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Ortho-McNeil-Janssen Pharmaceuticals, Inc.
(f/k/a Janssen Pharmaceutica Inc.) and
Johnson & Johnson

FILED
OCT 09 2009
JUDGE JESSICA R. MAYER

IN RE: RISPERDAL/SEROQUEL/
ZYPREXA LITIGATION

: SUPERIOR COURT OF NEW JERSEY
: LAW DIVISION : MIDDLESEX COUNTY

:
: CASE NO. 274

:
: CIVIL ACTION

THIS ORDER APPLIES TO :
Victoria Lape v. Johnson & Johnson, et al., :
Docket No. MID-L-9441-06MT :

:
: **ORDER**

: **RETURN DATE: October 9, 2009**
:

THIS MATTER having been brought before the Court by Drinker Biddle & Reath LLP, attorneys for Defendants Ortho-McNeil-Janssen Pharmaceuticals, Inc. (f/k/a Janssen Pharmaceutica Inc.)¹ and Johnson & Johnson, to dismiss the Complaint of plaintiff **Victoria Lape** only for failure to serve a Long Form Plaintiff Fact Sheet pursuant to Case Management Order No. 16; such dismissals being authorized by Case Management Order No. 4A; the Court having considered the papers submitted; ~~and the Court having heard the arguments of counsel, if any;~~ and for good cause shown;

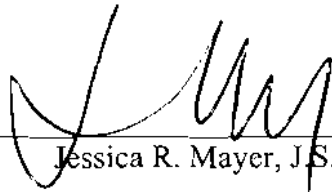
IT IS ON THIS 9th day of October, 2009;

¹ Janssen L.P. has been canceled.

ORDERED that Defendants' motion is hereby **GRANTED** and that the above-captioned Complaint is **DISMISSED** without prejudice against **Ortho-McNeil-Janssen Pharmaceuticals, Inc., Johnson & Johnson Pharmaceutical Research & Development, LLC and Johnson & Johnson** pursuant to Case Management Order No. 4A; and it is further

ORDERED that, in the event that plaintiff moves to vacate this Order on or before December 8, 2009, Defendants may move for an Order of Dismissal with prejudice pursuant to the procedure set forth in R. 4:23-5(a)(2); and it is further

ORDERED that a signed copy of this Order be served on all counsel within 7 days of the date hereof.



Jessica R. Mayer, J.S.C.

** For the reasons set forth in the attached memorandum.*

Unopposed

Opposed

FP01/6129531.2

OPPOSED

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

(In re Risperdal/Seroquel/Zyprexa, Case No. 274)
Lape v. Johnson & Johnson, Docket No. MID-L-9441-06-MT

Defendants' Motion to Dismiss Complaint Without Prejudice (returnable 10/09/09)

For defendants: Heidi Hilgendorff, Esq.
For plaintiff: Brian McCormick, Jr., Esq.

Defendants filed a motion, returnable on October 9, 2009, seeking dismissal of plaintiff's complaint, without prejudice, for failure to provide discovery in accordance with Case Management Order ("CMO") 4A and CMO 16.

Plaintiff submitted opposition to defendants' motion.

Defendants filed a reply letter brief in support of the motion.

Upon being contacted by the court's staff, the court understands that counsel agreed to waive oral argument of this matter and submit the matter to the court for disposition on the papers.

Defendants' argument

Defendants argue that plaintiff failed to comply with the requirements of CMO 4A and CMO 16. According to defendants, plaintiff failed to provide her Long Form Plaintiff Fact Sheet ("LFPFS"). The time to provide the LFPFS in this case expired on August 10, 2009. Defense counsel notified plaintiff's counsel of the discovery deficiency by way of letters dated August 14 and August 19, 2009.

Defense counsel filed a motion to dismiss plaintiff's complaint without prejudice returnable before this court on September 11, 2009. However, this court denied defendants' earlier motion as defendants had not obtained permission to file the original motion to dismiss plaintiff's complaint without prejudice.

Defense counsel subsequently obtained permission to file this motion to dismiss without prejudice at the case management conference conducted on September 15, 2009.

Plaintiff's argument

According to plaintiff's counsel, plaintiff served her LFPFS and authorizations the day before defense counsel's filing of the pending motion to dismiss without prejudice. Defense counsel filed this motion to dismiss without prejudice on September 23, 2009. Plaintiff forwarded her LFPFS and authorizations to defense counsel on September 22, 2009. Therefore, plaintiff's counsel requested withdrawal of defendants' motion returnable on October 9, 2009.

Defendants declined to withdraw the pending motion because defense counsel deemed the discovery responses deficient and, therefore, not "materially completed" in accordance with CMO 4A. By letter dated September 23, 2009, defense counsel noted certain deficiencies in plaintiff's discovery responses. Plaintiff's counsel responded to defense counsel's deficiency letter with supplemental discovery responses on September 25, 2009.

Plaintiff, relying on the language in CMO 4A, argues that the procedure for objecting to purported deficient discovery responses requires the filing of a separate and distinct motion. See CMO 4A, Section III.F. Plaintiff further argues that there were four deficient responses noted by defendants. Plaintiff has provided more detailed discovery responses and plaintiff continues to pursue more specific information as to any deficient items.

Lastly, plaintiff argues that the court should assess sanctions against defendants for failing to withdraw the motion pending before the court on October 9, 2009 in accordance with R. 1:4-8.

Defendants' reply

Defendants concede that plaintiff provided supplemental discovery responses; however, defendants assert that relevant and critical information remains incomplete as to plaintiff's use of other atypical antipsychotic drugs identified in plaintiff's Short Form Fact Sheet.

Conclusions

After consideration of the written submissions of counsel, the court denies defendants' motion to dismiss plaintiff's complaint without prejudice for the following reasons.

On the day prior to defendants' filing of the motion to dismiss without prejudice, plaintiff provided discovery responses. Plaintiff provided substantive discovery responses; not just pattern responses such as "to be supplied" or "see attached." Once the delinquent party provides discovery responses, the motion to dismiss for failure to provide discovery is moot. If the party receiving the discovery disputes the thoroughness and/or the sufficiency of the responses provided, then the receiving party may move to compel more specific discovery responses. However, the moving party may not convert a motion to dismiss for failure to provide discovery into a motion to compel more specific discovery responses. That procedure is not contemplated under the New Jersey Court Rules. See R. 4:23-5, entitled "Failure to Make Discovery." See also Plaza 12 v. Carteret Borough, 280 N.J. Super. 471, 477 (App. Div. 1995) (placing the burden upon

the propounder of discovery to file a motion seeking more responsive answers as part of the 'predictability and security in the conduct of litigation'.)

Nor does defendants' motion comport with this court's understanding of the procedure set forth in CMO 4A. Section III.F of CMO 4A provides a forty five (45) day window within which to cure alleged discovery deficiencies as to LFPFS. That window of time has not expired as plaintiff has until November 7, 2009 to respond to defense counsel's deficiency letter dated September 23, 2009.

Moreover, as the discovery end date in this matter has yet to be determined, R. 4:17-7 permits amending of answers to interrogatories twenty (20) days prior to the scheduled discovery end date. This court anticipates that plaintiff will provide the information regarding her use of other atypical antipsychotic drugs in the near future or face a defense motion to compel such information after November 7, 2009.

This court declines to award counsel fees and costs for the following reasons. First, plaintiff failed to file a cross motion seeking counsel fees and costs. Two, R. 1:4-8 requires a written demand that the purportedly frivolous paper be withdrawn by the filing party within twenty eight (28) days. No such letter demand was served by plaintiff's counsel. Third, any application for sanctions under R. 1:4-8, requires the filing of a motion separately from other applications. No such application was made by plaintiff in this case.

Therefore, this court shall deny defendants' motion to dismiss the complaint without prejudice and shall not assess any sanctions.