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FILED

March 17, 2023

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

IN RE: FOSAMAX® LITIGATION JUANA CANTERINO, Plaintiff, v. MERCK SHARP & DOHME CORP.,[1] et al, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MIDDLESEX COUNTY MCL NO.: 282 DOCKET NO.: MID-L-8651-14 **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 effectuate the probate process to appoint a formal estate representative and substitute the estate as this case was dismissed without prejudice on October 7, 2022, 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;

[1] Merck Sharp & Dohme Corp. has merged with and is now known as Merck Sharp & Dohme LLC, hereinafter "Merck."

IT IS on this 17th day of March, 2023;

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

ORDERED that Plaintiff's complaint, as to Merck & Co., Inc., and Merck Sharp & Dohme Corp., 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.

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 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. 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 on June 28, 2022, which provided Plaintiff until August 8, 2022 to move to substitute the estate for deceased Plaintiff. On August 10, 2022, this Court extended the time for which Plaintiff could file a motion to substitute an estate representative until September 21, 2022 or Plaintiff's case would be dismiss without prejudice. However, no substitution occurred. On October 7, 2022, this Court entered an Order dismissing Plaintiff's case without prejudice for failing to effectuate the probate process to appoint a formal estate representative and substitute the estate. In addition to dismissing Plaintiff's complaint without prejudice, the Court's October 7, 2022 Order provided Plaintiff with 120 days, or until February 4, 2023, to come into compliance and appoint a formal estate representative or Defendants may move to dismiss Plaintiff's complaint with prejudice.

Defendant Merck brings the instant motion to dismiss Plaintiff's complaint with prejudice because more than 120 days has passed since this case was dismissed without prejudice and plaintiff's next of kin has failed to appoint a formal estate representative and substitute the estate as the plaintiff in this matter.

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. The

Court finds that despite notice and opportunity, Plaintiff has 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 120 days has passed since Plaintiff's Complaint was dismissed without prejudice and Plaintiff has failed to substitute the estate, has failed to file a Motion to Reinstate the case, and Plaintiff has failed to object to the requested relief. As a result, Defendant Merck's motion to dismiss with prejudice is granted.