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FILED

July 7, 2023

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

CARMON RANDALL, et al Plaintiff Vs. MERCK & CO., INC., et al.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MIDDLESEX COUNTY FOSAMAX LITIGATION DOCKET NO. MID-L-9357-14 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 14, 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 7th day of July, 2023;

ORDERED that Defendant Merck's Motion to Dismiss with prejudice **is GRANTED**; and it is further

ORDERED that Plaintiff's complaint is dismissed with prejudice as to Defendant Merck; 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.

/S/ 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." Merck's counsel sent email notice as required by the February 3, 2023 CMO and after 14 days, filed a motion to dismiss Plaintiff's complaint without prejudice. On April 14, 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 remain delinquent on their discovery obligations, Defendant's motion to dismiss with prejudice is granted.