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

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

DENISE ALESSI,

Plaintiff,

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-006767-18

ORDER

WHEREAS, Defendants, Merck & Co., Inc., and Merck Sharp & Dohme, Corp., by and through its counsel, Fox Rothschild, LLP, with Plaintiff's complaint having been dismissed without prejudice on July 9, 2021, now moves the Court for an Order dismissing Plaintiff's complaint with prejudice pursuant to R. 4:23-2, and the Court having considered the moving papers, for the reasons in the statement of reasons, and for good cause shown;

IT IS on this 24th day September 2021, hereby;

ORDERED that Defendants' Motion to Dismiss Plaintiff's complaint **is hereby GRANTED**; and it is further

ORDERED that Plaintiff's complaint be and **is hereby DISMISSED with prejudice**; and it is further

ORDERED that this Order shall be deemed served upon its filing to eCourts. Movant shall serve all parties not electronically served within seven (7) days of the date of this Order in accordance with R. 1:5-1(a).

/s/ Bruce J. Kaplan

HONORABLE BRUCE J. KAPLAN J.S.C.

OPPOSED

SEE STATEMENT OF REASONS ATTACHED

STATEMENT OF REASONS

This matter comes before the Court by way of Merck & Co., Inc., and Merck Sharp & Dohme, Corp Motion to Dismiss Plaintiff's Complaint with prejudice in accordance with R. 4:23-5(a)(2). By way of background, on July 9, 2021, this Court entered an order dismissing this Plaintiff's complaint without prejudice for failure to provide a materially complete Plaintiff Fact Sheet ("PFS"). The instant motion represents that the PFS is still outstanding. This Court notes that it has considered the moving papers, papers in opposition and reply.

In opposition, it is not disputed that despite Plaintiff's counsel best efforts, the PFS has not been provided by the Plaintiff. Specifically, despite the Plaintiff being advised of her discovery obligation under PFS CMO dated June 12, 2019, and despite counsel calling the Plaintiff eighteen (18) times and mailing eight (8) notices, warning that failure to respond could result in a dismissal of her case with prejudice, the Plaintiff was unresponsive. Counsel in this case, then took the additional step of hiring a third-party investigator to locate the Plaintiff to no avail. The Court also notes that the opposition also represents that the Plaintiff has been noticed of the dismissal and mailed her via certified and regular mail on July 12, 2021, a copy of the dismissal along with a notice pursuant to R. 4:23-5(a)(1), which advised her of the dismissal and the steps necessary to rectify this matter. Counsel also advised her of this pending motion to dismiss with prejudice and mailed her via certified and regular mail on September 9, 2021, a copy of this motion along with a notice to client pursuant to R. 4:23-5(a)(2), which advised her of the filing of the motion, that her case could be dismissed with prejudice and what that would mean for her claim.

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)). 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)).

As demonstrated by the Court's foregoing discussion, PFS is threshold discovery that goes to the very foundation of this MCL. Moreover, the unfortunate reality is, at this juncture, given the length of time of non-compliance, there is no "lesser sanction" that can suffice to remedy the violations of this Court's order. Per the PFS CMO, Plaintiff's PFS was due on December 1, 2019. According to Defendants, Plaintiff has received roughly eight (8) 30-day extensions and one (1) 60-day extension to provide a materially complete PFS. This Court finds that the Plaintiffs have had more than enough time to comply with this Court's orders and to communicate and cooperate with their attorney and have failed to do so.

In light of the foregoing, Plaintiff cases are hereby **DISMISSED WITH PREJUDICE**.