

BLANK ROME LLP

A Pennsylvania LLP

Terry M. Henry (NJ ID 2571996)
Ann E. Querns (NJ ID 900902012)
300 Carnegie Center, Suite 220
Princeton, NJ 08540
(215) 569-5644 (Phone)
(215) 832-5644 (Fax)
Terry.Henry@BlankRome.com
Ann.Querns@BlankRome.com

*Attorneys for Defendants
Watson Pharmaceuticals, Inc.; and
Watson Laboratories, Inc.*

FILED

February 3, 2023

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

MARGARET BARBEE,

Plaintiff,

v.

MERCK SHARP & DOHME CORP., et al.,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY
DOCKET NO. MID-L-008318-14
MCL CASE NO. 282

CIVIL ACTION

ORDER

THIS MATTER, having been brought before the Court upon motion by Blank Rome LLP, attorneys for Defendants Watson Pharmaceuticals, Inc. and Watson Laboratories, Inc. (“Watson”), for an Order to Dismiss the Plaintiff’s complaint 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 this case was dismissed without prejudice on October 3, 2022, and the Court having read and considered the papers submitted in this matter, and for the reasons set in the attached Statement of Reasons, and for good cause having been shown;

IT IS on this 3rd day of February, 2023;

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

ORDERED that Plaintiff's, Margaret Barbee's, Complaint is hereby **DISMISSED WITH PREJUDICE** as to Defendants Watson Pharmaceuticals, Inc. and Watson Laboratories, Inc.; 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 Blank Rome LLP, attorneys for Defendants Watson Pharmaceuticals, Inc. and Watson Laboratories, Inc. ("Watson") for an Order dismissing Plaintiff's claim with prejudice pursuant to R. 4:23-2(b), 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 Plaintiffs have not filed opposition.

By way of relevant procedural history, Plaintiff was previously identified, in Exhibit A.1, as including a deceased Plaintiff for which there had been no substitution of an authorized Personal Representative. On October 3, 2022, this Court entered a Case Management Order ("CMO") dismissing all cases listed on Exhibit A.1 without prejudice. In addition to dismissing the cases on Exhibit A.1 without prejudice, the Court provided Plaintiff with sixty (60) days to move pursuant to R. 4:34-1 to substitute an authorized Personal Representative for the Estate of a deceased Plaintiff identified on Exhibit A.1 and move to reinstate Plaintiff's complaint. Sixty (60) days have passed and no motions for an extension of time or to substitute Plaintiff and amend the complaint have been filed. As a result, Watson Defendants bring the instant motion to dismiss Plaintiff's claim with prejudice.

Under New Jersey law, a deceased person has no standing to pursue a claim pursuant to Repko v. Our Lady of Lourdes Med. Ctr., Inc., 464 N.J. Super. 570, 575-74 (App. Div. 2020). R. 4:34-1(b) provides that "If a party dies and the claim is not thereby extinguished, the court shall on motion order substitution of the proper parties. The motion for substitution may be made by the successors or representatives of the deceased party or by any party." Pursuant to Repko, the law requires substitution of a deceased Plaintiff's estate for a litigation to proceed. A deceased Plaintiff cannot proceed on the Court's docket without having an estate opened and a representative appointed.

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 these cases with prejudice. The Court finds that despite notice and opportunity, Plaintiff has not reinstated the complaint, has not substituted the estate, and has not 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 Plaintiff’s Complaint was dismissed without prejudice and Plaintiff has failed to substitute the estate, have failed to file a Motion to Reinstate the case, and Plaintiff has failed to object to the requested relief. As a result, Defendants’ motion to dismiss with prejudice is granted.