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FILED

March 10, 2023

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

*Attorneys for Defendants Merck & Co., Inc.
and Merck Sharp & Dohme Corp.*

IN RE: FOSAMAX LITIGATION

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY
MCL NO.: 282
Docket No. MID-L-7153-14
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, pursuant to the Court's October 3, 2022 Case Management Order, dismissing all cases listed on Exhibit A.1 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, as these cases were dismissed without prejudice on October 3, 2022, and the Court having read and considered the papers submitted in this matter, opposition filed, and for the reasons stated on the record during oral argument on January 24, 2023, and for the reasons set forth in the attached Statement of Reasons, and for good cause having been shown;

IT IS on this 10th day of March, 2023;

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, Plaintiffs have not reinstated the complaint, have not substituted the estate, and have 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 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. The Court notes that Plaintiffs were provided with an additional month after the Court’s deadline expired on February 10, 2023. As a result, Defendants’ motion to dismiss with prejudice is granted.

Exhibit A.1

Plaintiff Name	Plaintiff Counsel	Case No.	Status
Bradley, Margaret	Weitz & Luxenberg	L-9326-14	
Cashman, Helen	Weitz & Luxenberg	L-9646-14	
Castro, Sharyn	Weitz & Luxenberg	L-7880-14	
Crawford, Karen	Weitz & Luxenberg	L-9237-14	
Davis, Elizabeth	Weitz & Luxenberg	L-9444-14	
Eagan, Lois	Weitz & Luxenberg	L-9700-14	
Greenwald, Barbara	Weitz & Luxenberg	L-9621-14	
Irwin, Beverly	Weitz & Luxenberg	L-11088-14	
Kabakova, Raisa	Weitz & Luxenberg	L-9504-14	
Lannigan, Matthew	Weitz & Luxenberg	L-8942-14	
Locicero, Rose	Weitz & Luxenberg	L-8181-14	
Lodge, Georgia	Weitz & Luxenberg	L-9320-14	
McNichol, Lydia	Weitz & Luxenberg	L-9651-14	
Mee, Alice	Weitz & Luxenberg	L-9482-14	
Peppers, Arvie	Weitz & Luxenberg	L-2530-15	
Pinkston, Jean	Weitz & Luxenberg	L-8504-14	
Purvis, Joyce	Weitz & Luxenberg	L-8489-14	
Roppe, Joan	Weitz & Luxenberg	L-0540-15	
Shelko, Eleanor	Weitz & Luxenberg	L-7476-14	
Sibbald, Jean	Weitz & Luxenberg	L-7873-14	
St. Peter, Carol	Weitz & Luxenberg	L-9572-14	
Willoughby, Natalie	Weitz & Luxenberg	L-9459-14	
Zwahlen, Dorothy	Weitz & Luxenberg	L-9238-14	