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FILED

December 2, 2022

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

OLLIE STIVERS and CHESTER STIVERS)

) SUPERIOR COURT OF NEW JERSEY
) LAW DIVISION: MIDDLESEX
) COUNTY
) **CASE NO. L-8080-14**

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 OLLIE STIVERS and CHESTER STIVERS, for an Order adjourning the instant proceeding for one-hundred and eighty days in order to locate the successor or representative of Plaintiffs, OLLIE STIVERS and CHESTER STIVERS, deceased, the claim set forth in the Complaint not having been extinguished by the deaths of OLLIE STIVERS and CHESTER STIVERS, pursuant to NJ Rule 4:34-1; and the Court having read and considered the papers submitted in this matter, opposition filed, 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.

OPPOSED

See Statement of Reasons attached

Statement of Reasons

This matter comes before the Court by way of Plaintiffs', Ollie Stivers and Chester Stivers, opposed Motion to Extend Time to Substitute the Estate. The Court notes that it has read and considered the papers submitted in this matter, and Defense Counsel's opposition. The Court notes that Plaintiff's Counsel has not filed a reply.

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 Ollie Stivers died on May 18, 2020 and Plaintiff Chester Stivers died on January 3, 2019. Counsel represents that his office has made a good faith effort to locate surviving relatives. Specifically, Counsel states that

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.

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.

By way of opposition, Defense Counsel argues that Plaintiff's Counsel has failed to dismiss Plaintiff's claims or file a motion to substitute the estate pursuant to R. 4:34-1 and this Court's Orders. Defense Counsel represents that this Court has already afforded Plaintiffs over 120 days from the date of the May 24, 2022 CMC and Plaintiff's have been explicitly informed of their responsibility to move for substitution since this Court's June 28, 2022 CMO. Defense Counsel asserts that good cause to extend does not exist here because Plaintiff's motion is scarce of any detail as to why an extension should be granted when Plaintiff's Counsel could not accomplish what was supposed to be done 177 days ago.

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, Ollie Stivers passed away more than two years ago and Plaintiff Chester Stivers passed away more than three 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.