

Thomas P. Giuffra, Esq.
RHEINGOLD GIUFFRA RUFFO & PLOTKIN
551 5th Avenue, 29th Floor
New York, NY 10176
(212) 684-1880
Attorneys for Plaintiff

FILED

December 2, 2022

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

STEPHANIE SMITH)

) SUPERIOR COURT OF NEW JERSEY
) LAW DIVISION: MIDDLESEX
) COUNTY
) **CASE NO. L-7835-14**

Plaintiffs,)

) CIVIL ACTION

v.)

) IN RE FOSAMAX LITIGATION

MERCK SHARP & DOHME CORP,)

) **ORDER**

Defendants.)

THIS MATTER being opened to the Court by Thomas P. Giuffra, Esq., attorney for the plaintiff STEPHANIE SMITH, for an Order adjourning the instant proceeding for one-hundred and eighty days in order to locate the successor or representative of Plaintiff, STEPHANIE SMITH, deceased, the claim set forth in the Complaint not having been extinguished by the death of STEPHANIE SMITH, pursuant to NJ Rule 4:34-1; and the Court having read and considered the papers submitted in this matter, and for the reasons in the attached Statement of Reasons, and for good cause having been shown;

IT IS on this 2nd day of December, 2022:

ORDERED that Plaintiff's motion to extend time to file a motion to substitute **is hereby DENIED**; and it is further

ORDERED that Plaintiff's complaint is hereby dismissed without prejudice; and it is further

ORDERED that Plaintiff's Next of Kin shall have until March 2, 2023, to file a motion to substitute the estate; and it is further

ORDERED that should Plaintiff's Next of Kin fail to substitute the estate by March 2, 2023, then a motion to dismiss with prejudice may be filed; and it is further

ORDERED that service of this Order shall be deemed effectuated upon all parties upon its upload to e-Courts. 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

See Statement of Reasons attached

Statement of Reasons

This matter comes before the Court by way of Plaintiff's, Stephanie Smith's, unopposed Motion to Extend Time to Substitute the Estate. The Court notes that it has read and considered the papers submitted in this matter,

By way of relevant procedural history, this Court entered a Case Management Order on June 28, 2022, which provided Plaintiff until September 21, 2022, to move to substitute the estate for this deceased Plaintiff. Additionally, the Court's September 22, 2022 Case Management Order¹ provided Plaintiff with further notice to substitute an authorized personal representative for the estate by November 17, 2022. The Court notes that same was not filed. Pursuant to the same Case Management Order, the Court provided that Counsel may request an extension of time provided good cause was shown. Accordingly, the instant motion was filed requesting additional time to substitute the estate.

In support of Plaintiff's motion, Plaintiff's Counsel represents that Plaintiff Stephanie Smith died on May 30, 2016. Counsel asserts that his office has made a good faith effort to locate surviving relatives. Specifically, Counsel states that his office has made efforts to search for a next of kin by way of phone and mail but have been unsuccessful in his attempts. To date, Counsel has been unable to locate a phone number. Counsel further represents that he would like to attempt contact through certified mail and an investigator. Accordingly, Counsel requests an additional 180 days to come into compliance.

¹ The language in the June 28, 2022 CMO, stated that the claims of Plaintiff will be dismissed with prejudice. During the September 22, 2022 CMC, the Court amended the previous CMO language to clarify that the claims of non-compliant plaintiffs will be dismissed without prejudice—not 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 the Repko case as cited above, 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.

The Court having read and considered the arguments of Counsel finds that the vague, uncorroborated record is void of any justification for an additional 180 days. Plaintiff, Stephanie Smith passed away more than six years ago. The record also reveals that Plaintiff’s Counsel was aware of Plaintiff’s death since the May 24, 2022 Case Management Conference. See June 28, 2022 CMO Exhibit B. The current record is void of any information when the search for the next of kin had begun, what efforts have been made prior to the filing of this motion, and the efforts made to identify a willing next of kin in the 5 months since learning of Plaintiff’s death. Forwarding a certified letter and/or retaining an investigator certainly could have been done in the 120 days the Court provided for previously. While the Court is sympathetic to the efforts of Counsel, the fact remains that this Plaintiff passed away quite some time ago, and to date, no willing next of kin has been identified.

Accordingly, the Court will be denying Plaintiff’s motion to extend time and will enter an order dismissing Plaintiff’s complaint without prejudice pursuant to the above-referenced case law and this Court’s previous Case Management Order.

With that said, it is not the intent of this Court, or this Order, to bar viable claims or deny counsel a reasonable time to comply with our court rules, case law, and this Court’s prior Orders. Therefore, while denying Plaintiff’s request for a 180-day extension for compliance, the Court will provide Plaintiff’s next of kin 90 days, or until March 2, 2023, from the date of this Order to file a motion to reinstate and amend the complaint to substitute the estate for this deceased Plaintiff. The Court notes this time is in addition to the 15 days that has accrued since the November 17, 2022 compliance date. To the extent there is a willing next of kin, there is ample time to locate same and file the necessary motion. Failure to do so could result in the case being dismissed with prejudice.

For the reasons stated, the motion is denied, and this matter is dismissed without prejudice.