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FILED

January 9, 2024

HON. BRUCE J. KAPLAN, J.S.C.

*Attorneys for Defendants Merck & Co., Inc.
and Merck Sharp & Dohme LLC*

CHARLES B. STILL and ANN MARIA
STILL,

Plaintiffs,

v.

MERCK & CO., INC., MERCK SHARP &
DOHME CORP., "JOHN DOE," "JANE
DOE," and "XYZ CORP" (FICTITIOUS
NAMES),

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY

DOCKET NO.: MID-L-002952-20

ORDER: DISMISSAL WITH PREJUDICE

THIS MATTER having been brought before the Court upon motion by Fox Rothschild LLP, attorneys for Defendants, Merck & Co., Inc., and Merck Sharp & Dohme Corp., for an Order to Dismiss Plaintiffs' Complaint, with prejudice, pursuant to R. 4:23-5(a)(1), for failure to provide completed authorizations, and the Court having read and considered the papers submitted in this matter, the opposition filed, and for good cause having been shown;

IT IS on this 9th day of January, 2024;

ORDERED that Defendant Merck's Motion to Dismiss with prejudice is **GRANTED**; and
it is further

ORDERED that Plaintiffs' complaint, as to Merck & Co. Inc. and Merck Sharp & Dohme Corp., is hereby dismissed with prejudice; and it is further

ORDERED that service of this Order shall be deemed effectuated upon all parties upon its upload to eCourts. Pursuant to Rule 1:5-1(a), movant shall serve a copy of this Order on all parties not served electronically within seven (7) days of the date of this order.

OPPOSED

151 Bruce J. Kaplan
HONORABLE BRUCE J. KAPLAN, J.S.C.

Statement of Reasons

This matter having been brought before the Court upon motion by Fox Rothschild LLP, attorney for Defendants, Merck & Co., Inc., and Merck Sharp & Dohme Corp., for an Order to dismiss Plaintiff's complaint without prejudice pursuant to R. 4:23-5(a)(1), for failure to provide a materially completed authorizations, consistent with this Court's Group B Bellwether July 13, 2023, CMO. The Court notes that it has considered the moving papers and Plaintiffs' opposition.

By way of background, on August 14, 2023, counsel for Merck chose Plaintiff's case as one of Merck's 15 Bellwether Discovery Cases. Pursuant to the Bellwether CMO, plaintiffs were subsequently required to provide signed authorizations to Merck by September 5, 2023. Plaintiff's liaison counsel then reached out again on September 6 and 7, requesting authorizations be provided by September 8, 2023. When Plaintiff failed to provide the authorizations, Defendant sought permission to dismiss Plaintiff's claims, which the Court granted on September 13, 2023. This case was then dismissed without prejudice on October 6, 2023. To date, Plaintiff has not provided the authorizations required by the Bellwether CMO. In support of Defendant's motion, Defense counsel argues that Plaintiff has not complied with this Court's Bellwether CMO, has failed to provide authorizations, and Plaintiff's failure forecloses any opportunity for Merck to assess the case. 60 days have now passed; accordingly, Merck asks this Court to dismiss Plaintiff's case with prejudice.

In so doing, the Court notes pursuant to R. 4:23-5(a)(2), if "an order of dismissal ... without prejudice has been entered pursuant to paragraph (a)(1) of this rule and not thereafter vacated, the party entitled to the discovery may, after the expiration of 60 days from the date of the order, move on notice for an order of dismissal with prejudice." It is well-settled that "dismissal with prejudice is the ultimate sanction, [and that] it will normally be ordered only when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party," Zaccardi v. Becker, 88 N.J. 245, 253 (1982) (internal citations omitted), "or when the litigant rather than the attorney was at fault." Ibid. (citing Schlosser v. Kragen, 111 N.J. Super. 337, 341 (1970)).

Plaintiff's counsel has diligently and repeatedly notified Plaintiffs of their duty to provide the authorization forms, including calling client four (4) times, mailing them four (4) notices about the

need to provide the authorizations and warning them that if they did not respond that their case could be dismissed with prejudice. In addition, Plaintiffs counsel hired a private investigator in order to locate plaintiff, to no avail.

Our Supreme Court has also held that, “[t]he dismissal of a party’s cause of action, with prejudice, is drastic and is generally not to be invoked except in those cases where the order for discovery goes to the very foundation of the cause of action ... or where refusal to comply is deliberate and contumacious.” Schlosser, 111 N.J. Super. at 341 (citing Tsibikas v. Morrof, 5 N.J. Super. 306 (App. Div. 1949)).

The unfortunate reality is given the length of time of non-compliance, the Court finds there is no “lesser sanction” that can suffice to remedy the violations of this Court’s order.

As it has been more than 60 days since this case was dismissed without prejudice, and Plaintiff remains delinquent on discovery obligations, Defendant Merck’s motion to dismiss with prejudice is granted.