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FILED

March 3, 2023

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

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

ANITA ITSELL and TREVES ITSELL,

Plaintiffs,

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-004915-22

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 Plaintiffs' Complaint, without prejudice pursuant to R. 4:23-5(a)(1), for failure to provide a materially complete and certified Plaintiff Fact Sheet, and the Court having read and considered the papers submitted in this matter, the opposition filed, and for the reasons set forth in the attached Statement of Reasons, and for good cause having been shown;

IT IS on this 3rd day of March, 2023;

ORDERED that Defendants' Motion to Dismiss without prejudice **is hereby GRANTED**;
and it is further

ORDERED that Plaintiffs' complaint, is hereby dismissed without prejudice; and it is further

ORDERED that should Plaintiff fail to produce a materially complete and certified Plaintiff Fact Sheet within sixty (60) days of this Order, 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 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.

1/5/ Bruce J. Kaplan
HONORABLE BRUCE J. KAPLAN, J.S.C.

OPPOSED

Statement of Reasons

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 Plaintiff's complaint without prejudice pursuant to R. 4:23-5(a)(1), for failure to provide a materially complete and certified Plaintiff Fact Sheet ("PFS"). The Court notes that it has considered the moving papers and Plaintiffs' opposition.

By way of background, Plaintiff's PFS was originally due on January 13, 2023, as set forth in the June 12, 2019, PFS Case Management Order. To date, Plaintiff has not provided Defendant with a PFS. On January 17, 2023, Defense Counsel notified Plaintiff's Counsel, by way of email, that Plaintiff was delinquent in the production of a PFS. On January 31, 2023, Defense Counsel again contacted Plaintiff's Counsel asking if they would agree to include plaintiff on a consent order. Plaintiff's Counsel did not respond to said request. During the January 26, 2023 liaison counsel call, this Court granted Defense Counsel permission to file the instant motion to dismiss without prejudice.

In support of Defendant's motion, Defense Counsel argues that Plaintiff has not complied with this Court's Orders, has failed to provide PFS, and Plaintiff's case should be dismissed without prejudice.

In opposition, Plaintiff's Counsel represents that their office notified Plaintiff of their discovery obligations under the PFS CMO, by calling Plaintiff twelve (12) times, and mailing Plaintiff three (3) notices about the need to respond to discovery. Furthermore, Plaintiff's Counsel hired a third-party personal investigator to locate the Plaintiffs and to produce additional means of contacting her, to no avail. Plaintiff's Counsel also represents that they have notified their client that there is a motion seeking the dismissal of their case, without prejudice, for failure to serve a completed and certified Plaintiff Fact Sheet and responsive documents, with this Court. However, Plaintiff has not responded. Plaintiff's Counsel requests additional time, as the Court sees fit, to produce the outstanding discovery.

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, Plaintiff has not provided PFS within the original time frame and Plaintiff has not responded to any of their attorney’s correspondences.

In light of the fact that Plaintiff continues to be non-compliant with discovery, the Court believes that dismissal without prejudice is appropriate at this time pursuant to R. 4:23-5(a)(1). A dismissal without prejudice is an appropriate sanction that will suffice to put Plaintiff on notice that their cases are in jeopardy of being dismissed, and Defendants will be within its right to file a motion to dismiss with prejudice should Plaintiffs fail to produce a materially complete and certified PFS within sixty (60) days of this Order.

Accordingly, the Court will be granting Defendants’ motion to dismiss without prejudice pursuant to R. 4:23-5(a)(1).