NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 08-1633

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: MARLENE CLARK-JAMES, Debtor, ---------- MARLENE CLARK-JAMES, Appellant, v. SETTLEMENT FACILITY DOW CORNING TRUST, et al., Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

O R D E R

Before: KENNEDY, ROGERS, and SUTTON, Circuit Judges.

Marlene Clark-James, an Illinois resident, appeals a district court judgment dismissing her complaint filed pursuant to 28 U.S.C. § 1331, the federal question statute. Clark-James has filed a motion to proceed on appeal in forma pauperis. This case has been referred to a panel of the Court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Clark-James is a breast implant rupture claimant before the Settlement Facility-Dow Corning Trust ("SF-DCT") pursuant to the Amended Joint Plan of Reorganization in the Dow Corning Corporation bankruptcy action. The documents submitted by Ms. Clark-James indicate that she received breast implants on February 2, 1979. The implants were removed on October 3, 1996.

Clark-James submitted a rupture claim to the SF-DCT, which was preliminarily reviewed by the SF-DCT staff. Clark-James did not submit any documentation indicating that she sought review of her rupture claim through the error correction and appeals processes. She also did not show that she elected a review under the Individual Review Process provided by the Amended Joint Plan of Reorganization ("the Plan").

On January 11, 2007, Clark-James filed a complaint in the United States District Court for the Eastern District of Michigan alleging that: 1) the SF-DCT failed to operate as a trusted agent in securing and upholding the integrity of the process by sharing Clark-James's confidential information with Dow Corning; 2) the SF-DCT continues to ignore the post-operative report of the explanting physician along with his written statement explaining his findings to support her rupture claim; and 3) the SF-DCT continues to operate with frivolous delays despite having available proof of rupture. Clark-James sought the following relief: punitive damages in the amount of $300,000; the removal of the SF-DCT chief administrative team; installation of a new administrative team to be comprised of professionals from the Claimants Advisory Committee, Plaintiffs Liaison Counsel, and the Dow Corning Liaison Unit; release to all claimants of their entire file; for the SF-DCT to accept as proof of her rupture claim the medical documentation she has submitted, including the MRI taken before the surgery; that the court assign a monitor to be present and review all claims; that the SF-DCT no longer refer to Clark-James's original pathology report since it has been established that it is flawed; and for the SF-DCT to accept as proof of her rupture claim the medical documentation submitted prior to surgery.

On February 5, 2007, Dow Corning filed a motion to dismiss the complaint pursuant to the Settlement Facility and Fund Distribution Agreement ("SFA"), Annex A, Section 8.05 and Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Clark-James responded, and Dow Corning filed a reply. On April 5, 2007, Clark-James filed a Request for Clerk's Entry of Default, which was denied by the Clerk because a motion to dismiss had been filed. *See* Fed. R. Civ. P. 55(a).

Thereafter, Clark-James filed an 80-page amended complaint which essentially raised the same arguments as the original complaint, in addition to further arguments opposing Dow Corning's

motion to dismiss. In the amended complaint, Clark-James sought damages in the amount of $400,000,000.00 and requested that this matter be forwarded to the United States Attorney General and the Board of Ethics for investigation of the SF-DCT and Dow Corning's violations of her privacy rights.

The district court granted the defendant's motion to dismiss and dismissed the complaint for failure to state a claim upon which relief may be granted. This appeal followed.

We review de novo a district court's decision to dismiss a suit under Rule 12(b)(6). *Kottmyer v. Maas*, 436 F.3d 684, 688 (6th Cir. 2006). The complaint should be construed in a light most favorable to the plaintiff, accepting all the factual allegations as true. *Id.* The Supreme Court has recently announced that a reviewing court must now apply the "accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007). Although a pro se litigant is entitled to a liberal construction of his pleadings and filings, this court's standard of review requires more than the bare assertion of legal conclusions and the complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory. *See Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005); *Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 361 (6th Cir. 2001); *Boswell v. Mayer*, 169 F.3d 384, 387 (6th Cir. 1999).

The district court properly dismissed Clark-James's complaint. Clark-James essentially seeks a review of the SF-DCT's determination that she has not submitted sufficient proof to show that her implants had ruptured. But the Plan provides no right to appeal to the district court, except to resolve controversies regarding the interpretation and implementation of the Plan and associated documents.

Moreover, the Plan is clear as to the requirement to show rupture. To show proof of a rupture, a claimant who was explanted after January 1, 1992, and before the Effective Date of the Plan, "must submit a *contemporaneous* operative report and, if available, a pathology report together with a statement as to whether the ruptured implants have been preserved and, if so, the name and address of the custodian." Clark-James sought an order from the district court for the SF-DCT to

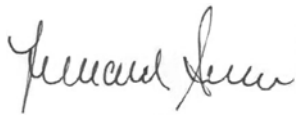
consider the medical reports, including the MRI taken before the explant surgery, as proof of rupture. However, the Plan clearly provides that a contemporaneous operative report and/or a pathology report must be submitted to show rupture. The Plan does not provide that medical reports prior to the explant surgery be considered as proof of rupture. Again, the district court had no authority to modify the Plan, equitable or otherwise, to provide that a medical report prior to the explant surgery be considered as proof of rupture.

The district court properly dismissed Clark-James's violation of privacy claims. The Plan provides that "Reorganized Dow Corning will also review, at the request of the Claims Office and/or the Claims Assistance Program, Proof of Manufacturer submissions that do not meet the standard for acceptable proof." Thus, Dow Corning and the SF-DCT are allowed to share such information under the Plan. In any event, Clark-James has not alleged that either Dow Corning or the SF-DCT shared the information outside of the Plan process. Also, Clark-James made her medical information public when she submitted her medical information to the district court as attachments to her complaints.

Finally, the district court properly dismissed Clark-James's remaining claims regarding the relief requested for the reasons stated by that court.

Accordingly, the motion for pauper status is granted for the limited purpose of this appeal, and the district court's judgment is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT



Leonard Green
Clerk

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Re: Case No. 08-1633*, In re: Marlene Clark-James, et al v. Settlement Facility Dow Cornin, et al*
Originating Case No. : 07-10191

Dear Sir or Madam,

The Court issued the enclosed (Order/Opinion) today in this case.

Sincerely yours,

s/Roy G. Ford
Case Manager
Direct Dial No. 513-564-7016
Fax No. 513-564-7096

cc: Mr. David J. Weaver

Enclosure

Mandate to issue