Wilmington Trust Co. v Metropolitan Life Ins. Co.
2008 NY Slip Op 32239(U)
August 4, 2008
Supreme Court, New York County
Docket Number: 0600242/2008
Judge: Richard B. Lowe

[* 1]

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

PRESENT: HON. RICHARD B. LOWE, III PART 56

Index Number : 600242/2008
WILMINGTON TRUST CO.
VS
METROPOLITAN LIFE INS. CO.
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE 5/5/08
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

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

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 8/4/08

HON. RICHARD B. LOWE, III J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 56

----------X

WILMINGTON TRUST COMPANY, as Trustee for ISRAEL DISCOUNT BANK,

Plaintiff,

-against-

Index No. 600242/08

METROPOLITAN LIFE INSURANCE COMPANY and BLACKROCK, INC.,

Defendants.

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RICHARD B. LOWE, III, J.:

This action principally involves a contract dispute between plaintiff Israel Discount Bank (IDB) and defendant Metropolitan Life Insurance Company (MetLife) arising from MetLife's sale of a corporate life insurance policy to IDB. IDB alleges that MetLife refused to reallocate assets that MetLife owned and invested on IDB's behalf, and now sues MetLife for breach of contract and breach of fiduciary duty. IDB has also named BlackRock, Inc. (BlackRock), the sub-advisor of the account in which MetLife invested assets on behalf of IDB, as an additional defendant in the breach of fiduciary duty claim.

Motion Sequence Nos. 001 and 002 are consolidated for disposition, and are disposed of in accordance with this decision. In Motion Sequence No. 001, MetLife moves for an order, pursuant to CPLR 3016 (b), 3211 (a) (1) and 3211 (a) (7), dismissing, with prejudice, all causes of action asserted in the complaint.

In Motion Sequence No. 002, BlackRock moves for an order, pursuant to CPLR 3211 (a) (7), dismissing the complaint as against it.

FACTS

In April 2002, IDB, through plaintiff Wilmington Trust Company, its corporate trustee, purchased from MetLife a Private Placement Group Variable Life policy (the Policy) that provides life insurance coverage on IDB's employees (Complaint, ¶¶ 6-7). IDB pays the premiums on the Policy to MetLife, and is the primary beneficiary under the Policy (id., ¶¶ 5-6). The benefits payable to IDB under the Policy are designed to match or provide partial or total funding for IDB's anticipated liabilities for post-retirement health care or other non-pension benefits (Private Placement Offering Memorandum [PPOM], § I.1 [Complaint, Exh B]).

The Policy allows IDB to allocate net contributions paid to MetLife (also known as policy cash value), less other specified charges, to a Fixed Account, a Variable Account, or a combination of the two (PPOM, § I.1). The Fixed Account is part of MetLife's general account, and provides a guaranteed rate of return on the policy cash value that a policyholder opts to allocate to that account (Policy, § 9.B [Complaint, Exh A]). The Variable Account comprises a number of different commingled, non-guaranteed investment account options called Separate Accounts (PPOM at v, definition 31). Separate Accounts are investment accounts established and maintained by MetLife, separate from MetLife's general account and other separate investment accounts (Policy, § 10.A). MetLife, rather than policyholders like IDB, owns the assets in the Separate Accounts ("[t]he assets allocated to the Separate Accounts are the property of MetLife" [PPOM, § IV.1). The Separate Accounts are used to purchase interests, or units, of what is essentially an underlying mutual fund (Policy, § 10.A; PPOM, §§ I.2; III.2). In addition, the Policy specifies that any "[i]ncome and realized and unrealized gains or losses from assets in the Separate Accounts are credited to or charged against the Separate Accounts without regard to

Metropolitan's other income, gains or losses" (Policy, § 10.A). The Policy further provides that each Separate Account "is established and maintained pursuant to the Insurance Law of the State of New York" (id.).

The PPOM that MetLife issued to IDB describes the private placement product in detail. Among other things, the PPOM states that interests in the Separate Accounts are sold only to sophisticated purchasers known as "accredited investors" under Rule 501 of the Securities Act of 1933 (PPOM, § I.2). The PPOM also describes in detail the investment goals and scope of investments permitted within each of the Separate Accounts (id., § VI).

IDB has the right under the Policy to allocate 100% of its policy cash value to the Fixed Account (Policy, § 11). The Fixed Account provides a Guaranteed Interest Rate of 4% per year (id., § 9.B). IDB rejected this option, and instead chose to allocate 100% of the policy cash value to Separate Account No. 84 – Liquidity Account (Complaint, ¶ 11). After MetLife made a new fund available in August 2002, Separate Account No. 362 – LIBOR Plus Account, IDB opted to reallocate 100% of the cash value of the Policy to the LIBOR Plus Account (id., ¶¶ 12, 13). The investment objective of the LIBOR Plus Account is "to maximize the total return measured in relation to the three-month London Inter Bank Offer Rate (LIBOR)" (id., ¶ 15)

The Investment Guidelines for the LIBOR Plus Account (Complaint, Exhibit D) state that the account value would vary based on the investment experience of the account, and that specific dollar amounts were not guaranteed. The Investment Guidelines also state that in order to meet its investment objective, the LIBOR Plus Account

> will invest primarily in publicly-traded, fixed-income securities such as (but not limited to) U.S. government and agency securities, publicly-traded mortgage-backed and asset-based securities (including CMOs, CDOs, and related "structured" securities),

> Yankee securities, public corporate debt, municipal debt, and cash equivalents ... The Account may also invest in 144A securities and, for portfolio management and hedging purposes, financial futures, listed options on financial futures, and interest rate, credit, and default swaps

(Investment Guidelines, ¶ A; Complaint, ¶ 15). The Investment Guidelines also explained how the value of investment units in the LIBOR Plus Account would be calculated, and informed IDB that, in valuing the units, "[i]f there is no readily available market value for any asset in SA-362, MetLife will, at its discretion, determine the value to be used ... in accordance with any applicable laws and regulations" (id., ¶ B).

In the PPOM, MetLife further advised IDB that "[l]ike other bond investments, the value of mortgage-related securities will tend to rise when interest rates fall, and fall when rates rise. Their value may also change because of changes in the market's perception of the creditworthiness of the organization that issued or guarantees them, or changes in the value of the underlying mortgages" (PPOM § VI.3).

IDB alleges that, on February 23, 2005, it received the Investment Guidelines for the LIBOR Plus Account (Complaint, ¶ 15). IDB further alleges that, thereafter, it received monthly account statements from MetLife, but that those statements did not disclose the underlying investments in the LIBOR Plus Account (id., ¶ 16).

MetLife originally retained State Street Research (State Street) to serve as the sub-advisor to the LIBOR Plus Account (Complaint, ¶ 13). In 2005, BlackRock acquired State Street, and became the sub-advisor for the account (id., ¶ 14). As sub-advisor, BlackRock was responsible for selecting the securities in which the account invested, subject to the investment criteria previously established by MetLife. BlackRock had no responsibility for dealing with

policyholders, or administering their policies (see e.g. PPOM and Investment Guidelines).

Rights under the PPOM include the right to freely transfer funds to and from the different Separate Accounts. Section III.6 of the PPOM states that IDB "may transfer amounts among the Fixed Account or the Separate Accounts up to four times in a Plan Year." Similarly, under Section 14 of the Policy, IDB has the right to "select and to change the allocation of Net Contributions and to transfer the Policy Cash Value between the Fixed Account and the Variable Account." The Variable Account is defined to include the various Separate Accounts.

During the summer of 2007, as the media began reporting on the decline in the world credit markets, the market value of certain securities in the LIBOR Plus Account declined, and the monthly LIBOR Plus Account statements that MetLife sent to IDB also began reporting losses (Complaint, ¶¶ 17-21; see id., Exhs F, G [press articles detailing the credit crisis]). For example, the monthly statements reported a $190,000 loss in July 2007, and a $700,000 loss in August 2007 (id., ¶¶ 17, 18).

On November 14, 2007, IDB mailed MetLife a request to reallocate 25% of the cash value in the Policy to Separate Account No. 87 – Fixed Income Index Account, leaving the balance in the LIBOR Plus Account (id., ¶ 22; Exh E). According to IDB, MetLife declined this request and "for the first time" allegedly told IDB that a "substantial part of the LIBOR Plus Account's assets" – 42% – "had been invested in sub-prime mortgage-backed securities" (id., ¶¶ 23-24). IDB claims that, prior to this disclosure, it "had no reason to suspect that MetLife and/or BlackRock had made significant sub-prime investments in the LIBOR Plus Account" (id., ¶ 27).

The Policy provides that transfers to or from any part of the Variable Account are

subject to several conditions: first, no transfer will be made sooner than 10 business days after the date MetLife receives the written request of transfer (Policy, § 11). Second, transfers to or from a Separate Account are subject to applicable restrictions, such as the one giving MetLife the right to determine the value of assets for which there is no readily available market (id.). Third:

> If in Metropolitan's reasonable judgment any transfer would involve the sale of Separate Account assets for which there is then no readily available market, Metropolitan will defer the withdrawal of all or part of the transfer amount for such period as it deems necessary

(id.).

MetLife received IDB's first mailed reallocation request on November 20, 2007 (Complaint, Exh H, at 3). On December 4, 2007, MetLife responded, advising IDB, among other things, that:

> As we explained to your group at the 11/26 meeting, in accordance with applicable contract provisions, MetLife has not effectuated that request. Since this is a commingled separate account, MetLife needs to assure that all policyholders participating in the same fund are treated in an equitable manner. Accordingly, MetLife is identifying what solutions it can make available to all policyholders invested in this account

(id.).

On the following day, IDB faxed MetLife a second reallocation request in which it requested that 100% of the cash value of the Policy be reallocated to Separate Account No. 84 – Liquidity Account (Complaint, ¶ 30; Exh I). Within 10 business days following IDB's second reallocation request, MetLife advised IDB that it was deferring IDB's request (id., ¶ 30).

IDB claims that as a result of defendants' wrongful conduct, it has sustained

losses in the amount of approximately $2,050,000 (id., ¶ 31). IDB brings two breach of contract claims against MetLife. The first is for MetLife's alleged breach of its contractual obligation to honor IDB's reallocation requests, and the second is for MetLife's alleged breach of its contractual obligation to invest IDB's funds only in "publicly-traded mortgage-backed and asset-backed securities" (id., ¶ 39).

IDB also brings a breach of fiduciary duty claim against both MetLife and BlackRock. IDB claims that MetLife and BlackRock breached their fiduciary duties to IDB "[b]y placing unsuitable sub-prime investments in the LIBOR Plus Account" (id., ¶ 46). IDB also claims "upon information and belief" that MetLife and BlackRock "improperly shifted their own sub-prime exposure and losses to the LIBOR Plus Account" (id., ¶ 47).

DISCUSSION

Although on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), "the pleading is to be afforded a liberal construction," and "the facts as alleged in the complaint [are presumed] as true" (Leon v Martinez, 84 NY2d 83, 87 [1994]; see also Rovello v Orofino Realty Co., 40 NY2d 633 [1976]), "'factual claims [that are] either inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration'" (Mark Hampton, Inc. v Bergreen, 173 AD2d 220, 220 [1st Dept 1991] [citation omitted], appeal denied 80 NY2d 788 [1992]; see also Caniglia v Chicago Tribune-New York News Syndicate Inc., 204 AD2d 233 [1st Dept 1994]).

In order to prevail on a motion to dismiss based upon documentary evidence, the movant must demonstrate that the documentary evidence conclusively refutes the plaintiff's claims (AG Capital Funding Partners, L.P. v State Street Bank and Trust Co., 5 NY3d 582

[2005]). In addition, "[f]actual allegations presumed to be true on a motion pursuant to CPLR 3211 may properly be negated by affidavits and documentary evidence" (Wilhelmina Models, Inc. v Fleisher, 19 AD3d 267, 269 [1st Dept 2005]).

Each of plaintiff's claims for breach of contract and fiduciary duty is legally deficient on its face, and/or contradicted by clear documentary evidence. Accordingly, the complaint fails as a matter of law to state a cause of action for breach or contract or breach of fiduciary duty, and defendants' motion to dismiss the complaint is granted.

Breach of Contract for Failure to Honor Reallocation Request (First Cause of Action)

In its first cause of action for breach of contract, IDB alleges that, "[p]ursuant to the explicit terms of the Policy and the PPOM, Plaintiff had the contractual right to transfer its funds out of the LIBOR Plus Account and into the Liquidity Account, subject only to the restrictions set forth in Section X11.2 of the PPOM and Section 11 of the Policy," which "restrictions do not apply" (Complaint, ¶ 33). IDB further alleges that, by "refusing to honor Plaintiff's reallocation demands, MetLife ... breached its express contractual obligations to Plaintiff" (id., ¶ 34).

The first breach of contract claim fails because IDB has not alleged any damages resulting from MetLife's deferral of its reallocation request, and because IDB has not adequately alleged that the deferral breached any provision of the policy.

A breach of contract claim must be dismissed where a plaintiff has failed to allege damages flowing from the alleged breach (see Arcidiacono v Maizes & Maizes, LLP, 8 AD3d 119, 120 [1st Dept 2004] [plaintiffs' claim for breach of contract was "properly dismissed by reason of their failure to allege any basis for an award of damages, or to plead facts from which

damages attributable to defendants' conduct might be reasonably inferred (citations omitted)"; Gordon v Dino De Laurentiis Corp., 141 AD2d 435, 436 [1st Dept 1988] ["The complaint contains only boilerplate allegations of damage. In the absence of any allegations of fact showing damage, mere allegations of breach of contract are not sufficient to sustain a complaint, and the pleadings must set forth facts showing the damage upon which the action is based"]).

Here, IDB has failed to allege any credible theory of damages resulting from the deferral of its allocation request. All of the losses alleged in the complaint relate to the decrease in value of the LIBOR Plus Account (see Complaint, ¶¶ 17-21, 28, 31, 36, 41, 48). Under the Policy, the PPOM and New York Insurance Law, however, the assets in the LIBOR Plus Account and the other Separate Accounts are the property of MetLife, not IDB (Policy, § 10.A ["Metropolitan owns the assets in the Separate Accounts"]; Ins Law § 4240 [a] [12]["Amounts allocated by the insurer to separate accounts shall be owned by the insurer, (and) the assets therein shall be the property of the insurer"]; see also PPOM, § IV.1 ["The assets allocated to the Separate Accounts are the property of Metropolitan Life"]). Thus, MetLife – not MetLife policyholders like IDB – owns the assets in the Separate Accounts, including the LIBOR Plus Account. The policyholder owns the right to be paid the benefits promised under the contracts, but unless and until the policyholder is denied such benefits, it has suffered no contractual damages.

Here, IDB has owned the Policy for more than five years, during which time the policy cash value has fluctuated. Although the policy cash value is less than it was at its high point, IDB has not alleged that it is no longer invested in the Policy, or that it has not received the Policy benefits to which it is entitled. Moreover, although IDB is entitled to make a partial

cash withdrawal from the Policy, or to discontinue the Policy and receive the net Cash Surrender Value (see Policy, §§ 13, 27), IDB has opted to do neither of these things. Unless and until it does, IDB has "nothing more than an inchoate right to the cash value under the polices" (Senese v Senese, 121 NYS2d 498, 502 [Sup Ct, Kings County 1953] [finding that the insured had no property interest in policies' death benefits or cash surrender values until the insured died or the polices were surrendered]). Simply put, IDB does not own the assets in the LIBOR Plus Account, so that it cannot show that it suffered any damage caused by MetLife's refusal to honor IDB's reallocation request. As the complaint fails to allege any damage to IDB other than damage caused by unrealized losses to MetLife's property, the first cause of action must fail (see Gordon v Dino De Laurentiis Corp., 141 AD2d at 436 ["the complaint is fatally deficient because it does not demonstrate how the defendant's alleged breach ... caused plaintiffs any injury"]; National Cleaning Contractors v Uris 380 Madison Corp., 84 AD2d 718 [1st Dept 1981] [defendant's counterclaim for breach of contract dismissed where it sustained no damages due to alleged breach]).

In response to the dismissal motion, IDB fails to directly address this point, and instead argues that in United States v Bess (357 US 51 [1958]), the Supreme Court overturned the cases cited in Senese v Senese, by holding that an insured does indeed have "'property' or 'rights to property'... in the cash surrender value" (Opp Mem., at 8 [citing Bess, 357 US at 56]). This argument misses the mark.

First, in Bess, the Supreme Court merely interpreted the Internal Revenue Code by holding that the cash surrender value of a life insurance policy falls within the section 3670 definition of "property" or "rights to property" to which federal tax liens may attach (see Bess,

357 US at 56 [an insured has "'rights to property, *within the meaning of § 3670*, in the cash surrender value"]). Thus, the Court did not hold, as IDB's argument implies, that an insured owns a property right in the cash surrender value for any purpose other than the levy by the Government under the federal tax code. As this case does not involve a federal tax lien, IDB's attempt to invoke Bess and its progeny to suggest that it has suffered damages caused by MetLife's alleged breach of contract is misplaced.

Second, Bess did not overturn the line of cases cited in Senese. In fact, the United States Court of Appeals for the Second Circuit held in United States v Home Life Ins. Co., that "[t]he doctrine that [the] insurer possesses no property of [the] insured in cash surrender value prior to surrender was firmly embedded before Bess," and that Bess did "not affect" that line of cases, including the cases cited in Senese (355 F2d 86, 88 [2d Cir 1966] [collecting cases, and reaffirming that cash surrender value "only becomes property when (the) insured performs the condition precedent" (i.e., surrender)]).

Moreover, even if IDB had adequately alleged damages, it fails to allege any breach of contract resulting from MetLife's deferral of IDB's reallocation request.

IDB admits that there are restrictions on transfers to and from the Separate Accounts (Complaint, ¶¶ 10, 33), which include MetLife's authority to defer a reallocation request indefinitely if in MetLife's "reasonable judgment" such a transfer "would involve the sale of Separate Account assets for which there is then no readily available market" (id., ¶ 10). In alleging breach, however, IDB baldly states only that "[t]hose restrictions do not apply" (id., ¶ 33). Although IDB offers no explanation for its conclusory allegation, the documentary evidence in the form of news articles attached to the complaint clearly show that IDB made its

reallocation request at a time of significant financial stress in the credit markets in which the LIBOR Plus Account is invested (see id., ¶ 27; Exhs F and G). These news articles refer to a "current liquidity crisis" that is "much worse" than prior crises (9/17/07 Fortune Article [Complaint, Exh F]); a "severe" credit crisis (10/1/07 FS Reports article [Complaint, Exh F]); and "credit market turmoil [that] is battering the financial sector" (12/5/07 Reuters article). IDB's own allegations, therefore, support MetLife's position that it merely exercised its right under Section11 of the Policy to "defer the withdrawal of all or part of the transfer amount for such period as it deems necessary." IDB's bald allegation that none of the conditions in Section 11 apply is thus insufficient to maintain its claim (see Matter of Omnicom Group Inc. Shareholder Derivative Litig., 43 AD3d 766 [1st Dept 2007] [dismissing plaintiffs' claim where news article adopted by plaintiffs in their complaint was inconsistent with their allegations and just as readily supported opposite conclusion]; see also Garber v Board of Trustees of State Univ. of N.Y., 38 AD3d 833, 834 [2d Dept 2007] ["While the allegations in the complaint are to be accepted as true when considering a motion to dismiss, 'allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (citations omitted)'"]).

Under these circumstances, the court must dismiss the first cause of action for failure to allege a breach of any contractual provision (see e.g. Kraus v Visa Intl. Serv. Assn., 304 AD2d 408, 408 [1st Dept 2003] [granting motion to dismiss breach of contract claim where "plaintiff failed to allege the breach of any particular contractual provision"]).

In opposition to the motion, IDB now attempts to back away from the news articles that it chose to attach to its complaint, and contends that MetLife's argument that it had

the authority to defer IDB's reallocation request "clearly fails on a motion to dismiss which must be decided on the pleadings, not the purported facts" (Opp Mem, at 10). However, the "purported facts" about which IDB complains are all facts within the four corners of the complaint, and its attachments, which are properly considered on this motion (see CPLR 3014 ["A copy of any writing which is attached to a pleading is a part thereof for all purposes"]). Thus, IDB's reliance on cases that found issues of fact that could not be resolved on a motion to dismiss are not relevant here.

IDB also includes in its first cause action a bare allegation that, by deferring IDB's request for reallocation, "MetLife has also breached its implicit covenant of good faith and fair dealing" (Complaint, ¶ 35). However, it is well-settled that a claim for breach of the covenant of good faith and fair dealing cannot survive if it only substitutes for a failed breach of contract claim (see TeeVee Toons, Inc. v Prudential Sec. Credit Corp., LLC, 8 AD3d 134, 134 [1st Dept 2004] [affirming dismissal of claim for breach of the implied covenant of good faith because it was "redundant" of breach of contract claim]; Triton Partners LLC v Prudential Sec. Inc., 301 AD2d 411, 411 [1st Dept 2003] [affirming dismissal of covenant of good faith and fair dealing claim where "it was merely a substitute for a nonviable breach of contract claim"]). As IDB has failed to allege a breach of contract or any damages flowing from such breach, its implied covenant claim based on the same allegations must be dismissed (see Empire State Bldg. Assocs. v Trump, 247 AD2d 214, 214 [1st Dept], lv dismissed in part, denied in part 92 NY2d 885 [1998] ["The causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing were properly dismissed on the grounds that the former fails to adequately allege any breach of contract, and the latter merely duplicates the former"]).

Although IDB suggests that its claim for breach of the implied covenant of good faith can survive dismissal because such a claim "occasionally" can stand on its own, even where a plaintiff has failed to allege a breach of contract (see Opp Mem., at 12-13, citing Gross v Empire Healthchoice Assur., Inc., 16 Misc 3d 1112[A], 2007 NY Slip Op 51390[U] [Sup Ct, NY County 2007]), the court rejects this argument. IDB's claim for breach of the implied covenant is based on one boilerplate allegation that it added to each of its breach of contract allegations (see Complaint, ¶¶ 35, 40), and IDB has not alleged that MetLife breached the covenant by acting "as part of a scheme to realize gains that the contract implicitly denied or to deprive the other party of the fruit of its bargain" when it deferred IDB's reallocation request, as IDB's cases require (see Gross, at *3; Opp Mem., at 12-13). Because IDB has not offered any allegations distinguishing its claim for breach of the implied covenant from its breach of contract claim, its implied covenant claim must fail.

Breach of Contractual Obligation to Invest IDB's Funds Only in "Publicly-Traded Mortgage-Backed and Asset-Backed Securities" (Second Cause of Action)

In its second cause of action, IDB alleges that, "upon information and belief, MetLife improperly invested Plaintiff's funds in securities that are not publicly traded," and in doing so has "flagrantly and willfully breached its express contractual obligation to invest only in 'publicly traded mortgage-backed and asset based securities'" (Complaint, ¶¶ 38-39). IDB, however, has failed to identify any provision of the Policy that imposes that limitation. For this reason alone, plaintiff's second cause of action must be dismissed (see Kraus v Visa Intl. Serv. Assn., 304 AD2d at 408 ["Also properly dismissed for failure to state a cause of action were plaintiff's breach of contract claims since plaintiff failed to allege the breach of any particular contractual provision"]; J&L Am. Enterprises, Ltd. v DSA Direct, LLC, 10 Misc 3d 1076[A],

2006 NY Slip Op 50101[U], * 6 [Sup Ct, NY County 2006] [dismissing claim where allegations were "devoid of any reference to a specific contractual provision that defendant is supposed to have breached"]).

Moreover, IDB's allegation that MetLife had an "express contractual obligation to invest only in 'publicly traded mortgage-backed and asset based securities'" is proven false by the Investment Guidelines cited by IDB in its complaint (Complaint, ¶ 15). In fact, the guidelines for the Account expressly permit investment in securities that are not publicly traded:

> [The LIBOR Plus Account] will invest *primarily* in publicly-traded, fixed income securities such as (but not limited to) U.S. government and agency securities, publicly-traded mortgage-backed and asset-based securities. ... *The Account may also invest in 144A securities*

(Investment Guidelines, ¶ A [emphases supplied]).

IDB contends that whether the term "primarily" means "only" is "a question of fact that cannot be resolved at the pleading stage" (Opp Mem., at 14). However, the common meaning of "primarily" is not "only." Moreover, IDB was on notice that the account could invest in securities that are eligible for purchase or sale pursuant to Rule 144 A of the Securities Act of 1933, which "permits certain qualified institutional buyers, such as the Separate Accounts, to trade *privately placed securities* even though such securities are not registered under the 1933 Act" (PPM, § VI.9 [emphasis supplied]). Thus, contrary to plaintiff's argument, the Investment Guidelines expressly permit investment in securities that are not publicly traded. It is well-settled that where, as here, "the terms of a contract are 'clear, unequivocal and unambiguous, the contract is to be interpreted by its own language'" (Cutler v Ensage, Inc., 18 Misc 3d 1101[A], 2007 NY Slip Op 52373[U], * 4 [Sup Ct, NY County 2007] [dismissing

breach of contract claim that was contradicted by the express terms of unambiguous contract documents (citation omitted)]). Thus, because these guidelines unambiguously permit the LIBOR Plus Account to invest in securities that are not publicly traded, IDB's second cause of action must be dismissed for failure to identify any specific contractual provision that has been breached (see Phillips v American Intl. Group, Inc., 498 F Supp 2d 690, 694 [SD NY 2007] [dismissing cause of action for breach of contract under New York law because the complaint "'does not allege any contractual provision upon which this claim is based'" (quoting Rattenni v Cerreta, 285 AD2d 636, 637 [2d Dept 2001])]).

IDB's failure to adequately allege a breach of contract in its second cause of action renders moot its identical allegation that by "investing Plaintiff's funds in securities that are not publicly traded, MetLife has also breached its implicit covenant of good faith and fair dealing" (Complaint, ¶ 40) (see Skillgames, LLC v Brody, 1 AD3d 247, 252 [1st Dept 2003] ["A claim for breach of the implied covenant of good faith and fair dealing cannot substitute for an unsustainable breach of contract claim"]). Moreover, "an implicit obligation will not be imposed if it is inconsistent with the terms of the governing contract" (TAG 380, LLC v ComMet 380, Inc., 40 AD3d 1, 8 [1st Dept 2007], affd as mod 10 NY3d 507 [2008]). Because the Investment Guidelines for the LIBOR Plus Account clearly contemplate that it may invest in securities that are not publicly traded, IDB's claim for violation of the covenant of good faith and fair dealing cannot be sustained.

Breach of Fiduciary Duty against MetLife and BlackRock (Third Cause of Action)

In its third cause of action for breach of fiduciary duty, IDB alleges that it "placed in MetLife and BlackRock, and MetLife and BlackRock knowingly accepted, Plaintiff's trust

and confidence in managing the LIBOR Plus Account" (Complaint, ¶ 42). This claim fails to states a cause of action against either defendant.

With respect to IDB's claims against MetLife, IDB fails to demonstrate the existence of a fiduciary relationship between MetLife and IDB. The law has been settled in New York for more than a century that there is no fiduciary relationship between a life insurer and its policyholder (Uhlman v New York Life Ins. Co., 109 NY 421 [1888]; Rabouin v Metropolitan Life Ins. Co., 182 Misc 2d 632 [Sup Ct, NY County 1999], affd 282 AD2d 381 [1st Dept 2001]). Rather, the relationship between an insurer and insured is contractual, and the rights and duties of the contracting parties are determined by the terms of the insurance policy (Uhlman v New York Life Ins. Co., 109 NY 421, supra; see also Equitable Life Assur. Socy. of U.S. v Brown, 213 US 25 [1909]). For this reason alone, IDB's claim for breach of fiduciary duty against MetLife must be dismissed (see Rabouin v Metropolitan Life Ins. Co., 182 Misc 2d 632, supra [dismissing policyholder's claim that life insurer breached fiduciary duty by allegedly manipulating pool of assets that insurer bought with insurance premiums]).

In opposition to the motion, IDB contends, relying heavily on a federal court decision (see Dornberger v Metropolitan Life Ins. Co., 961 F Supp 506 [SD NY 1997]), that New York courts do not follow a "per se" rule prohibiting the recognition of a fiduciary relationship in the insurance context. In Dornberger, however, the plaintiff alleged special circumstances from which the court concluded that the relationship between the insured and insurer was "more than a mere arm's-length association" (id. at 546). For example, the plaintiff alleged that the defendant actively "sought out" Americans living in Europe, including the plaintiff's husband, in order to "assuage their concerns," and offer "personalized service"

relating to the special needs of expatriates (id.).

Cases that have considered Dornberger make clear that Dornberger does not change the general rule that, absent unusual circumstances, an insured and insurer do not share a fiduciary relationship (see e.g. Phillips v American Intl. Group, Inc., 498 F Supp 2d at 696 [dismissing breach of fiduciary duty claim where plaintiff "has not alleged any facts suggesting that the relationship between plaintiff and defendants was anything other than arm's-length" and "'offer(s) no reason to depart from the general rule that the relationship between the parties to a contract of insurance is strictly contractual in nature' (citation omitted)"]; Rabouin v Metropolitan Life Ins. Co., 182 Misc 2d at 635 [instances where a fiduciary relationship will be found between insured and insurer "are the exception rather than the rule"]). Likewise, the complaint here does not allege any special facts or circumstances that could give rise to a fiduciary relationship between MetLife and IDB. Indeed, contrary to IDB's contentions, IDB's citation to a page on MetLife's website that discusses MetLife's 2008 advertising campaign in which it refers to itself as a "trusted partner who understands the issues" (see Opp Mem., at 16, n 7) is precisely the type of allegation that courts have held to be insufficient to create a fiduciary relationship (see e.g. Batas v Prudential Ins. Co. of America, 1999 WL 34805946 [Sup Ct, NY County 1999], affd 721 NYS2d 856 [1st Dept 2001] [no fiduciary relationship between insured and insurer based on allegation that relationship of trust arose from insurer's posting of promotional material on its web page in which it touted itself as a "trusted name" in health insurance]).

Equally fatal to IDB's claim is the fact that the assets in the LIBOR Plus Account to which IDB lays claim are the property of MetLife (see Policy, § 10.A; Ins Law § 4240 [a] [12]

["Amounts allocated by the insurer to separate accounts shall be owned by the insurer, the assets therein shall be the property of the insurer, and no insurer by reason of such account shall be or hold itself out to be a trustee"] see also PPOM, § IV.1). Since IDB does not own any of the assets in the LIBOR Plus Account and MetLife is, by statute, not a trustee of such funds, MetLife does not owe IDB any fiduciary duty with respect to how those assets are invested (see Rochester Radiology Assocs., P.C. v Aetna Life Ins. Co., 616 F Supp 985 [WD NY 1985] [dismissing annuity holder's claim for breach of fiduciary duty and refusing to establish constructive trust with respect to insurer's valuation of funds in account from which annuity holder's benefits were to be paid]).

Notwithstanding these clear bars to its claims, IDB alleges in two wholly conclusory paragraphs that it placed its "trust and confidence" in MetLife, and IDB relied on MetLife to manage the LIBOR Plus Account in IDB's best interests (Complaint , ¶¶ 43- 44). However, these types of "[c]onclusory allegations of 'trust and confidence' are insufficient to support a successful claim of a fiduciary relationship" (Muller-Paisner v TIAA, 446 F Supp 2d 221, 231 [SD NY 2006] [finding no fiduciary relationship under New York law between a retired teacher and the insurance company from which she bought a life annuity contract]). Where, as here, plaintiff – a sophisticated commercial bank that is an accredited investor – engaged in an arm's-length business transaction with MetLife that is reflected in a lengthy and detailed contract, IDB's two conclusory allegations offer no basis to find a fiduciary relationship (Uhlman v New York Life Ins. Co., 109 NY 421, supra; see also Equitable Life Assur. Soc. of the U.S. v Brown, 213 US 25, supra).

With respect to IDB's claims against BlackRock, IDB fails to plead the existence

of a fiduciary duty to BlackRock by IDB. "It is ... clear that to maintain a cause of action for breach of fiduciary duty, the existence of a duty is essential" (Marmelstein v Kehillat New Hempstead, 45 AD3d 33, 36 [1st Dept 2007], affd ___ NY3d ___, 2008 WL 2510623 [2008] [dismissing complaint under CPLR 3211 (a) (7) for failure to state a cause of action for breach of fiduciary duty]; see also Cutler v Ensage, Inc., 18 Misc 3d 1101[A] at *7 [dismissing breach of fiduciary duty claim under CPLR 3211 (a) (7) because "(i)n the absence of an(y) allegations sufficient to demonstrate a fiduciary relationship or any relationship approaching privity between the parties, no claim of fiduciary duty will arise"]). "Before courts can infer and superimpose" a fiduciary duty, "the contract and relationship of the parties must be plumbed" (Northeast Gen. Corp. v Wellington Adv., Inc., 82 NY2d 158, 162 [1993] [refusing to impose fiduciary relationship where plaintiff contracted to act as a finder to introduce potential purchasers to defendant because the contract "contains no cognizable fiduciary terms or relationship"])

Here, the complaint does not allege any contract between IDB and BlackRock that would give rise to a fiduciary relationship. Indeed, IDB fails to identify a single instance of direct contact between IDB and BlackRock. Rather, IDB merely alleges that it placed in BlackRock, and that BlackRock "knowingly accepted," IDB's "trust and confidence in managing the LIBOR Plus Account" and that BlackRock had "full knowledge" of IDB's reliance on BlackRock to act in IDB's best interest (Complaint, ¶¶ 43-44). Yet IDB does not provide any facts describing when, where or how IDB ever communicated with BlackRock, let alone "placed" its trust in BlackRock, or how BlackRock "knowingly accepted such trust." Nor does IDB explain how it could have been entrusting BlackRock to manage assets that IDB did not even own. IDB's "bare legal conclusion" of a fiduciary relationship, unsupported by any facts

whatsoever, fails to satisfy the strict pleading requirements under CPLR 3016 (b), which requires that "the circumstance constituting the wrong shall be stated in detail" (see e.g. Hyman v New York Stock Exch., Inc., 46 AD3d 335, 337 [1st Dept 2007] [motion to dismiss breach of fiduciary duty cause of action should have been granted because the plaintiff's "bare allegations ... fail(ed) to satisfy the pleading requirements of CPLR 3016 (b)"]; DeRaffele v 210-220-230 Owners Corp., 33 AD3d 752, 752 [2d Dept 2006], lv denied 8 NY3d 814 [2007] [breach of fiduciary duty claim properly dismissed for making only "conclusory allegations" and failing to allege "sufficient specific facts" as required by CPLR 3016 (b)]).

IDB also argues that a fiduciary duty arose because both MetLife and BlackRock had "complete investment discretion with respect to the LIBOR Plus Account" (Complaint, ¶ 44). The complaint itself contradicts this allegation. Far from having "complete investment discretion" over that account, MetLife and BlackRock's management of that Account was and is constrained by the Investment Guidelines which IDB attached to the complaint (Complaint, ¶ 15, and Exhs B and D). Those investment objectives and guidelines were contractual terms which existed prior to BlackRock's service as sub-advisor to the LIBOR Plus Account, and IDB freely chose to accept those objectives, guidelines and risks when it made its investment decision. Those contractual guidelines do not create any fiduciary duty between BlackRock and IDB.

IDB's breach of fiduciary duty claim is also barred because it is duplicative of the breach of contract claims. IDB has alleged no factual basis for recovery under its fiduciary duty claim other than that MetLife allegedly failed to keep its promises under the Policy. Therefore, IDB's claim is redundant of its breach of contract claims and must be dismissed (Gassman v Metropolitan Life Ins. Co., 18 Misc 3d 1112[A], 2007 NY Slip Op 52503[U], * 3 [Sup Ct,

Nassau County 2007] [cause of action for breach of fiduciary duty "which is merely duplicative of a breach of contract claim will not stand"]; see e.g. AG Capital Funding Partners, L.P. v State Street Bank and Trust Co., 40 AD3d 392, 394 [1st Dept 2007], affd as mod NY3d___, 2008 WL 2510628 [2008] [affirming dismissal of breach of fiduciary duty claim as "essentially duplicative of the claims for breach of contract"]; Kaminsky v FSP Inc., 5 AD3d 251, 252 [1st Dept 2004] [breach of fiduciary duty claim properly dismissed where it "fails to allege conduct by defendants in breach of a duty other than, and independent of, that contractually established between the parties and is thus duplicative"]).

IDB alleges that MetLife "fail[ed] to disclose its actual investments in the LIBOR Plus Account and fail[ed] to explain its refusal to honor Plaintiff's reallocation demands" (Complaint, ¶ 45); "plac[ed] unsuitable sub-prime investments in the LIBOR Plus Account" (id., ¶ 46); and "improperly shifted [its] own sub-prime exposure and losses to the LIBOR Plus Account" (id., ¶ 47). None of these allegations refers to matters that are extraneous or collateral to obligations under the Policy. Indeed, the Policy documents specify the reports to be provided to the policyholder (Policy, § 24), the investment guidelines for the LIBOR Plus Account (Complaint, Exh D), and the operation of the Separate Accounts (Policy, § 10.A). In short, everything of which IDB complains is governed by the parties' contract.

Moreover, IDB has not alleged that it sustained any damages for which a breach of contract claim would not provide complete recovery. In fact, IDB alleges that it suffered exactly the same damages in its breach of fiduciary duty claim as it did in each of its two breach of contract claims. Since all of IDB's allegations in support of its breach of fiduciary duty claim are governed by and disposed by the terms of the contract between MetLife and IDB, IDB's

fiduciary duty claim must be dismissed (see R.H. Damon & Co. v Softkey Software Prods., Inc., 811 F Supp 986 [SD NY 1993] [dismissing with prejudice plaintiff's tort claims as redundant to contract claims where no facts were alleged that were extraneous and collateral to the breach of contract claim]).

The court has considered the remaining claims, and finds them to be without merit.

Accordingly, it is

ORDERED that the motion of defendant Metropolitan Life Insurance Company to dismiss the complaint as against it (Motion Sequence No. 001) is granted and the complaint is dismissed with costs and disbursements to defendant Metropolitan Life Insurance Company as taxed by the Clerk of the Court; and it is further

ORDERED that the motion of defendant BlackRock, Inc. to dismiss the complaint as against it (Motion Sequence No. 002) is granted and the complaint is dismissed with costs and disbursements to defendant BlackRock, Inc. as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: August 4, 2008

ENTER:

HON. [illegible] D. LOWE, III

J.S.C.