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

PRESENT: HON. RONALD A. ZWEIBEL Justice

PART 50Q

0105991/2003

NATIONAL UNION FIRE INSURANCE
vs
GE BETZ INC.

SEQ 4

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for reargue/renew

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying Decision, Order & Judgment.

ENTER:

FILED
AUG 18 2004
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: JUL 31 2004

HON. RONALD A. ZWEIBEL J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50Q

In the Matter of the Arbitration of
Certain Controversies Between
NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PA.

Petitioner, Index Number 105991/03
Decision, Order & Judgment

-and-

GE BETZ, INC., f/k/a BETZDEARBORN INC.
f/k/a BETZ LABORATORIES, INC.,

Respondent.

ZWEIBEL, J.:

Petitioner National Union Fire Insurance Company of Pittsburgh, P.A. moves for leave to renew and reargue this Court's Decision Order and Judgment of July 1, 2003. Petitioner contends in its motion to reargue that this Court overlooked a "controlling authority" when it stayed arbitration between the parties. Petitioner further contends in its motion to renew that respondent has commenced an action in Pennsylvania state court, seeking to resolve the insurance coverage dispute over which respondent's insurance policies cover its liabilities in connection with the Grochocki lawsuit.

Respondent GE Betz, Inc. f/k/a Betz Dearborn Inc. f/k/a Betz Laboratories, Inc. opposes the motion, arguing that the "controlling authority" relied upon by petitioner is inapposite as that case never addressed whether the parties' agreement to arbitrate encompassed the dispute at hand. Respondent further argues that the facts raised by respondent in its Pennsylvania

action were submitted previously to this Court and are not "new." In support, respondent points out that it was this Court's conclusion that the dispute between petitioner and respondent concerned coverage and not the interpretation of the Cash Collateral Agreement that led this Court to stay arbitration in the first instance.

"A motion for reargument is not just a repetitious application by a disappointed lawyer, who feels he ought to have as much further reconsideration as he chooses" (New York Cent. R. Co. v. Banton Corp., 110 N.Y.S. 2d 64, 66 [App. Term 1st Dept. 1952]). Likewise a motion to reargue is not an opportunity "to allow counsel to rehash questions already decided" (Margulis v. Teichman, 127 Misc.2d 168 [N.Y. Surrogate's Ct. 1985]). A motion for reargument is addressed to the discretion of the court and is designed to afford a party an opportunity to demonstrate that the court overlooked, misapprehended or misapplied the law or the facts pertinent to the original motion (CPLR 2221[d][2]; Andrea v. E.I. Du pont de Nemours & Co., 289 A.D.2d 1039, 1040-1041 [4th Dept. 2001]; Foley v. Roche, 68 A.D.2d 558, 567 [1st Dept. 1979]). "Its purpose is not to serve as a vehicle to permit the unsuccessful party to reargue once again the very questions previously decided" (Foley v. Roche, 68 A.D.2d , at 567).

Petitioner asserts that this Court overlooked a controlling authority in the form of Welltech, Inc. v. National Union Fire

Insurance Co. of Pittsburgh, Pa., 299 A.D.2d 228 (1st Dept. 2002), lv. den. 100 N.Y.2d 513 (2003). Petitioner's assertion is belied by the fact that petitioner, a party to both cases, never cited Welltech to this Court, despite having cited a multitude of other cases in support of its motion to compel arbitration and that the court in Welltech never addressed the operative issue in this case, namely, whether the dispute between the parties was arbitrable.

In the instant case, the issue before this Court was whether the dispute between petitioner and respondent is subject to arbitration, pursuant to the Arbitration Clause of the Cash Collateral Agreement. In Welltech, the issue was not whether the parties' dispute was arbitrable but rather whether the arbitration sought by petitioner was time-barred. Indeed, the issue of whether the dispute in Welltech was arbitrable was never addressed by the court because the parties had conceded the issue. The Welltech Court simply held that, absent an express agreement by the parties to be bound by New York law, the case would be governed by the Federal Arbitration Act, under which the time-bar issue would be resolved by the arbitrator, rather than the court. Accordingly, the decision is not controlling, or even relevant, authority.

The Court notes that the Welltech court's decision was guided by the Federal Arbitration Act, under which courts

distinguish between a party's claim that the arbitration agreement at issue does not encompass a particular dispute, which is decided by the court (see e.g. Computer Assoc. Int'l, Inc. v. Com-Tech Assocs., 239 A.D.2d 379 [2nd Dept.], appeal den. 91 N.Y.2d 801 [1997]) and a party's claim that the movant's attempt to seek arbitration is time-barred, which is decided by an arbitrator (see e.g. Cone Mills Corp. v. August F. Nielsen Co., 90 A.D.2d 31, 33 [1st Dept. 1982], app. withdrawn N.Y.2d 763 [1983]).

The Court further notes that the cases it relied upon did in fact deal with whether the parties' dispute was encompassed within an agreement to arbitrate (see e.g. Gerling Global Reins. Corp. v. Home Ins. Co., 302 A.D.2d 118, 124 [1st Dept. 2002], lv. den. 99 N.Y.2d 511 [2003]; Argonaut Ins. Co. v. Travelers Ins. Co., 295 A.D.2d 235, 236 [1st Dept. 2002]). These cases support this Court's holding that the agreement to arbitrate was narrow and did not embrace the dispute over which of respondent's insurance policies covered its liabilities in connection with the Grochocki lawsuit.

Petitioner also claims that this Court overlooked the United States Supreme Court decision in Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S.1, 24-25 [1983], which states that "any doubts concerning the scope of arbitration should be determined in favor of arbitration." However, this Court did not

overlook Moses H. Cone. Rather, this Court had no doubts concerning the scope of arbitration to determine in favor of arbitration. Contrary to petitioner's argument, this Court does not believe there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the underlying contract. Thus, the moving papers fail to show that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court or that the decision is in conflict with the statute, or controlling decision, to which the attention of the court was not drawn, through the neglect or inadvertence of counsel (See Foşdick v. Town of Hempstead, 126 N.Y. 651, 652 [1891]). Since no question decisive of the case has been submitted and overlooked, and since no controlling decision supporting movant's position was before the court when it decided the original motion, no ground for reargument exists. Specifically, Welltech is not controlling and presents no basis upon which this Court may grant reargument of its determination that the dispute between petitioner and respondent is not arbitrable. The motion for leave to reargue is therefore denied.

As to petitioner's argument that this Court misconstrued the arbitration clause, that argument does not provide a proper basis for reargument. Although not raised in its original papers, petitioner now argues that the Arbitration Clause requires arbitration, even if there is no dispute over the interpretation

of the Cash Collateral Agreement. Petitioner now argues that the "key" to understanding the "dispute or difference arising out of the interpretation" out of the Cash Collateral Agreement language is not the word "interpretation" which this Court focuses on, but the word "arising out of the" language which petitioner argues this Court overlooked.

Firstly, a motion for reargument may not be premised on a brand new argument such as petitioner is now raising (see Rubenstein v. Goldman, 225 A.D.2d 328 [1st Dept.0], lv. den. 88 N.Y.2d 815 [1996]; William P. Pahl Equipment Corp. v. Kassis, 182 A.D.2d 22, 27 [1st Dept.], lv. den. 80 N.Y.2d 1005 [1992]; Foley, 68 A.D.2d, at 567-68). Secondly, this Court does not understand how petitioner can argue that the parties' agreement to arbitrate "all disputes or differences arising out of the interpretation of this Agreement..." mandates arbitration "even when 'the' interpretation is not in dispute" (see Petitioner's Mem. at 9; see also Gerling Global, 302 A.D.2d, at 124-26; Argonaut, 295 A.D.2d, 235).

The Court agrees with respondent that the words "arising out of the" simply modify the word "interpretation." The words "arising out of" are "ordinarily understood to mean originating from, incident to or having connection with..." (New Hampshire Ins. Co. v. Jefferson Ins. Co., 213 A.D.2d 325, 330 [1st Dept. 1995]). Thus, the parties agreed to arbitrate only when they had

a dispute or difference "originating from, incident to or having a connection with" the "interpretation" of the Cash Collateral Agreement. As this Court held, absent such an "interpretation" dispute or difference, there was no agreement to arbitrate. Thus, petitioner's new interpretation of the language in the Cash Collateral Agreement does not form the basis for a motion to reargue.

Finally, petitioner rehashes its argument that the various clauses contained in Article I (the "Single Contract Clause") and Article IV (including, the "Reasonably Determine" clause, the "Shall be Bound" clause and the "Follow the Fortunes" clause) of the Cash Collateral Agreement compel arbitration of the parties' dispute. These arguments were previously raised by petitioner and addressed by this Court. Thus, these previously decided arguments do not form the basis for granting a motion to reargue (see Margulis, 127 Misc. 2d, at 168).

With respect to petitioner's attempt to argue that the instant motion is also a motion to renew, this Court notes that a motion to renew is based upon additional material facts which existed at the time the prior motion was made, but which were not made known to the party seeking leave to renew and therefore not made known to the court and which the party seeking to leave to renew could not have known and made known to the court (see Foley v. Roche, 68 A.D.2d, at 568; see also Beiny v. Wynard, 132 A.D.2d

190, 209-10 [1st Dept. 1987], app. dism. 71 N.Y.2d 994 [1988]; Silverman v. Leucadia, Inc., 159 A.D.2d 254, 255 [1st Dept. 1990]). Motions to renew are rarely granted (see Beiny v. Wynard, 132 A.D.2d, at 210). The Court may grant such motions only where there is a valid excuse for the movant's failure to submit these "new" facts at the time if the original motion (see Beiny v. Wynard, 132 A.D.2d, at 210; see also CPLR 2221[e][3]).

In moving to renew, petitioner relies solely on the fact that respondent filed a Complaint in the state court of Pennsylvania after petitioner's motion to compel arbitration was submitted to this Court. Respondent's Pennsylvania Complaint appears to seek resolution of the coverage issue that this Court determined to be non-arbitrable. The factual allegations set forth in respondent's Pennsylvania complaint appear to be the same as those previously presented to this Court. Petitioner does not identify any facts alleged in respondent's Pennsylvania Complaint that were previously unknown by, or unavailable to, petitioner. Respondent states there are no such new facts.

Moreover, under New York law, a motion to renew will not be granted if it is based on a "new" document, unknown to the movant, that merely incorporates facts that were previously raised (see e.g. Orange and Rockland Utilities, Inc. v. Assessor of the Town of Haverstraw, 304 A.D.2d 668, 669-70 [2nd Dept. 2003]; Brooklyn Welding Corp. v. Chin, 236 A.D.2d 392 [2nd Dept.

1997]; Kassis, 182 A.D.2d, at 27). Here, to the extent that the Pennsylvania Complaint is a "new" documents, it incorporates the same facts previously submitted to the Court by respondent. The Court finds that petitioner has failed to identify any new material facts, existing at he time of the Court's previous ruling, of which it was unaware.

Even were this Court to consider the instant motion as one to renew, based on additional material facts not previously before the court, this court would still deny this portion of the motion based on the movant's failure to offer a valid excuse for not submitting the additional facts upon the application (Foley v. Roche, 68 A.D.2d, at 568).

Where, as here, a party files a motion characterized as one to reargue or to renew, but fails to carry its burden of setting forth new facts existing, but unknown, at the time of the previous motion, the court may deem the motion as one solely for reargument (see Reyes v. Ross, 289 A.D.2d 554, 555 [2nd Dept. 2001]; Liberty Mut. Ins. Co. v. General Accident Ins. Co., 277 A.D.2d 981, 982 [4th Dept. 2000]; Kirchoff v. International Harvester Co., 138 A.D.2d 820, 821 [3rd 1988]; State Farm Mut. Auto. Ins. Co. v. Wernick, 90 A.D.2d 519 [2nd Dept. 1982]). Thus, petitioner, having failed to identify any new material facts, existing at the time of the Court's previous ruling, of which it was unaware, the Court deems petitioner's entire motion

a motion to reargue and as such, it is denied.

Accordingly, petitioner's entire motion is deemed to be solely one for leave to reargue and the motion to reargue is denied in its entirety.

This constitutes the Decision, Order and Judgment of this Court.

ENTER:

Hon. Ronald A. Zweibel, J.S.C.

Dated: July 31, 2004