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**FILED**

**OCT 09 2009**

JUDGE JESSICA R. MAYER

**BAILEY PERRIN BAILEY**  
440 Louisiana St., Suite 2100  
Houston, Texas 77002  
(713) 425-7100

Attorneys for Plaintiffs

DIANE HARVEY

Plaintiff,

vs.

JOHNSON & JOHNSON COMPANY;  
JANSSEN PHARMACEUTICA PRODUCTS,  
L.P. a/k/a JANSSEN, L.P., a/k/a JANSSEN  
PHARMACEUTICA, L.P., a/k/a JANSSEN  
PHARMACEUTICA, INC.  
Defendants.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION  
MIDDLESEX COUNTY

CIVIL ACTION

CASE CODE 274  
(Risperdal/Seroquel/Zyprexa Litigation)

DOCKET NO. MID-L-6716-06 (MT)

**ORDER TO VACATE DISMISSAL  
AND TO REINSTATE COMPLAINT**

**THIS MATTER** having been brought before the Court by Leslie LaMacchia, counsel for Plaintiff, on a Motion pursuant to R. 4:23-5 for an Order vacating a prior Order of Dismissal Without Prejudice, reinstating the action and Demand for Jury Trial; and the Court having read the moving papers and the opposition, ~~if any, thereto; and having considered the arguments of counsel;~~ and for good cause shown;

IT IS on this 9<sup>th</sup> day of October, 2009

**ORDERED** that the Order of July 11, 2008 dismissing plaintiff's Complaint without prejudice be and hereby is VACATED, and the Complaint in the above-captioned action be and hereby is reinstated; and it is further

*For the reasons set forth in the attached memorandum*

**ORDERED** that counsel for plaintiffs shall serve a copy of this Order on counsel for defendant within 7 days of the date of this Order.



HON. JESSICA R. MAYER, J.S.C.

Motion X Opposed  
       Unopposed

All parties are to be served within seven (7) days of the date hereof.

**OPPOSED**

**(In re Risperdal/Seroquel/Zyprexa, Case No. 274)**  
**Harvey v. Johnson & Johnson, et al., Docket No. MID-L-6716-06-MT**

**Plaintiff's Motion to Vacate and Reinstate Complaint** (returnable 10/09/09)

Plaintiff's counsel: Leslie LaMacchia, Esq.  
Defendants' counsel: Heidi Hilgendorff, Esq.

**Summary of pending motion papers**

The required sanction fee was paid by plaintiff's counsel in connection with the pending motion to reinstate. A dismissal of plaintiff's complaint without prejudice was granted by order dated 7/11/08 due to plaintiff's failure to provide the SFFS and signed authorizations. Thereafter, on 10/14/08, defendant filed a motion to dismiss the complaint with prejudice. On 10/23/08, prior to the return date of defendant's motion to dismiss the complaint with prejudice, plaintiff, through her counsel, served the SFFS and signed authorizations. As a result, defendant withdrew the pending motion to dismiss plaintiff's complaint with prejudice. Almost one year later, plaintiff moves to reinstate the complaint.

Defendant opposes plaintiff's motion due to plaintiff's delay in reinstatement. Defendant correctly notes that the authorizations signed by plaintiff in 10/08 are nearly one year old and that many medical providers will not produce information in response to authorizations that are more than a few months old. Defendant "believes" there may be resultant prejudice in the event that plaintiff's medical providers destroyed documents related to plaintiff. Defendant also notes the absence of any information as to why plaintiff failed to move to reinstate her complaint sooner.

In addition, defendant argues that if this court is inclined to reinstate plaintiff's complaint, that plaintiff be required to pay attorneys' fees and costs.

Plaintiff submitted a reply letter brief repeating plaintiff's earlier arguments in favor of reinstatement of plaintiff's complaint and opposing any award of attorneys' fees and costs to defendant.

#### Legal analysis

Reinstatement of a pleading dismissed without prejudice is governed by R.4:23-5. There is no provision in R. 4:23-5 for automatic dismissal of a complaint with prejudice where reinstatement is not sought. See Sullivan v. Coverings & Install, 403 N.J. Super. 86, 95 (App. Div. 2008). Nor does R. 4:23-5 require defendant seek a dismissal with prejudice. Id. at 96. The rule expressly permits a plaintiff, whose complaint has been dismissed without prejudice pursuant to R. 4:23-5(a)(1), to move to restore the complaint at any time prior to the filing of a dismissal with prejudice.

In accordance with case law interpreting and applying R. 4:23-5, the ultimate objective of a trial court is the resolution of disputes on the merits. Id. See also The Trust Co. of New Jersey v. Sliwinski, 350 N.J. Super. 187, 192 (App. Div. 2002) (citing Aujero v. Cirelli, 110 N.J. 566, (1988)). In meeting this objective, the trial court, in its discretion may award counsel fees and costs and sanctions, or both, as part of reinstating a pleading previously dismissed without prejudice.

#### Conclusion

In this case, there is no evidence that medical records or other relevant documents have been destroyed – only defendant's conjecture that such items may have been destroyed. Nor is there any showing that defendant will actually suffer prejudice as a result of the nearly one year delay in reinstating plaintiff's complaint.

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This court declines to impose further monetary penalties (beyond the \$300.00 sanction imposed by the Court Rules) or to award attorneys' fees and costs against plaintiff in this case. However, this court agrees that current authorizations are required to be provided by plaintiff to defense counsel. Therefore, within thirty (30) days of the date of this Order, plaintiff's counsel shall provide current authorizations, duly signed by plaintiff, allowing the release of plaintiff's medical information. Defendant may request additional motion relief if plaintiff fails to provide current authorizations within thirty (30) days.