

Eileen Oakes Muskett, Esquire
Attorney ID No. 020731994
FOX ROTHSCHILD LLP
Midtown Building, Suite 400
1301 Atlantic Avenue
Atlantic City, NJ 08401
Tel: (609) 348-4515
Fax: (609) 348-6834
emuskett@foxrothschild.com

FILED

January 20, 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, and for the reasons set forth in the attached Statement of Reasons, and for good cause having been shown;

IT IS on this 20th day of January, 2023;

ORDERED that Defendants' Motion to Dismiss all cases listed on Exhibit A.1 with prejudice is hereby **GRANTED**; 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.

15/ Bruce J. Kaplan
HONORABLE BRUCE J. KAPLAN, J.S.C.

UNOPPOSED

Please see attached Statement of Reasons and Exhibit A1.

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 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. The Court has read and reviewed the papers submitted and notes that Plaintiffs have not filed opposition.

By way of relevant procedural history, the claims of the Plaintiffs identified in Exhibit A.1 were previously identified as including a deceased Plaintiff for which there had been no substitution of an authorized Personal Representative. On October 3, 2022, this Court entered a Case Management Order (“CMO”) dismissing all cases listed on Exhibit A.1 without prejudice. In addition to dismissing the cases on Exhibit A.1 without prejudice, the Court provided Plaintiffs with sixty (60) days to move pursuant to R. 4:34-1 to substitute an authorized Personal Representative for the Estate of a deceased Plaintiff identified on Exhibit A.1 and move to reinstate Plaintiffs’ complaints. Sixty (60) days have passed and no motions for an extension of time or to substitute Plaintiff and amend the complaint have been filed. As a result, Defendants bring the instant motion to dismiss all cases listed on Exhibit A.1 with prejudice.

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. As a result, Defendants’ motion to dismiss with prejudice is granted.

EXHIBIT A.1

| Plaintiff Name | Plaintiff Counsel | Case No. | Status |
|------------------------|----------------------------|-----------------|---|
| Guse, Jane | Aylstock Witkin | L-8334-14 | |
| Mathews, Anna | Aylstock Witkin | L-8544-14 | |
| Naghousi, Ehteram | Aylstock Witkin | L-9299-14 | |
| Pennell, Thomas | Aylstock Witkin | L-8384-14 | |
| Plesko, Kathleen | Aylstock Witkin | L-6893-14 | |
| Pressman, Judith | Aylstock Witkin | L-8862-14 | |
| Spear, Alta L. | Aylstock Witkin | L-9327-14 | Stipulation of Dismissal Pending |
| Stritikus, Priscena | Aylstock Witkin | L-6951-14 | |
| Blakely, Lyle | Bern Ripka Napoli Shkolnik | L-9228-14 | |
| Beaudoin, Phyllis M. | D'Arcy Johnson Day, P.C. | L-11346-14 | |
| Benson, Theodora | Douglas & London | L-9099-14 | |
| Gaastra, Ronald | Douglas & London | L-7721-14 | |
| Hardin, Mervin | Douglas & London | L-8725-14 | |
| Moore, Leola | Douglas & London | L-8705-14 | |
| Ellis, Eleanor Imogene | Jan Meyer & Associates | L-7197-14 | |
| Mazurik, Delores | Jan Meyer & Associates | L-7596-14 | |
| Noble, Lorraine Lynn | Jan Meyer & Associates | L-7249-14 | |
| Avers, Lyla | Levensten Law Firm | L-7948-14 | |
| Barbee, Margaret | Levensten Law Firm | L-8318-14 | |
| Baron, Charlotte | Levensten Law Firm | L-7276-14 | |
| Bishop, Merlin | Levensten Law Firm | L-7625-14 | Dismissed 8/8/2022 as to Merck Active as to Teva, Mylan, UDL Laboratories only |
| Bollino, Mary Alice | Levensten Law Firm | L-8480-14 | Dismissed 9/2/2022 as to Merck Active as to Watson and Northstar only |
| Brown, Barbara D. | Levensten Law Firm | L-8721-14 | |
| Cochran, Vanila A. | Levensten Law Firm | L-7519-14 | |
| Duffy, Lucille | Levensten Law Firm | L-8461-14 | |
| Fisher, Doris | Levensten Law Firm | L-6744-14 | |
| Furr, Betty | Levensten Law Firm | L-7000-14 | |
| Gretencort, Gail | Levensten Law Firm | L-9265-14 | |
| King, Charles | Levensten Law Firm | L-6753-14 | |
| Kinison, Meriam | Levensten Law Firm | L-8983-14 | |
| Kinsey, Dora | Levensten Law Firm | L-7769-14 | |
| Lee, Young Hwi | Levensten Law Firm | L-8216-14 | Dismissed 8/8/2022 as to Merck Active as to Mylan, UDL Laboratories only |
| Lobsiger, Genice | Levensten Law Firm | L-8684-14 | |
| Payne, Juanita | Levensten Law Firm | L-7618-14 | |
| Quick, Diane | Levensten Law Firm | L-7896-14 | |
| Rogers, Everlener C. | Levensten Law Firm | L-7641-14 | Dismissed 9/2/2022 as to Merck Active as to Watson only |

| Plaintiff Name | Plaintiff Counsel | Case No. | Status |
|----------------------------|--------------------|-----------|---|
| Rummer, Karen Lane | Levensten Law Firm | L-6967-14 | |
| Siedman, Ruth | Levensten Law Firm | L-8565-14 | |
| Stiffey, Shirley | Levensten Law firm | L-9349-14 | |
| Taylor, Carol | Levensten Law Firm | L-7378-14 | |
| Wasserman, Arlene | Levensten Law Firm | L-7664-14 | |
| Dix, Julius Alfred | Locks Law Firm LLC | L-7942-14 | |
| Harrington, Joanie | Locks Law Firm LLC | L-7786-14 | |
| Skapura, Jeanne | Locks Law Firm LLC | L-7604-14 | |
| Walters, Judith Ann | Locks Law Firm LLC | L-8922-14 | |
| Ahmadi, Akila | Lynch Daskal Emery | L-9193-14 | 8/1/2022 - Motion for Extension of Time to Move for Substitution of Party; requested extension to 9/21/2022 8/5/2022 – Motion for Extension WITHDRAWN |
| Collier, Knelda | Lynch Daskal Emery | L-8415-14 | |
| Gaitan, Alice | Lynch Daskal Emery | L-9139-14 | |
| Petkovsek, Marian | Lynch Daskal Emery | L-9121-14 | |
| Smith, Dorothy | Lynch Daskal Emery | L-9165-14 | |
| Stephenson, Mildred Nadine | Lynch Daskal Emery | L-9117-14 | 8/1/2022 - Motion for Extension of Time to Move for Substitution of Party; requested extension to 9/21/2022 8/5/2022 – Motion for Extension WITHDRAWN |
| Gromfine, Mildred | Miller Firm, LLC | L-7697-14 | |
| Born, Rosalyn | Oshman & Mirisola | L-8187-14 | |
| Crain, Memory | Oshman & Mirisola | L-8168-14 | |
| Gossett, Judith | Oshman & Mirisola | L-8195-14 | |
| Johnson, Yvonne | Oshman & Mirisola | L-8819-14 | |
| Mooney, Carole Ann | Oshman & Mirisola | L-7192-14 | |
| Overton, Dolores | Oshman & Mirisola | L-8118-14 | |
| Stracke, Doris | Oshman & Mirisola | L-7055-14 | |
| Su, Christina | Oshman & Mirisola | L-7824-14 | |
| Whited, Mary Ann | Oshman & Mirisola | L-8185-14 | |
| Woods, Charlotte A. | Oshman & Mirisola | L-7867-14 | |
| Boyce, Emma | Parker Waichman | L-9080-14 | |
| Christy, Maysel | Parker Waichman | L-8001-14 | |
| Dunaway, Joyce C. | Parker Waichman | L-8624-14 | |
| Galleshaw, Dianne | Parker Waichman | L-8623-14 | |
| Kotkins, Adaline | Parker Waichman | L-7621-14 | |
| Liggon, Carolyn | Parker Waichman | L 7035-14 | |
| Pugliese, Amelia | Parker Waichman | L-7492-14 | |
| Tarasar, Mary | Parker Waichman | L-6787-14 | |

| Plaintiff Name | Plaintiff Counsel | Case No. | Status |
|-----------------------|---------------------------|-----------------|---|
| Young, Evonne | Pinilis Halpern | L-7001-14 | |
| Phelps, Clara | Sanders Grossman Phillips | L-7101-14 | |
| Baker, Billie Sue | Seeger Weiss | L-6895-14 | |
| Campbell, Elizabeth | Seeger Weiss | L-2363-15 | |
| Colangelo, Vera | Seeger Weiss | L-6795-14 | |
| Corkum, Joan | Seeger Weiss | L-6894-14 | |
| Creeley, Shirley | Seeger Weiss | L-7049-14 | 8/8/2022 - Motion for Extension of Time to Move for Substitution of Party; requested extension of 30 days, or 9/7/2022 8/18/2022 - Opposition to Motion to Extend Time 8/22/2022 - Letter withdrawing motion to extend time |
| Cyr, Susan | Seeger Weiss | L-9128-14 | |
| Fowler, Barbara | Seeger Weiss | L-8741-14 | |
| Frame, Nancy J. | Seeger Weiss | L-9039-14 | |
| Fullmer, Patricia | Seeger Weiss | L-8744-14 | |
| Gossett, Julia | Seeger Weiss | L-9154-14 | |
| Harrell, Doris | Seeger Weiss | L-7746-14 | |
| Henderson, Bettye J. | Seeger Weiss | L-6832-14 | |
| Luckerth, Ruth | Seeger Weiss | L-8453-14 | |
| Mason, Mennie | Seeger Weiss | L-8297-14 | |
| Moragne, Earline | Seeger Weiss | L-6827-14 | |
| Olbrich, Diane J, | Seeger Weiss | L-6831-14 | |
| Oravets, Arlene | Seeger Weiss | L-9284-14 | |
| Peigh, Valentina | Seeger Weiss | L-7881-14 | |
| Strayer, Sally | Seeger Weiss | L-8630-14 | |
| Timko, Betty | Seeger Weiss | L-9169-14 | |
| Carlisle, Delores | Weitz & Luxenberg | L-6832-16 | |
| Feeheley, Joan | Weitz & Luxenberg | L-9469-14 | |
| Gaby, Julia | Weitz & Luxenberg | L-9579-14 | |
| Janda, Maureen | Weitz & Luxenberg | L-8024-14 | |
| Lake, Judith | Weitz & Luxenberg | L-9640-14 | |
| Morales, Raul | Weitz & Luxenberg | L-9645-14 | |
| Penoyer, Laverne | Weitz & Luxenberg | L-3612-15 | |
| Seagraves, Katie | Weitz & Luxenberg | L-7329-14 | |
| Viljevac, Janice | Weitz & Luxenberg | L-9484-14 | |
| Webb, Gladys | Weitz & Luxenberg | L-7465-14 | |