

55 Misc.3d 44, 49 N.Y.S.3d 814, 2017 N.Y. Slip Op. 27097

**\*\*1** Alleviation Medical Services, P.C., as Assignee of Ali Al Rahabi, Respondent,  
v  
Allstate Insurance Company, Appellant.

Supreme Court, Appellate Term, Second Department, 2d, 11th and 13th Judicial Districts  
2015-1847QC  
March 29, 2017

CITE TITLE AS: Alleviation Med. Servs., P.C. v Allstate Ins. Co.

### SUMMARY

Appeal from an order of the Civil Court of the City of New York, Queens County (Terrence C. O'Connor, J.), entered April 1, 2015. The order denied defendant's motion for summary judgment dismissing the complaint.

### HEADNOTE

[Insurance](#)  
[No-Fault Automobile Insurance](#)

Basic Economic Loss—Priority of Payment

In an action by plaintiff provider to recover assigned first-party no-fault benefits, defendant insurer was not entitled to summary judgment on a claim it had denied three years earlier on the ground of lack of medical necessity, notwithstanding that the insurance policy had been exhausted subsequent to the denial of the claim. The word “claims,” as used in [11 NYCRR 65-3.15](#), the priority-of-payment regulation, does not encompass claims that are not yet complete because they have not been fully verified in accordance with [11 NYCRR 65-3.15](#). Here, by denying plaintiff's claim on the ground of lack of medical necessity, defendant implicitly declared that the claim was fully verified. Thus, as fully verified claims are payable in the order they are received, defendant did not establish its entitlement to summary judgment on the ground that it paid other claims, which exhausted the available coverage, after it had denied the earlier claim on the ground of lack of medical necessity.

### RESEARCH REFERENCES

[Am Jur 2d Automobile Insurance §§ 519, 523, 559.](#)

[Couch on Insurance \(3d ed\) § 171:57.](#)

[11 NYCRR 65-3.15.](#)

[NY Jur 2d Insurance §§ 1900, 1916.](#)

### ANNOTATION REFERENCE

See ALR Index under Automobile Insurance; No-Fault Insurance.

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Query: no-fault /s provider & coverage /6 exhaust! & priority

### **\*45 APPEARANCES OF COUNSEL**

*Peter C. Merani, P.C. (Brian Kratenstein of counsel) for appellant.*

*Gary Tsirelman, P.C. (Irena Golodkeyer of counsel) for respondent.*

### **OPINION OF THE COURT**

Memorandum.

Ordered that the order is affirmed, with \$25 costs.

In this action by a provider to recover assigned first-party no-fault benefits, it is undisputed that defendant denied plaintiff's claim on May 10, 2011 on the ground of lack of medical necessity. In May 2014, defendant moved for summary judgment dismissing the complaint on the ground that the amount of available coverage had been exhausted. By order entered April 1, 2015, the Civil Court denied defendant's motion.

At the outset, we note that, although defendant did not deny the claim on the ground that the coverage limits of the insurance policy at issue had been exhausted, this defense is not precluded (*New York & Presbyt. Hosp. v Allstate Ins. Co.*, 12 AD3d 579 [2004]; *Flushing Traditional Acupuncture, P.C. v Infinity Group*, 38 Misc 3d 21 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2012]).

In *Nyack Hosp. v General Motors Acceptance Corp.* (8 NY3d 294 [2007]), the Court of Appeals, noting that no-fault benefits are overdue if not paid within 30 calendar days after receipt of a fully complete claim, held that the word "claims," as used in 11 NYCRR 65-3.15, the priority-of-payment regulation, does not encompass claims that are not yet complete because they have not been fully verified in accordance with 11 NYCRR 65-3.5 (b). In contrast, in the instant case, by denying the claim on May 10, 2011, defendant implicitly declared that the claim at issue was fully verified. As we read *Nyack Hosp.* to hold that fully verified claims are payable in the order they are received (see 11 NYCRR 65-3.8 [b] [3]; 65-3.15; *Nyack Hosp.*, 8 NY3d 294), defendant's argument—that it need not pay the claim at issue because defendant paid other claims after it had denied the instant claim, which subsequent payments exhausted the available coverage—lacks merit (see 11 NYCRR 65-3.15; cf. *Nyack Hosp.*, 8 NY3d 294; but see *Harmonic Physical Therapy, P.C. v Praetorian Ins. Co.*, 47 Misc 3d 137[A], 2015 NY Slip Op 50525[U] [App Term, 1st Dept 2015]). Consequently, defendant \*46 has not established its entitlement to summary judgment dismissing the complaint.

Accordingly, the order is affirmed.

Solomon, J.P., Pesce and Elliot, JJ., concur.

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