

Eileen Oakes Muskett, Esquire
Attorney ID No. 020731994
FOX ROTHSCHILD LLP
Midtown Building, Suite 400
1301 Atlantic Avenue
Atlantic City, NJ 08401
Tel: (609) 348-4515
Fax: (609) 348-6834
emuskett@foxrothschild.com

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

FILED

OCTOBER 8, 2021

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

CARMEN POWELL,
Plaintiff,

v.

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

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY

DOCKET NO.: MID-L-000159-21

WHEREAS, Defendants, Merck & Co., Inc., and Merck Sharp & Dohme, Corp., by and through its counsel, Fox Rothschild, LLP, now moves the Court for an Order dismissing Plaintiff's case without prejudice, pursuant to the September 8, 2021 Case Management Order and R. 4:23-2, for failure to serve a completed and certified Plaintiff Fact Sheet ("PFS") as required by the June 12, 2019 Case Management Order (the "PFS CMO, and the Court having considered the moving papers, for the reasons in the statement of reasons, and for good cause shown,

IT IS ON this 8th day October 2021, hereby;

ORDERED that Defendants' Motion is **GRANTED**; and it is further

ORDERED that Plaintiff's case be and is hereby **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

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 Merck & Co., Inc., and Merck Sharp & Dohme, Corp Motion to Dismiss Plaintiff's Complaint without prejudice in accordance R. 4:23-(a)(1). By way of background, on September 8, 2021, this Court entered a Case Management Order detailing the procedure for providing a materially complete Plaintiff Fact Sheet ("PFS") as required by the June 12, 2019, Case Management Order (the "PFS CMO"). The instant motion represents that the PFS is still outstanding. This Court notes that it has considered the moving papers and opposition.

In opposition, it is not disputed that despite Plaintiff's counsel best efforts, the PFS has not been provided by the Plaintiff. Specifically, despite the Plaintiff being advised of her discovery obligation under PFS CMO dated June 12, 2019, and despite counsel calling the Plaintiff eighteen (18) times and mailing five (5) notices, warning that failure to respond could result in a dismissal of her case without prejudice, the Plaintiff has been unresponsive. Counsel in this case, then took the additional step of hiring a third-party investigator to locate the Plaintiffs to no avail. The Court also notes that the opposition also represents that Counsel for Plaintiff was able to speak with Plaintiff on May 19, 2021. Plaintiff reported that she had been seriously ill, and she was being taken care of by an out-of-state relative. Plaintiff mentioned that she had not received any correspondence or messages. Upon request, Plaintiff's Counsel resent via Priority Mail, the same day, Plaintiff Fact Sheet materials. Plaintiff confirmed with Counsel that she received Plaintiff Fact Sheet materials on May 26, 2021, and would return it shortly. Plaintiff's Counsel advised Plaintiff that there is a motion to dismiss her case without prejudice for failure to serve a completed and certified PFS and responsive documents. Since May 26, 2021, Counsel has been unable to reach Plaintiff despite numerous telephone calls and written requests. On May 26, 2021, Plaintiff knew of the obligation to provide a materially complete PFS, but Plaintiff did not comply. Despite receiving the materials, Plaintiff's Counsel received no cooperation from client.

R. 4:23-5(a)(1) provides, in pertinent part, "[i]f a demand for discovery ... is not complied with ... the party entitled to the discovery may ... move, on notice, for an order dismissing or suppressing the pleading of the delinquent party.... Unless good cause or other relief is shown, the court shall enter an order of dismissal ... without prejudice."

Here, the facts before the Court demonstrates that Plaintiff has not provided a materially complete PFS within the original time frame, and multiple extensions were granted. In light of the fact that Plaintiff continues to be non-compliant with threshold discovery, the Court believes that a dismissal without prejudice is appropriate at this time in accordance with R. 4:23-5(a)(1). A dismissal without prejudice is an appropriate sanction that will suffice to put the Plaintiff on notice that her case is in jeopardy of being dismissed, and Defendants will be within its rights to file a motion to dismiss with prejudice should Plaintiffs fail to produce a materially complete PFS within sixty (60) days of the date of this Order.

As demonstrated by the Court's foregoing discussion, PFS is threshold discovery that goes to the very foundation of this MCL. Per the PFS CMO, Plaintiff's PFS was due on December 1, 2019. According to Defendants, Plaintiffs have received roughly three (3) 30-day extensions and one (1) 60-day extension to provide a materially complete PFS. This Court finds that the Plaintiff 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. Given the number of extensions in this case, the Court finds that Plaintiff has not made an effort to come into compliance with discovery obligations.

In light of the foregoing, Plaintiffs' cases are hereby **DISMISSED WITHOUT PREJUDICE.**