

Eileen Oakes Muskett, Esquire
Attorney ID No. 020731994
FOX ROTHSCHILD LLP
Midtown Building, Suite 400
1301 Atlantic Avenue
Atlantic City, NJ 08401
Tel: (609) 348-4515
Fax: (609) 348-6834

FILED

January 20, 2023

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

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

GORDON FOX,

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-003794-22

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 Plaintiff's complaint with prejudice pursuant to R. 4:23-5(a)(2), for failure to provide proof of use ("POU") as this complaint was dismissed without prejudice on November 4, 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 20th day of January, 2023;

ORDERED that Defendants’ Motion to Dismiss with prejudice is **hereby GRANTED**;
and it is further

ORDERED that Plaintiff’s complaint is hereby dismissed with prejudice; 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

See Statement of Reasons attached

Statement of Reasons

This matter comes 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)(2), for failure to provide proof of use (“POU”). The Court notes that it has read and reviewed the papers submitted in this matter, and Plaintiff’s opposition.

By way of background, this Court’s Case Management Order #8 (“CMO”), filed February 20, 2020, states that Plaintiffs’ liaison counsel shall forward the documentary evidence of proof of use of Zostavax to Defense liaison counsel within 35 days of the date the complaint is filed. Here, Plaintiff’s complaint was filed on August 1, 2022. Thus, Plaintiffs’ counsel was to forward documentary evidence of POU to Defense counsel by September 5, 2022. On November 4, 2022, this Court entered an Order dismissing Plaintiff’s complaint because of Plaintiff’s failure to provide Defendants with POU. In the instant motion, Defense Counsel argues that Plaintiff’s complaint should be dismissed with prejudice as more than sixty (60) days have passed since the case was dismissed without prejudice and Plaintiff has failed to provide documentary evidence of POU.

In opposition, Plaintiff’s Counsel represents that Plaintiff filed his case in good faith. Plaintiff’s counsel states that his office has repeatedly notified Plaintiff of his discovery obligations by calling seven (7) times and mailing him two (2) notice about the need to respond to discovery and warning him if he did not respond—his case could be dismissed. Plaintiff’s Counsel also employed a third-party investigator to locate Plaintiff, to no avail. Plaintiff’s Counsel represents that they have advised Plaintiff of the Defendants’ current motion to dismiss with prejudice for failure to provide POU by way of regular and certified mail on December 8, 2022. Plaintiff has not responded to any of Plaintiff Counsel’s communications and has not responded to Defendants’ discovery requests. Plaintiff’s Counsel asks the Court for thirty (30) days, or additional time, as the Court sees fit, to reconnect with Plaintiff and produce the required discovery.

In light of Plaintiff's 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. While the Court appreciates Counsel's arguments and Plaintiff's previous efforts, the fact remains that the records have not been produced. The Court finds that despite notice and opportunity, Plaintiff has not provided the outstanding discovery and does not provide justification for additional time.

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, 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 remain delinquent on their discovery obligations, Defendant's motion to dismiss with prejudice is granted.