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FILED

JAN 21 2011

BRIAN R. MARTINOTTI, J.S.C.

MARIANNE ZEANA, H,
Plaintiff,

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY**

Docket No. BER-L-2851-09

vs.

(In Re Zelnorm® Litigation-Case No. 280)

NOVARTIS PHARMACEUTICALS
CORPORATION; NOVARTIS PHARMA
STEIN AG; NOVARTIS AG; and DOES
1 through 350, inclusive,

CIVIL ACTION

PROPOSED ORDER

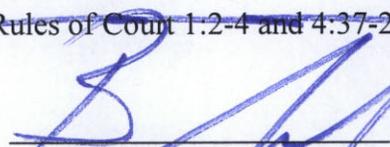
Defendants.

The above-captioned matter came on for hearing before the Court on _____, 2011
by motion of Defendant Novartis Pharmaceuticals Corporation ("NPC") seeking an Order of
Dismissal pursuant to New Jersey Court Rules 1:2-4 and 4:37-2(a). Based upon the arguments
and memoranda of counsel, *For the reasons set forth in the attached memorandum*

IT IS HEREBY ORDERED on this 21 day of January, 2011, that:

1. NPC's motion for the dismissal of the Plaintiff's Complaint with prejudice, in its
entirety, ~~and on the merits, pursuant to New Jersey Rules of Court 1:2-4 and 4:37-2(a) is granted.~~ *grt*

Dated: January 21, 2011


Brian R. Martinotti, J.S.C.

OAS

Marianne Zeanah v. Novartis Pharmaceuticals Corporation BER-L-2851-09

Before this Court is Defendant Novartis Pharmaceuticals Corporations' ("Novartis") Motion to Dismiss Plaintiff Marianne Zeanah's ("Zeanah") Complaint without Prejudice. This Motion is filed pursuant to Case Management Order ("CMO") #13 which was served on Zeanah by letter dated December 15, 2010 (received by Zeanah on December 20, 2010). This Motion is not opposed.

Facts

On March 30, 2009, Zeanah filed her Complaint in the Superior Court of New Jersey, alleging that her use of Zelnorm caused "serious and permanent physical and emotional injuries." The Complaint named Novartis, Novartis Pharma Stein AG, and Novartis AG as Defendants and asserted claims of strict liability, breach of implied warranty, breach of express warranty, negligence, fraud, and violation of the New Jersey Consumer Fraud Act, as well as a demand for the recovery of large sums of money [expended] for medical care and treatment." Zeanah also sought punitive damages based on Novartis' alleged violation of the New Jersey Products Liability Act. Novartis filed its Answer to Plaintiff's Complaint on May 24, 2009.

On April 7, 2010, Zeanah's counsel sought leave of Court to withdraw as Plaintiff's counsel. Counsel's stated reasons for withdrawal were differences between counsel and Zeanah as to prosecution of the case and Zeanah's employment of new counsel in her home state of California. This Court granted Counsel's Motion to Withdraw on April 30, 2010, noting at that time that Zeanah would proceed *pro se* and would be required to comply with all Court Orders and attend all case management conferences ("CMC").

On July 21, 2010, this Court held a CMC that Zeanah failed to attend. This Court then issued an Order requiring Zeanah to appear in person at the next CMC scheduled for October 6, 2010. Zeanah requested, and the Court granted, permission to appear at that CMC by phone. This Court then gave her 30 days to contact counsel and obtain representation.

Zeanah did not appear at the next CMC on December 15, 2010, and did not retain new counsel. In CMO #13, Counsel for Novartis was given leave to file a motion to dismiss *without* prejudice for failure to prosecute.

Decision

i. Plaintiff's failure to appear at CMC's

New Jersey Court Rule 1:2-4 states that:

If without just excuse or because of failure to give reasonable attention to the matter, no appearance is made on behalf of a party on the call of a calendar, on the return of a motion, at a pretrial conference, settlement conference, or any other proceeding scheduled by the court . . . the court may order any one or more of the following: . . . the dismissal of the complaint [].

R. 1:2-4. Zeanah has failed to appear at two CMC's (July 21, 2010 and December 15, 2010). In Kohn's Bakery, Inc. v. Terracciano, 147 N.J. Super. 582 (App. Div. 1977), the appellate division upheld the trial court's order of dismissal for plaintiff's failure to appear for trial and failure to file a trial brief. In Saini v. Latty & Amrita Petroleum, Inc., 2006 N.J. Super. Unpub. LEXIS 926 (App. Div. Sept. 29, 2006), the appellate division upheld a trial court's order of dismissal for the *pro se* plaintiff's failure to appear, without just excuse, at trial.

Novartis cites no caselaw supporting the notion that a trial court may dismiss with prejudice for failure to appear at a CMC. In fact, CMO #13 mandates dismissal *without*

prejudice. "There is no doubt at all of the right of a trial judge, as an exercise of discretion, to impose sanctions for violation of the rules or failure to obey the orders of the court, and these sanctions may include dismissal of the action." Kohn's Bakery, supra, 147 N.J. Super. at 585. This Court finds that Plaintiff's failure to appear at two CMC's is tantamount to failure to prosecute. Therefore, the Motion to Dismiss is Granted.

ii. Plaintiff's failure to comply with Court Orders

Novartis argues that Zeanah should be dismissed for failure to comply with this Court's orders. Zeanah violated this Court's July 21, 2010 Order by appearing telephonically, rather than in person as ordered, at the October 6, 2010 CMC. During that CMC, Zeanah was ordered to contact her former counsel within 30 days to obtain representation; to this date this Court has received no notification of representation. Accordingly, Zeanah is self-represented. Zeanah violated this Court's orders for a third time when she failed to appear at the December 15, 2010 CMC. Novartis argues that Zeanah was made aware of the "consequences of her action" in CMO #13. However, CMO #13 only stated that Novartis was given leave to file a Motion to Dismiss *without* prejudice.

R. 4:37-2(a) states that:

For failure of the plaintiff to . . . comply with . . . any order of court, the court in its discretion may on defendant's motion dismiss an action or any claim against the defendant. Such a dismissal shall be without prejudice unless otherwise specified in the order.

R. 4:37-2(a). In Consultants v. Chemical & Pollution Scis, Inc., 105 N.J. 464 (1987), the appellate division upheld a dismissal *without* prejudice for failure to comply with court

orders compelling discovery. Notably, the dismissal was without prejudice even though the trial court had previously warned the litigant that its claim would be dismissed if it did not comply with the court order. In deciding whether the trial court's dismissal be affirmed with or without prejudice, the appellate court held that "dismissal with prejudice is a severe sanction that should be imposed sparingly and 'only when no lesser sanction will erase the prejudice suffered by the non-delinquent party.'" Id. at 471(citing Crispin v. Volkswagenwerk, A.G., 96 N.J. 336, 345 (1984)). In accordance with CMO #13, Zeanah's Complaint should be dismissed without, rather than with, prejudice.

For the reasons set forth above, Zeanah's Complaint is Dismissed *Without* Prejudice. Counsel is directed to serve a copy of this decision and order on Zeanah by regular and certified mail. Counsel may move for dismissal with prejudice if no application to restore is filed by March 24, 2011.