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FILED

JUL 09 2018

RACHELLE L. HARZ
J.S.C.

MICHELLE MONTEJANO, Plaintiffs, v. BAYER CORP., et al. Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NUMBER: BER-L-8369-11 CIVIL ACTION IN RE YAZ®, YASMIN®, OCELLA® LITIGATION, CASE NO. 287 **ORDER OF DISMISSAL WITH PREJUDICE PURSUANT TO CMO 49**

THIS MATTER, having been assigned to the Honorable Rachelle L. Harz, J.S.C. pursuant to the Supreme Court's Orders of February 9, 2010 and July 22, 2016, ordering centralized case management of the New Jersey state court actions arising out of the use of the oral contraceptives Yaz®, Yasmin® and Ocella®,

And the Court having entered Case Management Order No. 49 on August 3, 2015, requiring that plaintiffs who enroll in the ATE Settlement Program comply with CMO 49 or be subject to a motion to dismiss with prejudice;

Whereas, Plaintiff has not complied with the provisions of CMO 49 or the ATE Settlement Agreement;

And for good cause shown, the following Order is hereby entered:

IT IS on this 9th day of July, 2018,

ORDERED as follows:

1. The Bayer Defendants' Motion to Dismiss Plaintiff's Complaint with Prejudice pursuant to Case Management Order No. 49, be and hereby is granted; and

2. Plaintiff's Complaint shall be dismissed with prejudice.

RACHELLE L. HARZ, J.S.C.

Decision attached

HONORABLE RACHELLE L. HARZ, J.S.C.
Superior Court of New Jersey, Law Division
Bergen County Justice Center
10 Main Street, Chambers 359
Hackensack, New Jersey 07601
(201) 221-0700 x 25557

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MICHELLE MONTEJANO, Plaintiff, v. BAYER CORP., et al. Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NUMBER: BER-L-8369-11 CIVIL ACTION IN RE YAZ®, YASMIN®, OCELLA® LITIGATION, CASE NO. 287 **DECISION**

Before this Court is defendant, Bayer Corp.'s motion to dismiss plaintiff Michelle Montejano's ("Montejano") Complaint with prejudice.[1]

I. Statement of Facts and Procedural History

By way of background, In re Yaz, Yasmin, Ocella Litigation was centralized in New Jersey Superior Court in Bergen County on February 9, 2010. Case Management Order ("CMO") 49, entered by Judge Brian Martinotti on August 3, 2015, implemented the arterial thromboembolism ("ATE") Settlement Program. Claimants "alleging an ATE injury after use of a DCOC [drospirenone-containing oral contraceptive] ...who wish to enroll in the Program and be bound by the terms of the Agreement must submit the 'Notice of Intent to Opt In Form'...." *See* CMO 49, page 2; La Mont Cert. ¶ 2. CMO 49 goes on to inform "[c]laimants with filed cases who allege an ATE Injury and submit a 'Notice of Intent to Opt In Form' but who do not timely submit a

[1] Plaintiff's counsel declined this court's offer for oral argument, and as such, this court's ruling is on the papers.

complete Claim Package will not be eligible to receive any compensation under the program and will be subject to a motion by BHCP for dismissal with prejudice following the Cure Deadline as set forth in the Agreement."

The plaintiffs that chose to enroll in the ATE Settlement Program were required to submit to the Claims Administrator all the Claim Package Materials which was attached as Exhibit A to CMO 49. A complete Claim Package included, among other things, full and complete contemporaneous prescription records from a pharmacy or medical facility reflecting that the claimant was prescribed or provided with a DCOC, and full and complete contemporaneous medical records reflecting a diagnosis of ATE Injury after the claimant was prescribed a DCOC.

Plaintiff Montejano, through her counsel, timely served her Notice of Intent to Opt In Form for the ATE Resolution program on October 2, 2015. Colella Cert. ¶4; Exhibit A to La Mont Cert. On December 18, 2015, a Notice of Incomplete Claim was served with a deadline to cure by January 17, 2016. Id. at ¶5. The Notice of Incomplete Claim outlined the deficiencies associated with plaintiff's claim. Specifically, plaintiff had not submitted a fully executed release, a medical records authorization form, contemporaneous prescription records demonstrating that she was prescribed or provided with Yaz/Yasmin/Ocella before her ATE injury, contemporaneous medical records demonstrating an ATE injury, or full and complete hospitalization or treatment records showing length of hospitalization or elements of both enhancement and deduction factors under the settlement. See Exhibit B to La Mont Cert.

Plaintiff failed to cure the defects outlined in the Notice of Incomplete Claim and the Claim Administrator determined on February 29, 2016 that plaintiff was ineligible for a settlement award. The deadline to appeal the Claim Administrator's decision was March 5, 2016. Colella Cert. ¶6. Plaintiff's counsel filed an appeal on March 2, 2016, containing all the contemporaneous medical

records in their possession. On April 28, 2016, the appeal was rejected because "there was no prescription record submitted that show plaintiff was prescribed or provided with a DCOC, as that term is defined in Recital A of the Master Settlement Agreement." See Exhibit D to La Mont Cert. The Claim Administrator's decision was binding and final.

Notably, plaintiff's counsel had been unable to reach plaintiff via telephone or mail, despite numerous efforts, since February 6, 2013. Colella Cert. ¶9. As such, plaintiff's counsel was unable to communicate with plaintiff regarding the outstanding issues and concerns of her particular case. Particuarly, they were unable to inform plaintiff that they did not have a copy of plaintiff's prescription for Yaz. On July 28, 2016, three months after plaintiff's counsel filed her appeal, plaintiff contacted the firm and gave updated contact information. Colella Cert. ¶10. It was not until September 27, 2017, almost two years after the Claim Package was due, when plaintiff provided her attorneys with the pharmacy information as to where she filled her Yaz prescription. Colella Cert. ¶11.

II. Napoli Bern Ripka Shkolnik Law Firm

Plaintiff retained Napoli Bern Ripka Shkolnik ("Napoli Bern") on November 9, 2009 to represent her for alleged injuries related to her ingestion of Yaz. Schaktman Cert. ¶2. Between April 2015 and September 2015, Napoli Bern's principal partners were engaged in a litigious breakup of the firm. During that period the firm's files were unavailable to the staff and no work was possible on the files. Id. at ¶4, 7. Pursuant to a settlement agreement between the partners, the law firm caseload was split evenly with plaintiff's file remaining with the new firm of Bern Ripka. Id. at ¶8. The retrieval process to actually get the files lasted from December 2015 through February 2016. Notably, this period of time was when the Claim Package was to be submitted to the Claim Administrator. It is important to note at that juncture, while the firm did appeal the

Special Master's decision, they still had not submitted the outstanding documents as outlined in the Notice of Incomplete Claim.

III. Legal Analysis

New Jersey has a strong public policy in favor of settlement agreements that resolve litigation and the Court, "absent a demonstration of fraud or other compelling circumstances, should honor and enforce [them] as it does other contracts." Brundage v. Estate of Carambio, 195 N.J. 575, 601 (2008).

The ATE Settlement Agreement provides that where a claimant has failed to submit their Claim Package in a timely manner, their complaint is subject to dismissal with prejudice:

> In the event that any Program Participant with a filed case fails to timely submit their Claim Package, fails to seek an extension of time to do so, or fails to meet the extension(s) granted, the Claims Administrator shall so notify the Program Participant, after which BHCP may make a motion before the judge presiding over that pending lawsuit to dismiss the lawsuit with prejudice. It is the expectation of the parties to this Agreement that such a motion will be granted, and the lawsuit will be dismissed with prejudice, absent a showing of good cause that justifies the failure to meet the deadline(s) to submit the Claim Package. All such motions shall be made on at least 14 days notice. The decision of the judge shall be final and binding with no right of appellate review.

See CMO 49, Exhibit A, Section 5.02(F).

There is no dispute that plaintiff opted into the voluntary ATE Settlement and counsel filed her Notice of Intent to Opt In Form on October 2, 2015. See Colella Cert. ¶4; La Mont Cert. ¶4. Plaintiff's counsel is also not suggesting that plaintiff did not intend to opt into the settlement. The clear and unambiguous language of the ATE Settlement states that failing to timely submit the Claim Package will result in dismissal with prejudice absent a showing of good cause. Both plaintiff and Bayer are bound by its terms.

Moreover, the ATE Settlement Agreement further provides that where the Claims Administrator has determined that a claimant is not entitled to an Award under the ATE Settlement Program, their complaint is subject to dismissal with prejudice:

> Process for Dismissal of Cases After Adjudication of Claim Packages.
>
> BHCP, or, if BHCP is not a Defendant in the case, any Defendant in such case, is entitled to file with the relevant court the Stipulation of Dismissal submitted with the Claim Package at any time after the Claims Administrator provides notice (i) that the Program Participant has received any portion of her Award, or (ii) that the Program Participant is not entitled to an Award, subject to the resolution of any request for reconsideration, and/or appeal, if permitted by this Agreement.
>
> *See* CMO 49, Exhibit A, Section 7.02.

Again, there is no dispute that the Claims Administrator found that plaintiff was not entitled to an award, and that plaintiff's appeal was denied because there was no evidence submitted to the Claims Administrator of plaintiff's prescription for Yaz.

Plaintiff's counsel cites numerous cases showing that there was a good cause as to plaintiff's failure to meet the Claim Administrator's deadline. For example, plaintiff relies on Jansson v. Fairleigh Dickinson Univ., 198 N.J. Super. 190 (App. Div. 1985). The court found "several important factors that have generally been considered in determining whether the rules should be relaxed. These include (1) the extent of the delay, (2) the underlying reason or cause, (3) the fault or blamelessness of the litigant, and (4) the prejudice that would accrue to the other party." Id. at 195. Moreover, in Jansson, the Appellate Division noted "that the sins or faults of an errant attorney should not be visited upon his client absent demonstrable prejudice to the other party" when reversing the trial court's decision. Id. at 194.

Plaintiff's counsel also relies on Parker v. Marcus, 281 N.J. Super. 589 (App. Div. 1995). Plaintiff's complaint in Parker was dismissed in 1991 due to the failure of counsel to notify plaintiff of the hearing and/or appear at the hearing on the plaintiff's behalf. Plaintiff moved to reinstate the complaint in 1994 but the motion was denied. Id. at 591-95. In reversing the trial court's

determination, the Appellate Division found dismissal was the ultimate sanction which left plaintiff without any remedy.

Both Jansson and Parker are distinguishable from the matter before this court. First, the procedural posture of both cases is different from the instant case as Jansson and Parker concern dismissals for failure to provide interrogatories and for failure to attend a hearing, respectively. The instant application is for a dismissal for failure to abide by the express terms of the ATE Settlement Program, which both parties voluntarily entered into and agreed to be bound by its terms

Further, in Jansson, the Appellate Division noted that "plaintiffs were, themselves, entirely blameless" because the plaintiffs "repeatedly inquired with respect to the status of the case." Jansson, 198 N.J. Super. at 195. Similarly, in Parker, the plaintiff over the course of a five-year period continuously "sent his attorney copies of medical bills, and requested information about the status of the case" because plaintiff was never informed that the case was dismissed. Id. at 592. When plaintiff inquired about the case's status, counsel lied. Id. The Appellate Division found that reinstatement should be allowed upon the fact that plaintiff "made every effort to keep in contact with his attorney during the pendency of his case." Id. at 594. Essential to the court's reasoning was that "plaintiff's dilemma was not occasioned by his own dereliction or ambivalence concerning whether or not to proceed with the suit," and that "[t]he dismissal . . . rest[ed] squarely on the shoulders of his prior attorney." Id. at 595.

Here, plaintiff herself was not proactive or blameless as in Jansson and Parker. Plaintiff's counsel filed the Notice of Opt In in a timely manner, and notwithstanding the ongoing issues with the dissolution of the Napoli Bern firm, was able to issue a timely but ultimately unsuccessful appeal with the Claims Administrator. This is not a situation where the attorneys were resting on

their laurels and misleading the client. Here, plaintiff did not communicate with her counsel for over three years, despite her counsel's attempts to contact her. When plaintiff finally provided new contact information to her counsel it was already two months after the appeal was denied. Finally, plaintiff still waited over a year from after she reestablished contact with her counsel to provide the important prescription information showing plaintiff had in fact taken Yaz. However, at that point it was too late.

Based on the foregoing, Plaintiff has failed to show any good cause as to why her complaint should not be dismissed as outlined in the agreed upon ATE Settlement Program between the parties. Therefore, pursuant to CMO 49 and the ATE Settlement Program, plaintiff's complaint is dismissed with prejudice.

IV. Conclusion

Based on the foregoing, defendant Bayer Corp.'s motion to dismiss plaintiff Michelle Montejano's complaint with prejudice is **GRANTED**.

Dated: July 9, 2018

Hon. Rachelle L. Harz, J.S.C.