

FILED

August 2, 2024

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

DANIEL COLLINS, SR. and BARBARA COLLINS, as partial co-guardians of KATHLEEN COLLINS

Plaintiff,

v.

MERCK & CO., INC. and MERCK SHARP & DOHME CORP.¹,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY

MCL No. 282 Fosamax

DOCKET NO.: MID-L-8561-14

**ORDER OF
DISMISSAL WITH PREJUDICE**

THIS MATTER, having been brought before the Court upon motion by attorneys for Merck & Co., Inc. and Merck Sharp & Dohme Corp. (“Merck”), for an Order to Dismiss the Plaintiff’s Complaint with Prejudice for failure to abide by prior court Order, and the Court having read and considered the papers submitted in this matter, and for the reasons set forth herein, and for good cause shown;

IT IS on this 2nd day of August 2024;

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

ORDERED that Plaintiff DANIEL COLLINS, SR. and BARBARA COLLINS, as partial co-guardians of KATHLEEN COLLINS’s Complaint is hereby **DISMISSED WITH PREJUDICE** as to Defendants Merck Sharp & Dohme Corp.; and it is further

ORDERED that service of this Order shall be deemed effectuated upon all parties upon

¹ Merck Sharp & Dohme Corp. is now known as Merck Sharp & Dohme LLC.

its upload to eCourts. Pursuant to *R. 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.

151 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 Merck Sharp & Dohme Corp., by and through its attorneys Fox Rothschild LLP, 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. The Court has read and reviewed the papers submitted and notes that Plaintiff has not filed an opposition.

By way of relevant procedural history, On January 9, 2024, the Court denied Plaintiff's motion for lack of proper documentation. See Def. Exhibit C. The Order stated in part "the motion is to be refiled within 90 days of this Order with proper documentation; otherwise a certification must be provided to the Court detailing the efforts made by Counsel and the steps and time necessary to obtain the required documentation..." See *id.* Thereafter, this Court filed Case Management Order of January 16, 2024, on January 26, 2024. Pursuant to that Order, "As required by this Court's prior orders, for those cases identified on Exhibit A, Plaintiff must file a motion pursuant to *R. 4:34-1*, dismissal, or amended complaint within sixty days of the date of this Order." See Def. Exhibit A. The Order further states that should the deadline be missed, a motion to dismiss with prejudice may be filed. More than sixty days have passed and Plaintiff's next of kin has not filed the motion to substitute the estate or moved to reinstate the case in any manner. Plaintiff's next of kin has failed to appoint a formal estate representative and substitute the estate as the Plaintiff in this matter. More than ninety days have passed and Plaintiffs have not refiled the motion with the appropriate documentation, nor has counsel offered any certification as to the efforts made to obtain same.

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 documentation, 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 sixty (60) days have passed since the Court’s case management order and Plaintiff has failed to substitute the estate, failed to provide the missing documentation and 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.