APPENDIX TABLE OF CONTENTS

APPENDIX A | App. 1

FILED
Aug 13, 2024
KELLY L STEPHENS, Clerk

No. 23-1913

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SOL M. LEINER,

Plaintiff-Appellant,

v.

DOW, INC., et al.,

Defendants-Appellees.

ORDER

Before: GRIFFIN, KETHLEDGE, and NALBANDIAN, Circuit Judges.

Sol M. Leiner has filed a petition for rehearing of this court's order of July 8, 2024, affirming the district court's judgment dismissing his product-liability suit.

Upon consideration, this panel concludes that it did not misapprehend or overlook any point of law or fact when it issued its order. See Fed. R. App. P. 40(a)(2).

We therefore **DENY** the petition for rehearing.

ENTERED BY ORDER OF THE COURT

[written signature]
Kelly L. Stephens, Clerk

FILED
Jul 8, 2024
KELLY L STEPHENS, Clerk

NOT RECOMMENDED FOR PUBLICATION

No. 23-1913

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SOL M. LEINER, Plaintiff-Appellant, v. DOW, INC.; DOW CHEMICAL COMPANY; DOW SILICONES CORPORATION, Defendants-Appellees.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

ORDER

Before: GRIFFIN, KETHLEDGE, and NALBANDIAN, Circuit Judges.

Sol M. Leiner, proceeding pro se, appeals the district court's dismissal of his product-liability action. Certain defendants have filed a motion to reconsider this court's order allowing Leiner to file a

supplemental reply brief, and they also move to file a sur-reply brief. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. See Fed. R. App. P. 34(a). For the following reasons, we affirm.

Leiner initially sued Orentreich Medical Group, LLP, and the Estate of Norman Orentreich ("the Orentreich defendants"), and Dow Inc., the Dow Chemical Company, and Dow Silicones Corporation ("the Dow defendants"), in New York state court. He sought damages for injuries that he suffered when Dr. Norman Orentreich treated his acne scars by injecting him with medical-grade fluid silicone allegedly manufactured and sold by the Dow defendants. Leiner alleged that he received the injections in December 1982 but only discovered his injuries when he underwent a biopsy on December 28, 2020. The Dow defendants removed the case to federal court, and

Leiner filed an amended complaint based on the same facts that he alleged in state court. The District Court for the Eastern District of New York remanded Leiner's claims against the Orentreich defendants to state court and transferred his claims against the Dow defendants to the District Court for the Eastern District of Michigan "pursuant to the bankruptcy plan" for Dow Coming Corporation.

The Dow defendants moved to dismiss Leiner's complaint. Leiner filed a response in opposition and a second amended complaint. The district court granted the motion to dismiss,[1] finding that an Amended Joint Plan of Reorganization ("the Reorganization Plan") entered in Dow Coming Corporation's Chapter 11 bankruptcy proceeding released the Dow defendants from liability for Leiner's claims. It also found that

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[1] Although the district court did not explicitly determine which complaint was the operative pleading, it held all claims alleged in each of Leiner's complaint and amended complaints fail.

Leiner could not sue Dow Inc. because that entity did not exist until 2019, well after Leiner was injured. The district court alternatively found that Leiner's claims against the Dow defendants were barred by New York's three-year statute of limitations for personal-injury claims.

On appeal, Leiner argues that the district court erred in finding that his claims are covered by the Reorganization Plan. First, he contends that the Dow defendants are not released from liability because he alleged fraudulent concealment and "willful and malicious injury" and because personal-injury claims are not "debts" that can be discharged through bankruptcy. Second, he contends that claims arising from the injection of medical-grade silicone are not covered by section 1.164 of the Reorganization Plan, which governs silicone materials claims. Leiner also challenges the district court's holding that his claims

are barred by New York's statute of limitations, but we need not address that argument, because we find that Leiner has not shown that the district court erred by concluding that the Reorganization Plan releases Dow Chemical Company and Dow Silicones Corporation from liability and that Dow Inc. is not a proper defendant.

We review de novo the district court's dismissal of Leiner's complaint for failure to state a claim. Lawrence v. Welch, 531 F.3d 364, 372 (6th Cir. 2008). To avoid dismissal, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*,550 U.S. 544, 570 (2007)).

In 1995, prompted by a wave of lawsuits related to breast implants that it had manufactured, Dow

Coming Corporation[2] petitioned for reorganization under Chapter 11 of the Bankruptcy Code. See In re Settlement Facility Dow Corning Tr., 628 F.3d 769, 771 (6th Cir. 2010). The Reorganization Plan, which took effect in 2004, established two separate entities: the Settlement Facility-Dow Coming Trust and the Litigation Facility. See In re Settlement Facility Dow Corning Tr., 592 F. App'x 473, 475-76 (6th Cir. 2015). The Settlement Facility handled settlements with personal injury claimants who opted into the settlement program, while the Litigation Facility administered and defended against claims brought by personal injury claimants who opted out of the settlement program. See id. The Reorganization Plan also includes a provision releasing Dow Coming

[2] Dow Coming Company became Dow Silicones Corporation in February 2018. *See In re Settlement Facility Dow Corning Tr.*, 760 F. App'x 406, 407 n.1 (6th Cir. 2019).

Corporation from liability. We conclude that this release covers Leiner's claims.

First, Leiner argues that his claims are not covered by the release because he alleges fraudulent concealment and willful and malicious injury, and because his personal-injury claims are not "debts." But the Reorganization Plan releases "the Debtor" from liability for "asserted or unasserted, . . . legal or equitable, [and] known or unknown . . . Other Products Claims" arising from "any conduct of the Debtor prior to the Confirmation Date." "Other Products Claims" include "the failure to warn, disclose or provide information concerning, the alleged fraud or misrepresentation regarding, or the failure to take remedial action with respect to, the Other Products," as well as claims for "punitive damages." And "Other Products" include "silicone or silicone-containing products, . . . including . . . fluids."

Second, although malpractice claims "are not affected by the releases," the Reorganization Plan states that the term "'Malpractice Claim' shall have the meaning given to that term by applicable non-bankruptcy law," with some exceptions that are not applicable here. A malpractice claim is a claim that alleges "[a]n instance of negligence or incompetence on the part of a professional." Black's Law Dictionary (11th ed. 2019). The only professional that Leiner named as a defendant is Dr. Orentreich, and Leiner's claims against Dr. Orentreich's estate were remanded to state court.

Third, Leiner argues that his claims are not "silicone material claim[s]," as defined by section 1.164 of the Plan. Even if that is true, Leiner's claims qualify as "Other Products Claims" for reasons discussed previously, and those claims are subject to the release provision in the Reorganization Plan.

Finally, we note that Leiner argues for the first time in his reply brief that, although Dow Inc. did not exist until 2019, it should be held "LIABLE for the Liability of Dow Chemical Company and . . . Dow Silicones Corp." under the "successor liability rule," because it is "a holding Company, with Control of both Companies." Although we generally do not address arguments raised for the first time in a reply brief, see *United States v. Allen*, 93 F.4th 350, 360 n.5 (6th Cir. 2024), we note that this argument is unavailing because Leiner has not shown that the district court erred in concluding that the Reorganization Plan releases Dow Chemical Company and Dow Silicones Corporation from liability. Dow Inc. therefore cannot be held liable merely because it "controls" those companies.

For the foregoing reasons, we **GRANT** the Dow defendants' motion to file a sur-reply brief, accept the

proposed sur-reply for filing, **DENY** as moot the Dow defendants' motion to reconsider the order allowing Leiner to file a supplemental reply brief, and **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

[written signature]
Kelly L. Stephens, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-1913

SOL M. LEINER,

Plaintiff-Appellant,

v.

DOW, INC.; DOW CHEMICAL COMPANY; DOW SILICONES CORPORATION,

Defendants-Appellees.

Before: GRIFFIN, KETHLEDGE, and NALBANDIAN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

[written signature]
Kelly L. Stephens, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SOL M. LEINER,

Plaintiff, **(FILED SEPT. 29, 2023)**

v.

Case No. 22-13058

DOW INC., THE DOW CHEMICAL COMPANY, and DOW SILICONES CORPORATION,

Honorable Denise Page Hood

Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS (#5), DENYING PLAINTIFF'S MOTION TO DISMISS (#16), GRANTING MOTION FOR LEAVE TO FILE MEMORANDUM (#18) AND DISMISSING ACTION

I. BACKGROUND

On December 16, 2022, this action was transferred to this District from the United States

District Court, Eastern District of New York. (ECF No. 1) On July 12, 2022, Plaintiff Sol M. Leiner filed a summons, and thereafter a complaint, before the New York Supreme Court, Queens County, on July 12, 2022 and October 12, 2022, respectively, against Orentreich Medical Group, LLP, Estate of Norman Orentreich, Dow, Inc., The Dow Chemical Company and Dow Silicones Corporation (collectively, "Dow Defendants"). (ECF No. 1, PageID.9-.15; PageID.17-.45) The Dow Defendants removed the matter to federal court, in the Eastern District of New York. Leiner filed an Amended Complaint on November 2, 2022. (ECF No. 2) Following a December 6, 2022 conference with the court, the claims against the Dow Defendants were transferred to this Court, and the remaining state law claims were remanded to the New York state court.

Leiner was treated by Dr. Norman Orentreich by injection of liquid injectable silicone to eliminate acne scars on December 29, 1982. (ECF No. 2, PageID.174-175) Leiner alleges that the Dow Defendants and/or Dr. Orentreich's office developed and manufactured the silicone used in the injection. (*Id.* at PageID.179-180, .191) Leiner claims that as a result of these injections, he suffered injuries that left him severely injured, permanently disfigured and requiring ongoing treatment. (*Id.* PageID.177) Leiner claims he learned of his injuries on December 28, 2020 after undergoing a biopsy. (*Id.* at PageID.182) This suit followed alleging strict products liability, negligence, failure to warn, and res ipsa loquitur. (Id. at PageID.179-.187)

This matter is now before the Court on the Dow Defendants' Motion to Dismiss filed on December 29, 2022. (ECF No. 5) Leiner filed a Response to the

Motion, along with a Re-Amended Complaint on January 10, 2023. (ECF Nos. 8, 9) A reply was filed by the Dow Defendants on January 24, 2023. (ECF No. 11) Leiner thereafter filed a Motion to Dismiss Defendant's Defective Motion on February 22, 2023, which was responded to by the Dow Defendants on March 7, 2023. (ECF Nos. 16, 17) A virtual hearing was held on the matter.

II. ANALYSIS

A. Standard of Review

When deciding a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court must "construe the complaint in the light most favorable to plaintiff and accept all allegations as true." *Keys v. Humana, Inc.*, 684 F.3d 605, 608 (6th Cir. 2012). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is

plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation omitted); see also *Bell All. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (concluding that a plausible claim need not contain "detailed factual allegations," but it must contain more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action"). Facial plausibility is established "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. The court primarily considers the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint may also be taken into account; *Amini v. Oberlin College*, 259 F.3d 493, 502 (6th Cir. 2001). Federal courts hold the *pro se* complaint to a "less stringent standard" than those

drafted by attorneys. *Haines v. Kerner*, 404 U.S. 519 (1972). However, pro se litigants are not excused from failing to follow basic procedural requirements. *Jourdan v. Jabe*, 951 F.2d 108, 110 (6th Cir. 1991); *Brock v. Hendershott*, 840 F.2d 339, 343 (6th Cir. 1988).

B. Dow Silicones (f/k/a Dow Corning) Bankruptcy Discharge

The Dow Defendants argue that all claims against Dow Silicones, f/k/a Dow Coming Corporation, are barred because Dow Silicones' debts arising before the date of the confirmation were discharged before the bankruptcy action. Leiner responds that the discharge did not include medical grade liquid silicone claims and also did not discharge claims of fraudulent concealment and/or willful and malicious injury.

The Amended Joint Plan of Reorganization ("Plan") in the Dow Coming Corporation ("Dow

Coming") bankruptcy action governs this matter. In Re Dow Corning Corp., Case No. 95-20512 (E.D. Mich. Bankr.). The Plan was confirmed in 1999 and became effective on June 1, 2004. Section 8.7 of the Amended Plan of Reorganization states that this Court retains jurisdiction to resolve controversies and disputes regarding the interpretation and implementation of the Plan and the Plan Documents, including the Settlement Facility and Fund Distribution Agreement ("SFA"), and, to enter orders regarding the Plan and Plan Documents. (Plan, §§ 8.7.3, 8.7.4, 8.7.5)

Generally, the provisions of a confirmed plan bind the debtor and any creditor. 11 U.S.C. § 1141(a); *In re Adkins*, 425 F.3d296, 302 (6th Cir. 2005). Section 1127(b) is the sole means for modification of a confirmed plan which provides that the proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before

substantial consummation of the plan. 11 U.S.C. § 1127(b). "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.

A bankruptcy court's confirmation of a reorganization plan discharges the debtor from any debt that arose before the date of the confirmation, regardless of whether proof of the debt is filed, the claim is disallowed, or the plan is accepted by the

claim's holder. 11 U.S.C. § 1141(d)(1)(A). A "claim" includes any "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured[.]" 11 U.S.C. § 101(5)(A).

The Plan in the Dow Coming bankruptcy action provided that the debtor "shall be discharged from and its liability shall be extinguished completely in respect of any Claim . . . whether reduced to judgment or not, liquidated, or unliquidated, contingent or noncontingent, asserted or unasserted, fixed or not, matured or unmatured, disputed or undisputed, legal or equitable, known or unknown, that arose . . . from any conduct of the Debtor prior to the Confirmation Date . . . (ECF No. 5, Ex. A Plan § 8.1.)

Leiner's claims against Dow Silicones arise from conduct that allegedly occurred in 1982, years

before the Plan was confirmed on November 30, 1999. This Court finds that any claims alleged by Leiner in his Complaint and his subsequent Amended Complaints against Dow Silicones were discharged under the Plan and must be dismissed. The discharge includes the medical grade liquid silicone alleged by Leiner because he claims that this silicone injured him, and, as such are "Products Liability Claims" under the Plan. The discharge also includes "Unmanifested Claims" which is defined as a "Personal Injury Claim of a Claimant who, as of the Effective Date, has not suffered any injury alleged to have been caused, in whole or in part, by a product of the Debtor." (Plan, § 1.176) The Court finds that Leiner's discovery of his claim after a December 22, 2020, biopsy could be considered an "Unmanifested Claim," which was discharged under the Plan. This Court has ruled that Dow Silicones is "discharged and,

essentially released from the various claims against it." *In re Dow Corning Corp.*, 255 B.R. 445, 475-76 (E.D. Mich. 2000), affd and remanded, 280 F.3d 648 (6th Cir. 2002).

C. The Plan's Release and Injunction Provisions

The Dow Defendants also argue that Leiner's claims against them are dismissed because they are barred by the release in Section 8.3 of the Plan. Leiner responds that he requires discovery on this issue.

Section 8.3 of the Plan (the "release provision") provides that personal-injury claims against various parties are deemed waived and released upon the effective date of the confirmation of the Plan. Section 8.4 (the "injunction provision") provides that holders of the claims are enjoined from commencing or continuing any action seeking to enforce their claims against the Released Parties, including the Debtor-

Affiliated Parties (the Debtor, the Reorganized Debtor, the Joint Ventures and Subsidiaries, and their respective Representatives), the Shareholder-Affiliated Parties (the Shareholders and their past and present Affiliates and their Representatives), the Settling Insurers, the Settling Physicians, and the Settling Health Care Providers. Amended Joint Plan, §§ 8.3, 8.4.

There is no need for discovery on this issue because the Plan expressly sets forth the parties who are subject to the release provision, including the Debtor, the Reorganized Debtor, the subsidiaries, and the Shareholders and their past and present Affiliates. Here, Dow Silicones is the new name of the Reorganized Debtor. Dow Inc. and Dow Chemical Company are the Shareholders and/or the present Affiliated Parties. This Court has found that the "the Plan Proponents have established that the release

Additional material from this filing is available in the Clerk's Office.