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FILED

July 21, 2023

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

FAY PICCOLO, et al

Plaintiff

Vs.

MERCK & CO., INC., et al.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION: MIDDLESEX COUNTY

FOSAMAX LITIGATION

DOCKET NO. MID-L-0425-15

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., 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 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 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.

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 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 ("CMO") on June 28, 2022, which required Plaintiffs to substitute an authorized Personal Representative for the Estate of the deceased by September 21, 2022. On August 10, 2022, this Court entered a CMO which required Plaintiffs to substitute an authorized Personal Representative for the Estate of the deceased by November 17, 2022. On October 3, 2022, this Court entered again entered a CMO which required Plaintiffs to substitute an authorized Personal Representative for the Estate of the deceased by November 17, 2022. On December 13, 2022 and February 3, 2023, this Court entered orders permitting Defense counsel to file a motion to dismiss without prejudice if Plaintiff had not moved for substitution of the deceased plaintiff. On February 30, 2023, Defendants filed a motion to dismiss Plaintiff's complaint without prejudice.

On April 28, 2023<sup>1</sup>, this Court granted Defendants' motion to dismiss Plaintiff's complaint 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 April 28, 2023 Order provided Plaintiff with 60 days 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 60 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

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<sup>1</sup> An amended order was uploaded to remove one plaintiff from Ex. 1 on May 1, 2023. No other changes were made.

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, 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.