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FILED

May 12, 2023

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

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

IN RE ZOSTAVAX LITIGATION

APPLICABLE TO ALL CASES ON
ATTACHED LIST

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY

DOCKET NO.: MID-L-004999-18

ORDER

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 the Complaints of the Plaintiffs listed in the attached Exhibit A with prejudice pursuant to R. 4:23-5(a)(2), for failure to effectuate the probate process to appoint a formal estate representative and substitute the estate as this case was dismissed without prejudice on December 2, 2022, and the Court having read and considered the papers submitted in this matter, opposition filed, and for the reasons set forth in the attached Statement of Reasons, and for good cause having been shown;

IT IS on this 12th day of May, 2023;

ORDERED that Defendant Merck's Motion to Dismiss with prejudice, the Complaints of Plaintiffs listed in the attached Exhibit A, **is hereby GRANTED**; 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.

/s/ Bruce J. Kaplan
HONORABLE BRUCE J. KAPLAN, J.S.C.

OPPOSED

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 the Complaints of the Plaintiffs listed in the attached Exhibit A with prejudice pursuant to R. 4:23-5(a)(2), for failure to effectuate the probate process to appoint a formal estate representative and substitute the estate. The Court has read and reviewed the papers submitted and Plaintiffs' opposition.

By way of relevant procedural history, this Court entered Case Management Order ("CMO") #29 on December 13, 2022. That Order stated that Plaintiffs' Counsel were to provide detailed explanations as to the status of the probate process for the case listed in Exhibit B to CMO #29 by January 1, 2023. Additionally, CMO #29 provided notice to Plaintiffs' Counsel that if motions to substitute the estate were not filed by February 1, 2023, then the Court reserves the right to dismiss the complaints of plaintiffs in Exhibit B to CMO #29 without prejudice at the February 2, 2023 Case Management Conference ("CMC"). The Court notes that the Plaintiffs subject to the instant motion, Exhibit A, were all included in Exhibit B to CMO #29. The Court further notes that the plaintiffs in the attached Exhibit A did not file motions to substitute the estate by February 1, 2023, and at the February 2, 2023 CMC the Court gave Defendants permission to file a Five-Day Order to dismiss plaintiffs' complaints without prejudice. On February 13, 2023, the Court, after receiving no opposition, uploaded Defendants' Five-Day Order and dismissed plaintiffs' complaints without prejudice. Defendant Merck brings the instant motion to dismiss Plaintiffs' complaint with prejudice because more than 60 days has passed since this case was dismissed without prejudice and plaintiffs' next of kin has failed to appoint a formal estate representative and substitute the estate as the plaintiff in this matter.

Plaintiffs' Counsel opposed the dismissal of three plaintiffs: Manson 4906-20, Fancher 3359-20, and Johnson 3051-21. These three plaintiffs have been removed from the attached Exhibit A and oral argument has been scheduled for June 28, 2023.

The Court finds that despite notice and opportunity, Plaintiffs have not provided the outstanding discovery, has not reinstated the complaint, or filed opposition. In light of Plaintiffs' failure to comply with this Court's Orders and in light of the additional time provided previously, this Court will be entering an Order dismissing this 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)).

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, and the lack of any opposition, the Court finds there is no “lesser sanction” that can suffice to remedy the violations of this Court’s order.

More than 60 days has passed since Plaintiffs’ Complaints were dismissed without prejudice, Plaintiffs have failed to substitute the estate, and Plaintiffs have failed to file a Motion to Reinstate the case. As a result, Defendant Merck’s motion to dismiss with prejudice is granted.

Exhibit A

Docket No.	Plaintiff
MID-L-003932-18	Harvey, Marshall
MID-L-008285-18	Rowell, Bivian
MID-L-000013-19	Pope, Lynn
MID-L-000569-19	Carrell, James
MID-L-003209-19	Nelson, Lynn
MID-L-004965-19	Haley-Dry, Deborah
MID-L-004146-20	McGarth, Claudia
MID-L-004308-20	Sommers, Dawn
MID-L-004317-20	Scudder, Laura
MID-L-004953-20	Wallis, Bernnis
MID-L-005040-20	Wadsworth, Wilma
MID-L-005516-20	Mickler, Martha