

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re:

SETTLEMENT FACILITY
DOW CORNING TRUST MATTER
LIEN APPEAL

Case No. [REDACTED]

[REDACTED]

Honorable Denise Page Hood

Appellant,

v.

HUMMER LAW OFFICES,

Appellee.

_____ /

MEMORANDUM OPINION AND ORDER
REGARDING [REDACTED] LIEN APPEAL

I. BACKGROUND

This matter is before the Court on an appeal filed by Claimant [REDACTED] from the Lien Judge's decision awarding Claimant's former counsel, Hummer Law Offices ("Hummer"), attorney fees against Claimant's Rupture Claim award, in addition to expenses in the amount of \$500.00. Documents and briefs have been filed by Claimant and Hummer. Although Claimant requested a hearing via telephone, the Court finds that the facts and legal arguments submitted by the parties are adequately presented in their papers and the decisional process would not be significantly aided by oral argument. Bankr. R. 8012; Fed. R. Civ. P. 78(b).

Hummer asserted a lien with the Settlement Facility-Dow Corning Trust ("SF-DCT") for attorney fees on Claimant's Rupture Claim and \$500.00 for expenses against any settlement funds to be received by Claimant from the SF-DCT. Claimant objected to the lien before the SF-

DCT. The Lien Judge, Frank Andrews, issued his decision on March 21, 2008 finding that the Hummer lien was valid as to the Rupture Claim and should be honored by the SF-DCT. (Hummer Resp. Ex. C) On April 3, 2008, Claimant filed a letter with the Court appealing the Lien Judge's decision. ([REDACTED] Appeal) On May 6, 2008, Hummer filed a response to the Claimant's appeal arguing that the Lien Judge's decision should be upheld. Claimant submitted various letters and documents in support of her position.

II. ANALYSIS

A. Jurisdiction/Standard of Review

The Court has subject matter jurisdiction over the post-confirmation lien appeal pursuant to 28 U.S.C. § 1334(b) because the Lien Judge's decision could conceivably have an effect on the estate being administered in bankruptcy. *See In re Wolverine Radio Co.*, 930 F.2d 1132, 1141 (6th Cir. 1991); *Browning v. Levy*, 283 F.3d 761, 773 (6th Cir. 2002). The Court retains jurisdiction to interpret and enforce confirmed plans of reorganization. *See In re Thickstun Bros. Equip. Co., Inc.*, 344 B.R. 515, 522 (6th Cir. B.A.P. 2006); *In re Beta Int'l, Inc.*, 210 B.R. 279, 284 (E.D. Mich. 1996). The Amended Joint Plan of Reorganization ("Plan") provides that the Court has the authority to resolve controversies and disputes regarding the interpretation of the Plan and Plan Documents, which includes the Settlement Facility and Fund Distribution Agreement ("SFA") *See* Amended Joint Plan, § 8.7.3; SFA, §§ 4.01 and 10.09. The Court reviews *de novo* the Lien Judge's findings of fact and conclusions of law. 28 U.S.C. § 157(c)(1).

The June 30, 2005 Amended Stipulation and Order Establishing Procedures for the Review of Asserted Liens Against Settling Implant Claimants ("Lien Review Procedures") provide that a "party may appeal the decision of the Lien Judge by filing a Notice of Appeal with the District Court within 14 days of the date of the notice from the SF-DCT providing the

decision of the Lien Judge.” (Lien Review Procedures, § 7.01) Claimant timely filed her Notice of Appeal.

B. Lien Judge’s Decision

The Lien Judge found that Hummer undertook representation of Claimant in April 2004 and continued the representation until February 5, 2007. (Lien Judge’s Decision, p. 1) The Lien Judge further found that although there is a dispute between Hummer and the Claimant as to the amount and value of the services rendered, and issues involving communication between the office and the Claimant, Hummer was highly instrumental in securing acceptable Proof of Manufacturer of the Claimant’s breast implants, which is the initial step in documenting a claim. (*Id.*) The Lien Judge concluded that without the assistance of Hummer, the Claimant would not have had her explant and rupture claims approved. (*Id.*) The Lien Judge noted that the only claims ripe for payment are for explant, for which no attorney fees may be awarded, and the rupture claim in the amount of \$20,000.00. (*Id.*) Liens asserted by Hummer against any future claims, if approved, will be resolved by the Lien Judge when the payments become ripe. (*Id.*, p. 2)

As to the Class 9 claim for a TMJ and sub-malar implants, the Lien Judge indicated that these claims were settled pursuant to an Expedited Release which does not fall under the Lien Judge’s jurisdiction. (*Id.*, p. 2)

Claimant argues that Hummer was not highly instrumental in securing acceptable Proof of Manufacturer. Claimant asserts that Hummer was unresponsive and did nothing without prompting which caused a delay of at least 14 months. Claimant states that if she had handled her claim on her own, it would have been complete over one year earlier and that Hummer was the majority of the problem and not an essential part of the solution. Claimant argues that

Hummer was guilty of legal malfeasance as to the Class 9 claim because it recommended and expedited release and failed to pursue a case worth over \$100,000.00.¹ Claimant seeks to return the \$1,000 she received from the Class 9 Expedited Release program so that Claimant may pursue her Class 9 claim before the SF-DCT.

In response, Hummer claims that at the time it undertook representation of the Claimant in April 2004, Claimant was given accurate information on both the Dow Corning and the Revised Settlement Programs ("RSP"). At that time, Hummer states that Claimant did not have any documentation identifying the manufacturer of the implants. Hummer filed the Claimant's registrations before the SF-DCT and the RSP. Hummer asserts that it spent substantial time and expenses attempting to document the Claimant's Class 5 Proof of Manufacturer and her Class 9 Proof of Manufacturer. Hummer states that it spent considerable time explaining to the Claimant the Class 9 Dow Corning settlement and the necessary documentation to bring successful Class 9 claim. As to the Class 5 breast implant claims, Hummer advised Claimant that for proper identification, her implants should be removed. Hummer provided Claimant with the name of a knowledgeable, board-certified surgeon for the removal of her breast implants and secured the assistance of an international breast implant identification expert. Hummer argues that as a direct result of the removal and the expert identification, Hummer obtained bilateral implant identification and rupture evidence, compiled, organized and prepared the necessary medical records to file a successful Class 5 Explant and Rupture claims. The Claimant eventually

¹ Payments for Class 9 Claims "Other Products" range from \$1,000.00 (expedited release payment) to \$10,000.00 (TMJ implant with enhanced payment), depending on the evidence submitted by a claimant to support a particular Class 9 Claim. (Annex A, § 6.03(e) to (h)).

obtained acceptable Proof of Class 5 Manufacturer, Explant Claim compensation, Rupture Claim compensation and has now become eligible for Disease Claim Review.

Hummer states that its offices communicated almost exclusively with ██████████, Claimant's husband regarding the status of Claimant's claims. Hummer claims it promptly contacted and answered any questions from ██████████ and ██████████. Hummer urges the Court to uphold the Lien Judge's decision as there is no abuse of discretion in the Lien Judge's findings.

The Lien Review Procedures apply to disputes between claimants who have been determined to be eligible and have been paid by the SF-DCT and persons or entities who assert the right to receive a portion of the payments to the claimants from the SF-DCT. (Lien Review Procedures, § 1.01) Section 6.05 of the Lien Review Procedures provide that all expenses incurred and sought to be recovered must be reasonable in relation to the work performed and the result obtained. (Lien Review Procedures, § 6.05) Allowable expenses incurred by an attorney who is an Alleged Lienholder are set forth in the Claimant Information Guide for Class 5 Breast Implant Claims and the Agreed Order Adopting Q&A's Regarding Article IX of Annex A, The Claims Resolution Procedures, July 22, 2004. (Lien Review Procedures, § 6.05)

"In interpreting a confirmed plan courts use contract principles, since the plan is effectively a new contract between the debtor and its creditors." *In re Dow Corning Corporation*, 456 F.3d 668, 676 (6th Cir. 2006); 11 U.S.C. § 1141(a). "An agreed order, like a consent decree, is in the nature of a contract, and the interpretation of its terms presents a question of contract interpretation." *City of Covington v. Covington Landing, Ltd. P'ship*, 71 F.3d 1221, 1227 (6th Cir. 1995). A court construing an order consistent with the parties' agreement does not exceed its power. *Id.* at 1228.

Upon a *de novo* review of the Lien Judge's decision and the documents submitted by the parties, the Court agrees with the Lien Judge that Hummer is entitled to the attorney fees (set forth in Annex A, § 9.01(a) of the Plan (10 % of the first \$10,000 paid to the Claimant; 22.5% of the next \$40,000; and 30% in excess of \$50,000)) for the Rupture Claim in addition to expenses in the amount of \$500.00. The Lien Judge did not err in finding that Hummer secured the necessary documentation to support and acceptable Proof of Manufacturer. As a result of Hummer's services, the explant and rupture claims were approved. The documentation submitted by both parties support the Lien Judge's finding that Hummer performed services on behalf of Claimant before the SF-DCT. Although Claimant believes that there was delay in the payment of her Rupture Claim, because the Explant and Rupture Claims were eventually approved, Hummer is entitled to attorney fees for presenting an acceptable Proof of Manufacturer. The Claimant may have successfully submitted adequate documentation to the SF-DCT to support her claims if she were to have filed the claims without the assistance of any law firm. However, given that Hummer did represent Claimant and the record indicates Hummer communicated with Claimant, her husband and SF-DCT, the Claimant's belief is speculation at this juncture of the process.

As to the Class 9 Expedited Release settlement, Claimant has shown no provision in the Plan or on the signed release that allows Claimant to return any payments made under the settlement. The Court's review of the Plan also does not reveal any provisions which would allow the Claimant to return any payments from any settlement after a release has been signed.

III. CONCLUSION

For the reasons set forth above, the Court finds that Hummer is entitled to be paid for the attorney fees set forth in Annex A, § 9.01(a) of the Plan in connection with the Claimant's

approved Rupture Claim in addition to expenses in the amount of \$500.00, which lien must be honored by the SF-DCT. The Lien Judge will resolve any further attorney fee liens related to Claimant's claims, if approved, currently pending before the SF-DCT.

Accordingly,

IT IS ORDERED that Lien Appeal, Case No. 08-11672, is DENIED and DISMISSED. The Lien Judge's Decision is AFFIRMED.

IT IS FURTHER ORDERED that the Motion to Dismiss for an untimely filing of a Reply Brief and/or Strike the Reply Brief filed by Appellee (Doc. No. 5, filed 6/20/2008) is DENIED, the Court having considered Claimant's Reply Brief.

/s/ Denise Page Hood
DENISE PAGE HOOD
United States District Judge

DATED: March 30, 2009

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on this date, March 30, 2009, by electronic means and/or first class U.S. mail.

S/Sakne Srour
Deputy Clerk