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FILED

December 16, 2022

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

FAY FOSTER,

Plaintiff,

v.

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

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY

DOCKET NO.: MID-L-003893-21

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 Plaintiff's complaint with prejudice pursuant to R. 4:23-5(a)(2), for failure to provide a materially complete and certified Plaintiff Fact Sheet ("PFS") as this complaint was dismissed without prejudice on September 26, 2022, 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 16th day of December, 2022;

ORDERED that Defendants' Motion to Dismiss with prejudice **is hereby GRANTED;**
and it is further

ORDERED that Plaintiff's complaint is hereby dismissed with prejudice; 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.

UNOPPOSED

See Statement of Reasons attached

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 a materially complete and certified Plaintiff Fact Sheet (“PFS”). The Court notes that it has read and reviewed the papers submitted in this matter. The Court further notes that Plaintiffs’ Counsel has not filed an opposition.

By way of relevant procedural history, Plaintiff’s PFS was originally due on November 8, 2021. On April 29, 2022, Defense Counsel sent a deficiency letter to Plaintiff’s Counsel. Plaintiff had an opportunity to cure within thirty (30) days by May 31, 2022. At the request of Plaintiff’s Counsel, Defense Counsel provided additional time until July 5, 2022, to cure the deficiencies. On August 5, 2022, this Court entered an Order granting Defendants’ Motion to Compel Plaintiff Fay Foster to provide a materially completed and certified PFS by August 19, 2022. On September 26, 2022, the Court granted Defendants’ unopposed Motion to Dismiss Plaintiff’s case without prejudice. In addition to dismissing Plaintiff’s complaint without prejudice, the Court’s September 26, 2022 Order provided Plaintiff with sixty (60) days to come into compliance and provide materially complete and certified PFS or Defendants may move to dismiss Plaintiff’s complaint with prejudice. Defendants bring the instant motion to dismiss Plaintiff’s complaint with prejudice because more than sixty (60) days has passed since this case was dismissed without prejudice and Plaintiff has failed to provide materially complete and certified PFS.

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 and does not provide 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 remains delinquent on discovery obligations, Defendants’ motion to dismiss with prejudice is granted.