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

PRESENT: _____ PART 56

Justice

Index Number : 600242/2008

WILMINGTON TRUST CO.

VS.

METROPOLITAN LIFE INS. CO.

SEQUENCE NUMBER : 003

RENEWAL

INDEX NO. _____

MOTION DATE 10/20/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

FILED

FEB 06 2009

COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 2/3/09

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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.

----------X

RICHARD B. LOWE, III, J.:

This action involves a contract dispute between plaintiff Wilmington Trust Company, as trustee for Israel Discount Bank (IDB) and defendant Metropolitan Life Insurance Company (MetLife) arising from MetLife's sale of a corporate life insurance policy to IDB (the Policy). The Policy allowed IDB to allocate net contributions paid to MetLife, less other specified charges, to a number of different commingled, non-guaranteed investment account options called Separate Accounts. After MetLife made the LIBOR Plus Account available in August 2002, IDB opted to allocated 100% of the cash value of the Policy to the LIBOR Plus Account. IDB alleges that MetLife refused to reallocate assets from the LIBOR Plus Account to a different Separate Account, and asserts causes of action for breach of contract (Count I and Count II) and breach of fiduciary duty (Count III).

By decision and order dated August 4, 2008 (the Decision), this court granted MetLife's motion to dismiss all three counts of the complaint.

IDB now moves, pursuant to CPLR 2221, for leave to renew and reargue its opposition to MetLife's motion to dismiss the complaint with respect to Count I of complaint. IDB also moves, pursuant to CPLR 3025, for leave to amend the complaint in the event that the

court grants IDB's motion for reargument and renewal.

For the reasons set forth below, IDB's motion is denied.

The general facts of this matter were previously discussed in the Decision, and shall not be repeated here, except to the extent necessary to decide this motion.

On February 29, 2008, MetLife moved to dismiss the entire complaint with prejudice. With respect to the first count for breach of contract, MetLife made two arguments that are relevant to this motion: (1) IDB failed to identify any damages caused by MetLife's deferral of its reallocation request in December 2007 because MetLife, not IDB, owned the assets in the LIBOR Plus Account in which IDB's Policy cash value was invested; and (2) IDB did not adequately allege the breach of any provision of the Policy because its allegation that MetLife's deferral of IDB's reallocation request did not fall into any of the exceptions permitted under section 11 of the Policy, particularly the exception involving 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," was contradicted by numerous press articles that IDB annexed to its complaint (*see* MetLife Moving Mem., at 7-10 [Aff. of Kathryn C. Ellsworth, Exh B]).

In its opposition to MetLife's motion to dismiss the first count, which IDB served on March 21, 2008, IDB offered no response to the statutory and Policy language that MetLife quoted that showed that IDB did not own the assets in the LIBOR Plus Account at the time it made its reallocation request. Instead, IDB argued that it had properly alleged damages because it held a property interest in the Policy cash value under Supreme Court case law. It also argued that it had properly alleged that MetLife's deferral of the reallocation request breached the

Policy because MetLife allegedly had not invoked any of the exceptions listed in the Policy to MetLife's obligation to honor reallocation requests. Finally, in response to MetLife's argument concerning the contradictory press articles, IDB argued that, even if MetLife had explicitly asserted the readily available market exception under section 11 of the Policy, whether there was a readily available market for the LIBOR Plus assets at the time of the reallocation request was a question of fact that could not be properly decided on a motion to dismiss (IDB Opp Mem., at 8-11 [Ellsworth Aff., Exh C]).

MetLife served its reply on March 28, 2008. In its reply, MetLife reiterated that the materials attached to the complaint supported the conclusion that MetLife had exercised its undisputed right under the Policy to defer IDB's reallocation request when MetLife judged that a transfer would involve the sale of assets for which there was then no readily available market. Under those circumstances, MetLife argued, IDB's unsupported allegation that the deferral was not based on that exception was insufficient to maintain the claim of breach (MetLife Reply Mem., at 6 [Ellsworth Aff., Exh D]).

The court heard oral argument on the motion on May 5, 2008. At that time, IDB had already written a letter requesting the Maximum Partial Cash Withdrawal from the Policy and giving notice of its request to discontinue the Policy as of July 1, 2008 (*see* Proposed Amended Complaint, Exh I]). IDB did not fax its letter, which was dated May 2, 2008, to MetLife until May 5, 2008, while the court was hearing argument on the motion to dismiss.

On August 4, 2008, the court granted MetLife's motion to dismiss the complaint with prejudice in a detailed opinion. The court dismissed the first count of the complaint, for breach of contract, on two grounds: (1) the complaint failed to allege any damage to IDB

resulting from MetLife's alleged breach of contract because IDB did not "own" the assets in the Separate Accounts, prior to liquidation; and (2) the complaint failed to allege breach of any contractual provision resulting from MetLife's deferral of IDB's request for reallocation of cash value in the Policy from the LIBOR Plus Account to another Separate Account, because there were exceptions under the policy with respect to MetLife's obligation to reallocate.

IDB seeks leave to renew its opposition to MetLife's motion to dismiss the first count of the complaint on the ground that new facts have developed since the motion was heard that allegedly enable IDB to now claim the same damages that it failed to adequately allege before.

A motion for renewal is made to draw to the court's attention "material facts which, although extant at the time of the original motion, were not then known to the party seeking renewal and, consequently, were not placed before the court" (*Matter of Weinberg*, 132 AD2d 190, 209-210 [1st Dept 1987], *lv dismissed* 71 NY2d 994 [1988]; *see* CPLR 2221 [e]; *Matter of Orange & Rockland Util., v Assessor of Town of Haverstraw*, 304 AD2d 668, 669 [2d Dept 2003] [motion to renew "must be based upon new or additional facts which, although in existence at the time of the original motion, were not made known the party seeking renewal, and therefore, were not known to the court"]). A key requirement of CPLR 2221 (e) is that the "new" facts raised on the motion to renew must have been in existence at the time of the original motion (*Matter of Weinberg*, 132 AD2d at 210 ["renewal affords parties an additional opportunity to insure that the record as its exists at the conclusion of proceedings in the motion court is complete and reflects their efforts to include within it everything they deem necessary and proper to support their respective positions"]; *see also Johnson v Marquez*, 2 AD3d 786 [2d

Dept 2003]; *Emerging Vision, Inc. v Main Place Opt., Inc.*, 11 Misc 3d 1057(A), 2006 NY Slip Op 50261[U] [Sup Ct, Nassau County 2006]).

For instance, in *Emerging Vision*, the plaintiff franchisor moved to renew a prior motion based on the "new" facts that the defendants, former franchisees, had, since the plaintiff's initial motion for a preliminary injunction, opened a non-franchised retail store that the plaintiff believed should have been enjoined under the original injunction issued by the court. The court held that "[the plaintiff's] motion is not based upon facts that existed when this Court heard and decided the prior motion. This motion is based upon events and facts that took place after the court heard the prior motion and issued its [] order." The court concluded that "[s]ince this motion is not based upon facts that existed but were not provided to the Court when deciding the prior motion, renewal must be denied" (11 Misc 3d 1057(A) at * 4); *see also Johnson v Marquez*, 2 AD3d at 789 [denying motion for leave to renew where the plaintiffs "improperly relied on facts not in existence at the time of the original motion"]).

In support of the motion to renew, IDB contends that, "after MetLife's motion to dismiss was fully submitted to this court (but before the Decision was rendered)," in its letter to MetLife dated May 2, 2008, "IDB discontinued its policy with MetLife and sought the return of the Policy's 'Cash Surrender Value' to which it was contractually entitled" (IDB Mem., at 2). IDB asserts that thus, "the policy has now been discontinued, and therefore, IDB's loss has been realized, mooting the court's first ground for dismissal" (*id.*). In making this argument, IDB specifically concedes that all of the "new" facts upon which it bases its motion took place after the motion was fully submitted (*see id; see also* IDB Mem., at 11 [("a)fter the motion was motion was fully submitted, IDB did exactly what the Court ultimately suggested and ownership

of the assets in the Separate Accounts has now shifted back to IDB"]). Under these circumstances, IDB's motion for leave to renew must be denied, as IDB is improperly relying on facts that were not in existence at the time of the original motion (*see Johnson v Marquez*, 2 AD3d 786, *supra*; *Emerging Vision, Inc. v Main Place Opt., Inc.*, 11 Misc 3d 1057(A), *supra*).

In any event, IDB offers no justification for having failed to bring the "new facts" of its letter of May 2, 2008 to the Court's attention at the time of the original motion (*see Matter of Weinberg*, 132 AD2d at 210 ["Renewal is granted sparingly, and only in cases where there exists a valid excuse for failing to submit the additional facts on the original application"]; *see also Miller v Fein*, 269 AD2d 371 [2d Dept], *lv dismissed* 95 NY2d 887 [2000]). Accordingly, the motion to renew must be denied (*see* CPLR 2221 [e] [3]; *Interpublic Group of Cos., Inc. v National Union Fire Ins. Co. of Pittsburgh, Pa*, 8 AD3d 169 [1st Dept 2004]; *Aviles v San Rafael Cooperativa de Ahorro y Credito*, 7 AD3d 431 [1st Dept], *lv dismissed* 4 NY3d 739 [2004]).

Moreover, even if the court were to conclude that the "new facts" that occurred after the prior motion was fully submitted could provide a proper basis for renewal, none of those facts supports reconsideration of the court's dismissal of Count I of the complaint because the outcome of MetLife's prior motion would be the same.

In the Decision, the Court held that the complaint failed to allege damages to IDB caused by MetLife's alleged breach:

> [A]lthough 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 policies" (*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

> policies 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 435, 436 [1st Dept 1988] ["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]).

Decision, at 9-10. As this quoted language makes clear, a key element of the court's holding was that the damages IDB alleged in the complaint - the decline in value of the LIBOR Plus Account between June and December 2007 – were simply "unrealized losses to MetLife's property," so IDB could maintain no claim to those losses as damage to itself.

Even if the court were to consider the new facts IDB alleged occurred after the motion was submitted and heard, the facts underlying the court's decision to dismiss the first count of the complaint have not changed. IDB alleged that MetLife breached the Policy in late November and early December 2007 by refusing to honor IDB's reallocation request, and seeks to allege the identical breach in its proposed amended complaint (*see* Complaint, ¶¶ 22, 29-30; Proposed Amended Complaint, ¶¶ 18, 24-25). But, as noted in the Decision, at the time of the alleged breach, IDB did not own the assets in the LIBOR Plus Account, had not opted to discontinue the Policy, and had not opted to request Maximum Partial Cash Withdrawal from the Policy. Therefore, IDB's later requests for cash withdrawal and discontinuance of the Policy cannot related back to create an ownership interest in the LIBOR Plus assets as of the time of the alleged breach. Thus, the cases cited in the Decision for this point, *Gordon v Dino De Laurentiis*

Corp. (141 AD2d 435, *supra*) and *National Cleaning Contractors v Uris 380 Madison Corp.* (84 AD2d 718, *supra*), would require the same result of dismissal, even if IDB's "new facts" had existed and been in front of the court when it decided the original motion. Because the result would be the same even if the court were to consider the facts that IDB alleged have occurred since the prior motion, IDB's motion to renew must denied (*see Kaufman v Kunis*, 14 AD3d 542 [2d Dept 2005]; *Herrera v Matlin*, 4 AD3d 139 [1st Dept 2004]).

IDB also seeks leave to reargue the court's holding that IDB failed to allege a breach of a provision of the Policy on the ground that the court misapprehended both the facts and the law before it. IDB contends that this court misconstrued the basis upon which MetLife rejected IDB's reallocation requests when IDB made those requests. IDB argues that, although there were certain exceptions to MetLife's obligation to honor such requests in the Policy, MetLife did not invoke any of those exceptions, but rather impermissibly refused to honor the reallocation requests for reasons not set forth in the Policy

A motion for reargument is addressed to the sound discretion of the trial court, and may be granted upon a showing that the court overlooked or misapprehended the facts or law, or misapplied any controlling principle of law (*McGill v Goldman*, 261 AD2d 593 [2d Dept 1999]; *Opton Handler Gottlieb Feiler Landau & Hirsch v Patel*, 203 AD2d 72 [1st Dept 1994]). It is not designed to provide the unsuccessful party with successive opportunities to argue once again the very issues previously decided (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 [1st Dept], *lv dismissed in part, denied in part* 80 NY2d 1005 [1992]; *Matter of Bliss v Jaffin*, 176 AD2d 106 [1st Dept 1991]), or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558 [1st Dept 1979]).

IDB's motion for reargument is denied. IDB fails to demonstrate that the court overlooked or misapplied any controlling principle of law in granting the dismissal motions (see CPLR 2221 [d] [2]; *Daluise v Sottile*, 15 AD3d 609 [2d Dept 2005]; *Matter of Armstead v Morgan Guar. Trust Co. of N.Y.*, 13 AD3d 294 [1st Dept 2004]). Rather, IDB's papers merely restate the same arguments that were already considered and rejected in the Decision, or set forth new arguments that are not appropriate for resolution on reargument.

For instance, IDB once again argues, as it did in its original opposition papers, that the readily available market exception under section 11 of the Policy was not applicable. Thus, IDB merely repeats and rehashes the same argument that was originally presented and rejected on the prior motion, which is insufficient to grant a motion for reargument (*see Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971 [1st Dept 1984]; *Foley v Roche*, 68 AD2d 558, *supra; see e.g. O'Kelly v North Fork Bank*, 2008 WL 3243826, 2008 NY Slip Op 32153[U], * 7 [Sup Ct, Nassau County 2008] [denying motion for reargument of opposition to motion to dismiss the plaintiffs' claims where "the same arguments advanced in support of reargument were made by the plaintiffs in support of their original cross motion, considered by the Court and rejected in a detailed decision"]).

IDB also raises the new argument that the news articles that it submitted with its complaint "in no way dispositively establish that there was no market in which to liquidate [the LIBOR Plus] assets" (*see* IDB Mem., at 14). This argument, however, is completely devoid of merit, as a motion for reargument is not a vehicle for parties to "advance arguments different from those tendered on the original application" and "may not be employed as a device for the unsuccessful party to assume a different position inconsistent with that taken on the original

motion" (*Foley v Roche*, 68 AD2d at 568; *see e.g. Pryor v Commonwealth Land Title Ins. Co.*, 17 AD3d 434, 436 [2d Dept 2005] [denying motion for leave to reargue on ground that such motion "does not offer an unsuccessful party, as here, successive opportunities to present arguments not previously advanced"]; *DeSoignies v Cornasesk House Tenants' Corp.*, 21 AD3d 715 [1st Dept 2005] [same]). Moreover, IDB offers no reasons why this argument was not raised in its original motion papers (*see Matter of Hua Nan Commercial Bank v Albicocco*, 270 AD2d 265 [2d Dept 2000]).

Accordingly, IDB's motion for renewal and reargument is denied. As such, IDB's motion for leave to file an amended complaint is also denied.

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

Accordingly, it is

ORDERED that plaintiff's motion for leave to renew and reargue, and for leave to amend the complaint, is denied.

Dated: February 2, 2009

J.S.C.