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

BARBARA LOWRANCE BOOK,

Plaintiff,

v.

MERCK & CO., INC., MERCK SHARP &  
DOHME CORP., "JOHN DOE," "JANE  
DOE," AND "XYZ CORP" (FICTITIOUS  
NAMES),

Defendants.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: MIDDLESEX COUNTY

DOCKET NO.: MID-L-005341-18

**ORDER**

**WHEREAS**, Defendants, Merck & Co., Inc. and Merck Sharp & Dohme Corp., by and through counsel, Fox Rothschild, LLP, move before the Court to dismiss Plaintiffs' case with prejudice, and the Court having read and considered the moving papers submitted, the opposition filed, the reply thereto, and for good cause having been shown;

**IT IS ON** this 1st day of November, 2021,

**ORDERED** that Defendants' Motion to Dismiss is hereby **GRANTED in part and DENIED in part**; and it is further

**ORDERED** that Plaintiff's case is **DISMISSED WITHOUT PREJUDICE** in accordance with R. 4:23-5(a)(1); and it is further

**ORDERED** that this Order shall be deemed served upon its filing to eCourts. Movant shall serve all parties not electronically served within seven (7) days of the date of this Order in accordance with R. 1:5-1(a).

*/s/ Bruce J. Kaplan*

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**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 an opposed Motion to Dismiss the Plaintiff's Complaint with prejudice pursuant to R. 4:23-2. The Court, in deciding this motion, has read and considered the Motion, the opposition, and the reply thereto.

The record will reflect that on July 29, 2021, the Court entered an Order compelling the Plaintiff to provide a verified, materially complete Plaintiff Fact Sheet ("PFS") within 60 days of the Order with the failure to do so subjecting the Plaintiff to having her case dismissed with prejudice. See Statement of Reasons to July 29, 2021 Court Order. The additional time was provided to allow the Plaintiff's Next of Kin ("NOK") more time to complete the estate process. Unfortunately, that did not occur and this motion ensues.

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. at 341 (citing Tsibikas v. Morrof, 5 N.J. Super. 306 (App. Div. 1949)).

In opposition to the current motion, Counsel represents that the motion was properly served on the Plaintiff's NOK and they were advised of the consequences of non-compliance<sup>1</sup>. Unfortunately, again, it appears that the NOK are non-communicative and unresponsive to Counsel's efforts. If the NOK were communicating with Counsel, and it could be affirmatively represented and demonstrated that they were taking the steps necessary to be appointed personal representative of the Plaintiff for purposes of prosecuting this lawsuit, this Court would provide the additional time requested in opposition. However, in this case the parties are not communicating with Counsel and there is nothing before this Court to corroborate that any efforts have been made.

As demonstrated by the Court's foregoing discussion, PFS is threshold discovery that goes to the very foundation of this MCL. Per the Court's July 29, 2021 Order, Plaintiff was to provide a materially complete Plaintiff Fact Sheet within 60 days of that order. This Court finds that the Plaintiffs have had more than enough time to comply with this Court's orders and to communicate and cooperate with their attorney and have failed to do so.

Due to the delays and the failure to comply with Court Orders this matter will be dismissed. However, pursuant to R. 4:23-5, a two-step dismissal process must occur, and this matter will first be dismissed without prejudice. In the event of failure to provide the required materially complete PFS within sixty (60) days a Motion to Dismiss with prejudice pursuant to R. 4:23-5(a)(2) may be filed. In light of the foregoing, Plaintiffs' case is hereby **DISMISSED WITHOUT PREJUDICE**.

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<sup>1</sup> In opposition Plaintiff's Counsel asserts that efforts to call the Plaintiff were made fifteen (15) times, sent four (4) notices about the need to respond to discovery, and employed a third party investigator to learn that the Plaintiff passed away on September 3, 2020.