

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  
[emussett@foxrothschild.com](mailto:emussett@foxrothschild.com)

FILED

June 29, 2023

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

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

ROGER FANCHER,  
Plaintiff,

v.

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

Defendants.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: MIDDLESEX COUNTY

DOCKET NO.: MID-L-003359-20

**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 Complaint of Plaintiff 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 February 13, 2022, and the Court having read and considered the papers submitted in this matter, opposition filed, and for the reasons set forth in the attached Statement of Reasons, and for good cause having been shown;

**IT IS** on this 29th day of June, 2023;

**ORDERED** that Defendants' motion is **GRANTED**; and it is further

**ORDERED** that Plaintiff's complaint is **DISMISSED with prejudice** in its entirety; 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.

**OPPOSED**

**Statement of Reasons**

This matter was initially 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 Exhibit B Plaintiffs' complaints 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 The Court has read and reviewed the papers submitted and notes that Plaintiff has withdrawn their previously filed opposition.

By way of relevant procedural history, this Court entered Case Management Order ("CMO") #29 on December 13, 2022. That Order stated that Plaintiffs' Counsel were to provide detailed explanations as to the status of the probate process for the case listed in Exhibit B to CMO #29 by January 1, 2023. Additionally, CMO #29 provided notice to Plaintiffs' Counsel that if motions to substitute the estate were not filed by February 1, 2023, then the Court reserves the right to dismiss the complaints of plaintiffs in Exhibit B to CMO #29 without prejudice at the February 2, 2023 Case Management Conference ("CMC"). The Court notes that Plaintiff was included in Exhibit A to CMO #29. The Court further notes that the plaintiff did not file a motion to substitute the estate by February 1, 2023, and at the February 2, 2023 CMC the Court gave Defendants permission to file a Five-Day Order to dismiss Plaintiff's complaint without prejudice. On February 13, 2023, the Court, after receiving no opposition, uploaded Defendants' Five-Day Order and dismissed Plaintiff's complaint without 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.

Defendant Merck's motion was originally filed, on April 18, 2023, as an omnibus motion. Plaintiff was removed from said motion because Plaintiff had filed opposition. However, Plaintiff has since withdrawn their opposition.

The Court finds that despite notice and opportunity, Plaintiff has not provided the outstanding discovery, has not reinstated the complaint, and has withdrawn their opposition. 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.

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 Plaintiff’s complaint was dismissed without prejudice, Plaintiff has failed to substitute the estate, and Plaintiff has failed to file a Motion to Reinstate the case. As a result, Defendant Merck’s motion to dismiss with prejudice is granted.