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FILED

January 10, 2024

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

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

DEBORAH NUNEZ,
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-001486-23

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, with prejudice, pursuant to R. 4:23-5(a)(1), for failure to provide a materially complete and certified Plaintiff Fact Sheet, and the Court having read and considered the papers submitted in this matter, noting no opposition filed, and for good cause having been shown;

IT IS on this 10th day of January 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.

UNOPPOSED

/s/ 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 without prejudice pursuant to R. 4:23-5(a)(1), for failure to provide a materially complete and certified Plaintiff Fact Sheet ("PFS"). The Court notes that it has considered the moving papers and also notes that Plaintiff has not filed an opposition.

By way of background, Plaintiff's PFS was originally due on June 26, 2023, as set forth in the June 12, 2019, PFS Case Management Order and the September 8, 2021, Amended CMO: Plaintiff Fact Sheets (the "PFS CMOs"). On June 29, 2023, Merck's counsel contacted plaintiff's counsel regarding this case, as Merck had not yet received a PFS despite the deadline for service of the same having passed, however no response was received. On July 13, 2023, Merck's counsel again contacted plaintiff's counsel, asking if they would agree to include Plaintiff on a consent order. On August 24, 2023, Plaintiff's counsel responded stating he would "need additional time." During the August 29, 2023, Case Management Conference and pursuant to CMO #35, Plaintiff's counsel was to provide substantially complete and certified PFS by October 1, 2023 or counsel for Merck had permission to file a motion to dismiss without prejudice thereafter. On October 20, 2023, this matter was dismissed without prejudice. Within that Order the Court outlined that after 60 days Defendant would be free to file a motion to dismiss with prejudice, 60 days have elapsed and Defendant then filed this motion.

In support of Defendant's motion, Defense counsel argues that Plaintiff has not complied with this Court's PFS Orders, has failed to provide a PFS, and Plaintiff's failure forecloses any opportunity for Merck to assess the case. Accordingly, Merck asks this Court to dismiss Plaintiff's case with prejudice.

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.