At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 19th day of April 2024.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS

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AMERICAN TRANSIT INSURANCE COMPANY,
Plaintiff(s)

-against-

MODERN BROOKLYN MEDICAL PC, A/A/O BEST RODERICK2
Defendant(s)

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Index No: 502079/2023

ORDER

The following e-filed papers read herein:	NYSCEF Nos.:
Notice of Motion/Affirmation in Support/Affidavits Annexed Exhibits Annexed/Reply.....	8-12; 23
Affirmation in Opposition/Affidavits Annexed/Exhibits Annexed.....	19-20

In this matter, Modern Brooklyn Medical PC, A/A/O Best Roderick2 ("Defendant") moves (Motion. Seq. 1) to dismiss American Transit Insurance Company's Complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7). Defendant has opposed the motion.

This action stems from a motor vehicle accident that took place on November 20, 2020. Plaintiff issued a New York insurance policy to non-party Rafa Heskey which was in effect at the time of the accident and included a no-fault endorsement that provided coverage for basic economic loss to any eligible injured person for all necessary medical expenses, lost wages and other expenses resulting from a motor vehicle accident up to the minimum statutory amount of $50,000. Defendant submitted no fault claims to Plaintiff seeking reimbursement for medical services rendered to Best Roderick from November 30, 2020, through April 13, 2021, in the amount of $5,766.34. Defendant initiated arbitration which was decided by Arbitrator Wendy Bishop, Esq. ("Arbitrator Bishop") who issued an award for Defendant in the amount of $5,766.34. Plaintiff then filed for Master Arbitration, wherein Master Arbitrator Alan Barran, Esq. ("Master Arbitrator Barran") upheld the award.

In its complaint, Plaintiff asserts a cause of action for de novo review of the arbitration awards pursuant to CPLR 7511, Insurance Law 5106(c) and 11 NYCRR 65-4.10(h)(1)(ii). Plaintiff asserts that the filing of this de novo action renders the underlying arbitration award unenforceable as the prior proceedings become a nullity and that it is now entitled to a declaration that the decisions rendered by Arbitrator Bishop and Master Arbitrator Barran have no force or effect as a consequence of the court's de novo review.

In support of its motion, Defendant argues that pursuant to both Insurance Law §5106(c) and 11 NYCRR §65-4.10(h), Plaintiff had the option of either: (a) commencing a proceeding to vacate the arbitration award or (b) commencing a trial de novo, and that Plaintiff has failed to sufficiently plead a cause of action for either. Defendant asserts that if Plaintiff is seeking a trial de novo, that Plaintiff's Complaint does not specify what the alleged defenses are that preclude Plaintiff's obligation of paying Defendant's claims, and that Plaintiff has not made any allegations as to any facts that would warrant the vacatur of the arbitration award or for any other relief. Defendant contends that the filing of a proper de novo action renders the underlying arbitration awards a nullity, but that Plaintiff only seeks a determination and not a declaratory judgment and thus is not entitled to it. Alternatively, Defendant states that if Plaintiff's Complaint is for a CPLR 7511 proceeding, Plaintiff's Complaint must be dismissed because Plaintiff has not alleged any of the proper grounds for vacating listed under the statue.

In opposition, Plaintiff argues that this is a de novo action and not a declaratory judgment action. Plaintiff states that Insurance Law 5106(c) and 11 NYCRR 65-4.10(h)(1)(ii) permit it to bring a de novo action in instances where an arbitration award was issued which exceeded $5,000.00. Plaintiff contends that it properly plead that the matter was fully arbitrated for an award greater than the required amount. Furthermore, Plaintiff claims its burden does not require it to establish that the underlying decision was arbitrary and capricious in order to vacate the award, and that the award s effectively vacated upon the filing of the de novo action requiring the bills to now be relitigated.

When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*Leon v. Martinez*, 84 NY2d 83, 87 [1994]; *Skefalidis v China Pagoda NY, Inc.*, 210 A.D. 3d 925 [2d Dept. 2022]); *Oluwo v Sutton*, 206 A.D.3d 750 [2d Dept. 2022]; *Sokol v Leader*, 74 A.D.3d 1180 [2d Dept. 2010]). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (*Eskridge v Diocese of Brooklyn*, 210 A.D.3d 1056 [2d Dept. 2022]; *Zurich American Insurance Company v City of New York*, 176 A.D.3d 1145 [2d Dept. 2019]; *EBC I Inc. v Goldman, Sachs & Co.*, 5 NY3d [2005]).

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the burden never shifts to the non-moving party to rebut a defense asserted by the moving party (*Sokol* at 1181; *Rovello v Orofino Realty Co. Inc.*, 40 NY2d 970 [1976]). CPLR 3211 allows a plaintiff to submit affidavits, but it does not oblige him or her to do so on penalty of dismissal (*Id.*; *Sokol* at 1181). Affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint and such affidavits are not to be examined for the purpose of determining whether there is evidentiary support for the pleading (Id.; *Rovello* at 635; *Nonon* at 827). Thus, a plaintiff will not be penalized because he has not made an evidentiary showing in support of its complaint.

Unlike on a motion for summary judgment, where the court searches the record and assesses the sufficiency of evidence, on a motion to dismiss, the court merely examines the adequacy of the pleadings (*Davis v. Boeheim*, 24 NY3d 262, 268 [2014]). The appropriate test of the sufficiency of a pleading is whether such pleading gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments (*V. Groppa Pools, Inc. v. Massello*, 106 AD3d 722, 723 [2d Dept 2013]; *Moore v Johnson*, 147 AD2d 621 [2d Dept 1989]). In instances where a defendant submits evidentiary material in support of a motion to dismiss, a court is permitted to consider it (*S. P. v Dongbu Ins. Co.*, 174 AD3d 911, 913 [2d Dept 2019]; CPLR 3211[a][7]; CPLR 3211[c]; *Sokol* at 1181). When evidentiary material is considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion has not been converted to one for summary judgment, the criterion then is whether the plaintiff *has* a cause of action, not whether one has been stated, and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate (*see Guggenheimer v. Ginzburg,* 43 NY2d 268 [1977]).

CPLR 7511 provides that a party can file a petition to vacate an arbitration award within ninety days after its delivery to him and that the award shall be vacated if the court finds that the rights of that party were prejudiced by: (i) corruption, fraud or misconduct in procuring the award; or (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made, or by (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 N.Y.3d 471 [2006]; *Tauber v Gross,* 216 A.D.3d 1066 [2d Dept. 2023]; see *Jurcec v Moloney,* 164 A.D.3d 1434 [2d Dept. 2018]). A party seeking to overturn an arbitration award on one or more grounds stated in CPLR 7511(b)(1) bears the burden in establishing a ground for vacatur by clear and convincing evidence [*Tauber* at 1068; *Matter of Denaro v Cruz,* 15 A.D.3d 742 [2d Dept. 2014]; see *Jurcec v Moloney,* 164 A.D.3d 1431 [2d Dept. 2018]).

The award of a master arbitrator in a dispute over a no-fault claim is binding except for the grounds for vacating an award under CPLR 7511 (see Insurance Law 5106[c]; 11 NYCRR 65-4.10[h][1][I]). Where the amount of such master arbitrator's award is five thousand dollars or greater, exclusive of interest and attorney's fees, the insurer or the claimant may institute a court action to adjudicate the dispute de novo (Insurance Law 5106[c]; *Matter of Greenberg*, 70 NY2d 573 [1987]). Additionally, under 11 NYCRR 65-4.10(h)(1)(ii), a decision of a master arbitrator is final and binding except for if the award of the master arbitrator is $5,000.00 or greater, exclusive of interest and attorney's

fees, either party may, in lieu of an article 75 proceeding, institute a court action to adjudicate the dispute de novo. A party who intends to commence an article 75 proceeding or an action to adjudicate a dispute de novo shall follow the applicable procedures as set forth in CPLR article 75. If the party initiating such action is an insurer, payment of all amounts set forth in the master arbitration award which will not be the subject of judicial action or review shall be made prior to the commencement of such action (NYCRR 65-4.10(h)(2).

While Insurance Law 5106[c] and 11 NYCRR 65-4.10(h)(1)(ii) permit de novo adjudication of a no-fault insurance claim where the master arbitrator's award is $5,000 or greater, exclusive of interest and attorney's fees, here Plaintiff merely alleges that an underlying arbitration award was granted by Arbitrator Bishop in the amount of $5,766.34 and affirmed by Master Arbitrator Barran. Plaintiff does not plead sufficient facts which give notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved. For instance, Plaintiff does not allege facts to support why claimant's injuries were not covered by the policy, nor its defenses demonstrating why payment is not owed. Additionally, Plaintiff does not allege nor proffer admissible evidence that Defendant's claims were timely denied and that the denial form included the necessary information to "promptly apprise the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated," (see 11 NYCRR 65-3.4[c][11]; see also *Ability Transmission, Inc. v John's Transmission, Inc.*, 150 AD3d 1056 [2d Dept. 2017]). Moreover, while Defendant does not dispute that an arbitration award was granted, neither party has submitted the underlying decisions, thus the court cannot confirm the monetary amount awarded.

Accordingly, it is hereby,

ORDERED, that Defendant Modern Brooklyn Medical PC, A/A/O Best Roderick's motion to dismiss Plaintiff American Transit Insurance Company's complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7) is granted.

This constitutes the decision and order of the court.

Hon. Ingrid Joseph J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice