rosas' policy. Thus, Country-Wide's submissions showed that the policy was **properly** exhausted prior to the underlying arbitration (see 11 NYCRR 65-3.15).

In the Matter of DTR Country-Wide Insurance Company v Refill Rx Pharmacy, Inc., 212 AD3d 481 (1st Dept 2023) (citation omitted;

emphasis supplied).

Debra A. James

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7/26/2023

DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE