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FILED

August 4, 2023

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

In Re: Fosamax

Applicable to All Cases on the
Attached Case List

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY
FOSAMAX LITIGATION
DOCKET NO. MID-L-7153-14
CIVIL ACTION CASE NO. 282
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 Plaintiffs listed in the attached Exhibit 1 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 these cases were dismissed without prejudice on April 28, 2023, and the Court having read and considered the papers submitted in this matter, and for the reasons set forth in the attached Statement of Reasons, and for good cause having been shown;

IT IS on this 4th day of August, 2023;

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

ORDERED that the Complaints of Plaintiffs listed in the attached Exhibit 1 are dismissed with prejudice, as to Merck & Co., Inc., and Merck Sharp & Dohme Corp.; 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.

UNOPPOSED

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 Plaintiffs listed in the attached Exhibit 1 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 notes that Plaintiff has not filed an opposition.

By way of relevant procedural history, this Court entered a Case Management Order (“CMO”) on June 28, 2022, which required Plaintiffs to substitute an authorized Personal Representative for the Estate of the deceased by September 21, 2022. On August 10, 2022, this Court entered a CMO which required Plaintiffs to substitute an authorized Personal Representative for the Estate of the deceased by November 17, 2022. On October 3, 2022, this Court entered again entered a CMO which required Plaintiffs to substitute an authorized Personal Representative for the Estate of the deceased by November 17, 2022. On December 13, 2022 and February 3, 2023, this Court entered orders permitting Defense counsel to file a motion to dismiss without prejudice if Plaintiff had not moved for substitution of the deceased plaintiff. On March 30, 2023, Defendants filed a motion to dismiss Plaintiff’s complaint without prejudice.

On April 28, 2023, this Court granted Defendants’ unopposed motion to dismiss the Complaints of Plaintiffs listed in the attached Exhibit 1 without prejudice for failing to effectuate the probate process to appoint a formal estate representative and substitute the estate. In addition to dismissing Plaintiffs’ complaint without prejudice, the Court’s April 28, 2023 Order provided Plaintiffs with 60 days to come into compliance and appoint a formal estate representative or Defendants may move to dismiss Plaintiffs’ complaint with 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 have failed to appoint a formal estate representative and substitute the estate as the plaintiff in this matter.

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. The Court finds that despite notice and opportunity, Plaintiffs have not provided the outstanding discovery, has not reinstated the complaint, or filed opposition.

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 and Plaintiffs have failed to substitute the estate, have failed to file a Motion to Reinstate the case, and Plaintiffs have failed to object to the requested relief. As a result, Defendant Merck’s motion to dismiss with prejudice is granted.

Exhibit 1
Case List to Order
Granting Dismissal With Prejudice for Failure to Effectuate the Probate Process

Name	Docket #	Firm
Mock, Chyrrel	MID-L-007004-14	Bern
Deal, Chong	MID-L-007585-14	Levensten Law
Herman, Carolyn	MID-L-008559-14	Levensten Law
Herst, Barbara	MID-L-008120-14	Levensten Law
Kanelos, Helen	MID-L-006762-14	Levensten Law
Malone, Ann	MID-L-009112-14	Levensten Law
Steele, Carolyn	MID-L-008303-14	Levensten Law
Thomas, Catherine	MID-L-008320-14	Levensten Law
Benjamin, Esther	MID-L-006765-14	Levin Papantonio
Early, Marjorie	MID-L-006981-14	Lynch Daskal
Healey, Ruth	MID-L-009173-14	Lynch Daskal
French, Mary	MID-L-007084-14	Miller Law
Greenspan, Marilyn	MID-L-008477-14	Oshman Mirsola
Davidson , Mary	MID-L-007068-14	Oshman Mirsola
Weaver, Marilyn	MID-L-007677-14	Oshman Mirsola
Zwerver, Wilhelmina	MID-L-007048-14	Oshman Mirsola
Burgess, Patricia	MID-L-008404-14	Parker Waichman
Carter, Patricia	MID-L-007932-14	Parker Waichman
Cobb, Benjamin	MID-L-006878-14	Parker Waichman
D'Amato, Cesira	MID-L-008213-14	Seeger Weiss
Dilly, Judith	MID-L-009354-14	Seeger Weiss
Farr, Lola	MID-L-007807-14	Seeger Weiss
Fenno, John	MID-L-008743-14	Seeger Weiss
Hawk, Martha E.	MID-L-009494-14	Seeger Weiss
Keith, Dorothy	MID-L-006826-14	Seeger Weiss
Lilienthal, Renata	MID-L-009231-14	Seeger Weiss
Martin, Jeanne	MID-L-006887-14	Seeger Weiss
McGuire, Betty	MID-L-008629-14	Seeger Weiss
Oldfield, Julia	MID-L-009127-14	Seeger Weiss
Rafferty, Margaret	MID-L-006896-14	Seeger Weiss
Rowe, Marchetta	MID-L-006733-14	Seeger Weiss
Savine, Florence	MID-L-009133-14	Seeger Weiss
Simmons, Betty	MID-L-009496-14	Seeger Weiss
Slezak, Ann	MID-L-006998-14	Seeger Weiss
Squires, Helen	MID-L-006892-14	Seeger Weiss
Wagstaff, Carolyn	MID-L-008020-14	Seeger Weiss

Name	Docket #	Firm
Barnes, Jeanne	MID-L-009465-14	Weitz & Luxenberg
Bradley, Beatrice	MID-L-008955-14	Weitz & Luxenberg
Chavez, Josie	MID-L-008043-14	Weitz & Luxenberg
Conrad, Ernestine	MID-L-008052-14	Weitz & Luxenberg
Crouch, Kathy	MID-L-007206 14	Weitz & Luxenberg
Everson, Mary	MID-L-007240-14	Weitz & Luxenberg
Lockard, Valerie	MID-L-009574-14	Weitz & Luxenberg
Morris, Mary	MID-L-007501-14	Weitz & Luxenberg
Rousseau, Myra	MID-L-009334-14	Weitz & Luxenberg
Seitz, Joan	MID-L-007094-14	Weitz & Luxenberg
Shinaver, Muriel	MID-L-008053-14	Weitz & Luxenberg