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FILED

July 21, 2023

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

JOYCE FLAKE, et al

Plaintiff

Vs.

MERCK & CO., INC., et al.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION: MIDDLESEX COUNTY

FOSAMAX LITIGATION

DOCKET NO. MID-L-8972-14

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. (“Merck”), for an Order to Dismiss the Plaintiff’s complaint with prejudice pursuant to R. 4:23-5(a)(2), for failure to provide proof of use (“POU”) as this complaint was 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 21st day of July, 2023;

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

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

151 Bruce J. Kaplan
HONORABLE BRUCE J. KAPLAN, J.S.C.

UNOPPOSED

Statement of Reasons

This matter comes 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 provide proof of use ("POU"). The Court has read and reviewed the papers submitted in this matter and notes that Plaintiff has not filed an opposition.

By way of background, on February 3, 2023, this Court entered a Case Management Order ("CMO") that permitted Merck to file a motion to dismiss Plaintiff's complaint for failure to provide proof of use. In that CMO, Plaintiff was listed in Exhibit D and received prior notice by way of this Court's July and November 2022 Case Management Conferences and CMOs. This Court's February 3, 2023, CMO required Merck's counsel to provide email notice to Plaintiff's counsel "advising that proof of use . . . has not been received and if it is not provided within 14 days of the email notice, a motion to dismiss without prejudice will be filed." Plaintiff Joyce Flake was represented by Edward T. Rogan who passed away on December 25, 2021. On January 31, 2022, Paul Faugno was appointed as Attorney-Trustee for the purposes of terminating the law practice of Mr. Rogan. Merck's counsel provided notice to Mr. Faugno as required by the February 3, 2023 CMO by FedEx letter dated February 1, 2023. Additionally, Merck sent an email to Mr. Faugno after a phone call to his office on March 28, 2023.

During the April 4, 2023 Case Management Conference, this Court granted Merck permission to file a motion to dismiss this case without prejudice for failure to provide proof of use. On April 28, 2023, this Court granted Merck's motion to dismiss without prejudice. In addition to dismissing Plaintiff's complaint without prejudice, this Court provided Plaintiff with sixty (60) days to provide the outstanding POU before Merck could file a motion to dismiss with prejudice. Merck filed the instant unopposed motion to dismiss with prejudice because more than sixty (60) days has passed since the case was dismissed without prejudice and Plaintiff has failed to provide documentary evidence of POU.

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 filed opposition, has not reinstated the complaint, and has not provided any justification for additional time.

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, the Court finds there is no “lesser sanction” that can suffice to remedy the violations of this Court’s order.

As it has been more than 60 days since this case was dismissed without prejudice and Plaintiff has failed to file a Motion to Reinstate the case, and has failed to object to the requested relief, and Plaintiff remains delinquent on their discovery obligations. As a result, Defendant Merck’s motion to dismiss with prejudice is granted.