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FILED

March 6, 2024

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

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

GARY FOREN,

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-001897-19

ORDER: DISMISSAL WITH PREJUDICE

THIS MATTER having been brought before the Court upon motion by Fox Rothschild LLP, attorneys for Defendants, Merck & Co., Inc., and Merck Sharp & Dohme Corp., for an Order to Dismiss Plaintiffs' Complaint, without prejudice, pursuant to R. 4:23-5(a)(1), for failure to provide authorizations in accordance with CMO #36 by November 10, 2023 and the Court having read and considered the papers submitted in this matter, opposition filed, and for good cause having been shown;

IT IS on this 6th day of March, 2024;

ORDERED that Defendants', Merck & Co., Inc., and Merck Sharp & Dohme Corp.'s, Motion to Dismiss with prejudice **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.

OPPOSED

151 Bruce J. Kaplan
HONORABLE BRUCE J. KAPLAN, J.S.C.

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 Plaintiff's complaint with prejudice pursuant to R. 4:23-5(a)(1). 60 days have passed since the Court dismissed Plaintiff's case without prejudice on December 1, 2023 for failure to provide authorizations in accordance with CMO #36 by November 10, 2023. The Court notes that it has considered the moving papers and notes Plaintiff's opposition.

By way of background, the Court entered the June 5, 2023, Group B Bellwether CMO, which outlined a requirement of having all Group B cases "review with their respective plaintiffs the operative Plaintiff Fact Sheets" to ensure they intended to continue seeking recovery in this case. Any case not dismissed prior to the July 31, 2023, deadline was eligible to become a Group B Bellwether plaintiff. Despite this initial review, plaintiffs continued to voluntarily dismiss or fail to comply with discovery obligations once selected as a Group B Bellwether Plaintiff. For this reason, the Court entered the CMO #36 on October 16, 2023, requiring all Group B cases not already selected as a Bellwether case to produce fully executed authorizations by November 10, 2023. See CMO #36, entered October 16, 2023.

The reason for this was outlined in the November 1, 2023, case management conference stating:

One [purpose] was, in the event that somebody drops out or there's a concern as to . . . one of [the] plaintiffs' current ability to proceed, we will have already [] had authorizations for replacement plaintiffs so we could continue on our tight timeframe. Just as importantly, however, . . . when someone then goes from being asked whether they want to proceed to being ordered that they have to complete certain documents and participate and communicate in order to proceed, sometimes there's a difference. And the intent of the Court's order was to ensure that the plaintiffs that are now being represented that they want to proceed actually do want to proceed, and that it's not just words, but it's by action by signing a release, authorizations.

[See 11/1/23 CMC Tr.]

Further, at the case management conference it was emphasized that authorizations provided years ago did not satisfy the requirements of CMO #36 because the purpose was to ensure current willingness to participate in this litigation, not willingness to participate years ago.

In support of Defendant's motion, Defense counsel argues that Plaintiffs have not complied with this Court's CMO #36, which resulted in the Plaintiff's case being dismissed via omnibus Order on December 1, 2023. Because Defendant has not reinstated this case within 60 days, in accordance with the Order, Merck asks this Court to dismiss this Plaintiff's case with prejudice.

In opposition, Plaintiff's counsel represents that their office notified Plaintiff of their discovery obligations under the Bellwether CMO, by way of calling Plaintiff three (3) times and mailing him two (2) notices about the need to respond to discovery and warning him that if he did not respond that his case would be dismissed. Additionally, Plaintiff's counsel employed a third-party investigator to locate Plaintiff and to produce additional means of contacting him, to no avail. Plaintiff asks this Court for additional time, as the Court sees fit, to produce the outstanding discovery.

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, the Court finds there is no "lesser sanction" that can suffice to remedy the violations of this Court's order.

As it has been more than 60 days since this case was dismissed without prejudice, and Plaintiff remains delinquent on discovery obligations, Defendant Merck's motion to dismiss with prejudice is granted.