

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DIET DRUGS (PHENTERMINE/)
FENFLURAMINE/DEXFENFLURAMINE)) MDL NO. 1203
PRODUCTS LIABILITY LITIGATION)
_____))
MARY ELLEN RIXEY)
)
v.)
)
7TH AMENDMENT AND WYETH CORP.) CIVIL ACTION NO. 06-05651

MEMORANDUM AND PRETRIAL ORDER NO.

Bartle, C.J.

October 5, 2007

Before this court are two motions concerning the above-captioned action. The first is the motion of defendant Wyeth to dismiss the complaint of plaintiff Mary Ellen Rixey ("Rixey" or "plaintiff").¹ The second motion by Class Counsel on behalf of the Seventh Amendment Fund Administrator ("Fund Administrator") is one for summary judgment or, in the alternative, to dismiss the same complaint.

Rixey, a class member under the Diet Drug Nationwide Class Action Settlement Agreement ("Settlement Agreement"), seeks damages under the Seventh Amendment to the Settlement Agreement ("Seventh Amendment") and against Wyeth for alleged fraudulent conduct in the processing of her claim. This court approved the Settlement Agreement in Pretrial Order ("PTO") No. 1415 (Aug. 28, 2000) and the Seventh Amendment in PTO No. 4567 (Mar. 15, 2005)

1. Rixey is pro se.

as part of our continuing jurisdiction over the terms of the Settlement Agreement. See Settlement Agreement § VIII.B.1.

On May 29, 2002, Rixey submitted a signed Blue Form to the Trust to register her claim for Matrix Compensation Benefits.² In her Blue Form, Rixey claimed that she had severe mitral valve regurgitation.³ When the Seventh Amendment was approved by this court on March 15, 2005, Rixey was provided with an opportunity to opt out of the Seventh Amendment. She declined to do so and was classified as a Category One Class Member. See Seventh Amendment § III.A.1. In July 2005, Rixey submitted to the Fund Administrator the "proof requirements" demanded of Category One Class Members under the Seventh Amendment.⁴ See id. § XV.B. One of the "proof requirements" that must be submitted to the Fund Administrator is a "Relevant Echocardiogram Tape or Disk." Id. § XV.B.2. The "Relevant Echocardiogram Tape or Disk" is the only echocardiogram submitted by the Fund Administrator for medical review. Id. § XV.M. The "Relevant Echocardiogram Tape or Disk" submitted by Rixey was dated April 17, 2003.

2. The various forms used in the course of implementing the Settlement Agreement are commonly identified by their color.

3. Mitral valve regurgitation is one of the medical conditions that entitles class members to benefits under the Settlement Agreement and Seventh Amendment. See Settlement Agreement § IV.B. and Seventh Amendment § VII.

4. The Fund Administrator oversees the processing of Seventh Amendment claims. In PTO No. 6875, this court approved the procedures the Fund Administrator utilizes when assessing and making a determination regarding a Category One Class Member's claim. See PTO No. 6875 (Jan. 23, 2007).

Thereafter, based on an initial medical review of her claim, the Fund Administrator determined that Rixey had moderate mitral regurgitation. In addition, the Fund Administrator found that claimant had a rheumatic valve which reduced her claim and that her age at first diagnosis was 73.⁵

Dissatisfied with the Fund Administrator's findings, Rixey filed a "Petition to Return Claimant's Case to AHP Trust from Review by 7th Amendment," hereinafter "Petition." In her Petition, Rixey cited two deficiencies in the Fund Administrator's findings: her age of diagnosis and the diagnosis of rheumatic heart disease. Wyeth filed a response in which it erroneously stated that the Fund Administrator had found that Rixey had severe mitral regurgitation instead of moderate mitral regurgitation. In response to Wyeth's misstatement, Rixey filed the present complaint against the Seventh Amendment and Wyeth.⁶

Rixey's complaint alleges that the Fund Administrator and Wyeth fraudulently handled her claim. Specifically, Rixey contends that echocardiograms performed before the April 13, 2003 "Relevant Echocardiogram" she submitted to the Fund Administrator showed that she suffered from severe mitral regurgitation. As

5. For purposes of the Seventh Amendment, "age at first diagnosis" is defined as "the age of the Diet Drug Recipient ... as of the date that a [medical condition qualifying for payment from the Seventh Amendment Fund] is first diagnosed." Seventh Amendment § I.B.2. Generally, the older the diet drug recipient, the less money he or she will receive from the \$1.275 billion Supplemental Class Settlement Fund ("Supplemental Fund").

6. Rixey's petition remains pending.

mentioned previously, the initial medical review of her claim concluded that she had moderate mitral regurgitation. According to the complaint, the purported fraud occurred when Wyeth filed its response to her Petition and stated that the Fund Administrator determined that she had severe mitral regurgitation.⁷ Rixey also contends that Wyeth implied in its response that during a second medical review she would be able to change her age at first diagnosis although she has been told by the Fund Administrator that such a change cannot be made.⁸

Wyeth requests that Rixey's complaint be dismissed because it fails to specify how the purported fraudulent statements deceived her or caused her to act to her detriment. Wyeth also argues that her lawsuit is barred by her submission of a signed Blue Form as well as under the provisions of the Settlement Agreement and Seventh Amendment. Finally, Wyeth asserts that Rixey's complaint threatens the finality of the Settlement Agreement and Seventh Amendment.⁹

7. In her complaint, Rixey confuses Wyeth with the Fund Administrator, stating: "[t]he Fund Administrator stated that the Plaintiff had SEVERE REGURGITATION in Court papers knowing that the Plaintiff had been informed that only MODERATE REGURGITATION had been found by 7th Amendment Cardiology review ..." Compl. 2. Wyeth, and not the Fund Administrator, misstated claimant's level of mitral regurgitation.

8. Rixey maintains that her age at first diagnosis should be changed from 73 years to 68 years.

9. Wyeth also states that to date it has not been properly served with the complaint and summons.

Class Counsel raises similar arguments in support of the Seventh Amendment Fund Administrator's motion for summary judgment or, in the alternative, motion to dismiss. Class Counsel argues that Rixey's complaint merely states her dissatisfaction with the Fund Administrator's review of her claim and thus fails to satisfy the requirement of Rule 9(b) of the Federal Rules of Civil Procedure that fraud be pleaded with specificity. See Seventh Amendment § XV.M. Moreover, class counsel contends that under the terms of the Seventh Amendment the Fund Administrator is immune from liability when it acts in "good faith."¹⁰ See Settlement Agreement § IV.E.1.

II.

In her complaint, Rixey alleges that her claim for benefits was handled in a fraudulent and deceitful manner by both the Fund Administrator and Wyeth. Allegations of fraud must be pleaded with specificity. Rule 9(b) of the Federal Rules of Civil Procedure states:

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge and other condition of mind of a person may be averred generally.

Fed. R. Civ. P. 9(b).

The elements of fraud under Pennsylvania law are: "(1) a representation; (2) which is material ...; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is

10. Class Counsel notes that the Fund Administrator has not been served with a summons.

true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance." Argent Classic Convertible Arbitrage Fund L.P. v. Rite Aid, 315 F. Supp. 2d 666, 686 (E.D. Pa. 2000) (citations omitted).

Rixey's sole support for her claim of fraud is that Wyeth, in filing its response to her Petition, mistakenly stated that the Fund Administrator had found her to have severe mitral regurgitation when the Fund Administrator had reported that she had only moderate mitral regurgitation. The complaint, however, fails to allege that the misstatement was material to her claim, that Rixey relied on the misstatement, or that she was harmed as a result of her reliance.

First, the complaint does not allege that Wyeth's misstatement was material to the review and determination of Rixey's Category One Claim. It is the Fund Administrator, not Wyeth, that assesses the severity of a claimant's level of regurgitation and makes the ultimate determination regarding the merits of a claim. Wyeth has no role in the review and assessment of Seventh Amendment claims and its statements regarding Rixey's condition had no bearing on the Fund Administrator's assessment of her claim. Indeed, Wyeth's misstatement was made after Rixey received the Fund Administrator's determination that she suffered moderate mitral regurgitation. The Fund Administrator's determination with which

Rixey takes issue was already made and known to her when Wyeth misstated her level of regurgitation.

Furthermore, Rixey has failed to allege that she relied to her detriment on Wyeth's erroneous statement that she had severe mitral regurgitation. Rixey's status under the Seventh Amendment has not changed since Wyeth's misstatement, and she remains entitled to a second medical review of her claim. See Seventh Amendment § XV.M. Moreover, Rixey's mere disagreement with the initial medical report of the Seventh Amendment participating physician is insufficient to show that she was damaged by Wyeth's misstatement.

Finally, Rixey contends that the Fund Administrator erroneously determined her age at first diagnosis as 73. She has failed to explain how that the determination was fraudulent or even erroneous under the terms of the Settlement Agreement. As with Rixey's level of mitral regurgitation, her age at first diagnosis was determined before Wyeth made its purported fraudulent statement.¹¹ Moreover, Rixey's age at first diagnosis was determined in accordance with the Seventh Amendment by calculating her age at the time of the Relevant Echocardiogram. See Seventh Amendment §§ I.B.2., XV.M. Accordingly, Rixey has failed to allege fraud with the particularity required under Rule

11. We also note that Rixey's level of mitral regurgitation has no bearing on her age at first diagnosis.

9(b) of the Federal Rules of Civil Procedure.¹² We will therefore grant the motions of defendants, Wyeth and the Seventh Amendment, to dismiss the complaint.

12. Because the complaint fails to plead in accordance with Rule 9(b) of the Federal Rules of Civil Procedure it is unnecessary to address the parties' other arguments.

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MEMORANDUM AND PRETRIAL ORDER NO.

AND NOW, on this 5th day of October 2007, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the motion of Wyeth to dismiss the complaint of Mary Ellen Rixey as to it is GRANTED; and

(2) the motion of the Seventh Amendment Fund Administrator to dismiss the complaint of Mary Ellen Rixey as to it is GRANTED.

BY THE COURT:

/s/ Harvey Bartle III

C.J.