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and Merck Sharp & Dohme LLC*

FILED

March 17, 2023

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

IN RE ZOSTAVAX LITIGATION

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY

DOCKET NO.: MID-L-004999-18

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 Omnibus Order to Dismiss the attached Exhibit B Plaintiffs' complaints with prejudice pursuant to R. 4:23-5(a)(2), for failure to effectuate the probate process to appoint a formal estate representative and substitute the estate as these cases were dismissed without prejudice on December 13, 2022, and the Court having read and considered the papers submitted in this matter, 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 17th day of March, 2023;

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

ORDERED that Defendants’ Omnibus Motion to Dismiss with prejudice **is hereby GRANTED** for the Plaintiffs identified in the attached Exhibit B; and it is further

ORDERED that the attached Exhibit B Plaintiffs’ complaints, as to Merck & Co., Inc., and Merck Sharp & Dohme Corp., are hereby dismissed with prejudice; and it is further

ORDERED that Defendants’ Omnibus Motion to Dismiss with prejudice **is hereby DENIED** for Plaintiffs Hector Cordova 658-19 and Sheila Johnson 3453-20; and it is further

ORDERED that oral argument for Defendants’ Motion to Dismiss Plaintiff Hector Cordova’s Complaint will occur on April 12, 2023, after the conclusion of our Case Management Conference; and it is further

ORDERED that Plaintiffs’ Counsel will provide estate documentation evidencing Desmond Jeter’s appointment as Personal Representative of Sheila Johnson’s estate within thirty (30) days of this Order; 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.

/s/ Bruce J. Kaplan
HONORABLE BRUCE J. KAPLAN, J.S.C.

OPPOSED

Please see attached Exhibit B.

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 Exhibit B Plaintiffs’ complaints with prejudice pursuant to R. 4:23-5(a)(2), for failure to effectuate the probate process to appoint a formal estate representative and substitute the estate. The Court has read and reviewed the papers submitted and Plaintiffs’ opposition.

By way of relevant procedural history, the sixteen (16) Plaintiffs listed in the attached Exhibit B were originally identified in this Court’s Case Management Order (“CMO”) #27 or #28. Plaintiffs Billy Taliaferro 7915-19; Elbanyvea Centeno 7924-19; James Owens 3445-20; and Harlan Beberg 4853-20 had until October 28, 2022 to substitute the estate or provide an explanation as to the

status of the probate process and affirmative steps taken by the next of kin to become personal representatives. See CMO #27. However, these Plaintiffs did not comply with the Court's Order. As a result, CMO #29 authorized Defense Counsel to file a motion under the five day rule to dismiss these Plaintiffs without prejudice for failing to comply with CMO #27. On December 13, 2022, after receiving no opposition, this Court uploaded the five day order and dismissed these Plaintiffs' cases without prejudice.

The remaining twelve Plaintiffs, in the attached Exhibit B, were first listed in Exhibit A at our October 13, 2022 Case Management Conference ("CMC"). At the October 13, 2022 CMC, the Court set December 1, 2022 as the deadline for these plaintiffs to appoint an estate representative and substitute the estate. If a substitution did not occur by the deadline, this Court's October 18, 2022 CMO #28 stated that these Plaintiffs must provide an explanation as to the status of the probate process and affirmative steps taken by the next of kin to become personal representatives by December 1, 2022. The Court notes that these Plaintiffs did not comply with the Court's prior Order. As a result, CMO #29 authorized Defense Counsel to file a motion under the five day rule to dismiss these Plaintiffs without prejudice for failing to comply with CMO #28. On December 13, 2022, after receiving no opposition, this Court uploaded the five day order and dismissed these Plaintiffs' cases without prejudice.

In addition to dismissing Plaintiff's complaint without prejudice, the Court's December 13, 2022 Order provided Plaintiff with 60 days to come into compliance and appoint a formal estate representative or Defendants may move to dismiss Plaintiff's complaint with prejudice.

Defendant Merck brings the instant motion to dismiss the complaints of the sixteen (16) Plaintiffs listed in the attached Exhibit B with prejudice because more than 60 days has passed since this case was dismissed without prejudice and these plaintiffs' next of kin has failed to appoint a formal estate representative and substitute the estate as the plaintiff in this matter.

In response to the instant motion, Plaintiffs' Counsel filed three oppositions for Plaintiffs Hector Cordova 658-19; Lena Huffman 632-19; and Sheila Johnson 3453-20.

Regarding Mr. Cordova, Plaintiffs' Counsel represents that Mr. Cordova passed away on February 19, 2021 and that their office has located a next of kin, Olga Cordova, who is interested in proceeding with this litigation. Additionally, Plaintiffs' Counsel represents that Ms. Cordova informed their office on December 13, 2022 that her estate attorney, Juan Hector Gil, is preparing estate documentation. On February 7, 2023, Plaintiffs' Counsel spoke with Ms. Cordova and explained that their office had yet to receive estate documentation. Ms. Cordova has represented that estate documentation is forthcoming. As a result, Plaintiffs' Counsel requests an additional sixty (60) days to obtain estate documentation.

In reply, Defense Counsel argues that Plaintiff has been deceased for more than two years and Plaintiffs' opposition lacks information to determine whether additional time in this case is warranted. Specifically, Defense Counsel asserts no estate documents have been forwarded despite Ms. Cordova representing, more than two months ago, that estate documents were being prepared and in February Ms. Cordova stated that her attorney would estate documents. Defense Counsel argues that if estate documents were completed, there is no explanation why Ms. Cordova's

counsel have not forwarded it knowing that the case is dismissed without prejudice. In conclusion, Defense Counsel asks this Court to dismiss Mr. Cordova's complaint with prejudice.

At this time, the Court will not dismiss Mr. Cordova's complaint. Instead, the Court has scheduled oral argument to occur on April 12, 2023, after the conclusion of our next Case Management Conference.

Regarding Ms. Huffman, Plaintiff's Counsel represent that Ms. Huffman passed away on April 13, 2021 and that their office has located Ms. Huffman's next of kin grandson, Tyler Huffman, who has notified Counsel that he is interested in continuing this litigation. However, Plaintiffs' Counsel has not been able to re-establish contact with Mr. Huffman since November 2022. Plaintiffs' Counsel asks this Court for an additional sixty (60) days to re-establish contact with Mr. Huffman and obtain estate documentation.

In reply, Defense Counsel argues that Plaintiff has been deceased for nearly two years and no steps have been taken by Mr. Huffman. Moreover, Defense Counsel argues that it appears that Mr. Huffman is not interested in continuing this litigation because he has not responded to Plaintiffs' Counsel despite phone calls and emails. In conclusion, Defense Counsel maintains that a sixty-day extension is unwarranted, and Ms. Huffman's complaint should be dismissed with prejudice.

The Court notes that on March 15, 2023, Plaintiffs' Counsel withdrew their opposition. Consequently, the Court will grant Defendant Merck's motion to dismiss Ms. Huffman's complaint with prejudice.

Regarding Ms. Johnson, Plaintiffs' Counsel represents that Mr. Johnson passed away on January 12, 2021 and that their office has located a next of kin, Desmond Jeter, who is interested in proceeding with this litigation. Furthermore, Mr. Jeter provided Plaintiffs' Counsel with a copy of decedent's death certificate and will. As a result, Plaintiff' Counsel has requested permission to file motions to reinstate Ms. Johnson's complaint and substitute the estate.

The Court notes that Plaintiff Counsel's current estate documentation is deficient for motions to reinstate and substitute the estate. Mr. Jeter must provide Plaintiffs' Counsel with evidence that he has been formally appointed as personal representative of Ms. Johnson's estate. Recognizing that Mr. Jeter appears willing to obtain the necessary estate documents, the Court will not dismiss Ms. Johnson's complaint at this time. Instead, the Court will provide Plaintiffs' Counsel with thirty (30) days to provide estate documentation evidencing Desmond Jeter's appointment as personal representative of Sheila Johnson's estate.

The Court finds that despite notice and opportunity, the Plaintiffs identified in the attached Exhibit B have not provided the outstanding discovery and have not reinstated the complaint. In light of Plaintiffs' 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 these cases with prejudice.

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, and the lack of any opposition, the Court finds there is no “lesser sanction” that can suffice to remedy the violations of this Court’s order.

More than 60 days has passed since the Exhibit B Plaintiffs’ Complaints were dismissed without prejudice and Plaintiffs have failed to substitute the estate and have failed to file a Motion to Reinstate the case. As a result, Defendant Merck’s motion to dismiss with prejudice is granted.

EXHIBIT B

Docket No.	Plaintiff
MID-L-006270-17	Engler, Adolphe
MID-L-006559-18	Bonetti, Lou
MID-L-006587-18	Spiegel, Susan
MID-L-007443-18	Griffis, Mary Lou
MID-L-000534-19	Mitchell-Chaney, Carolyn
MID-L-000632-19	Huffman, Lena
MID-L-000638-19	Lenington, Howard
MID-L-000658-19	Cordova, Hector
MID-L-000673-19	Ashley, Tony
MID-L-007915-19	Taliaferro, Billy
MID-L-007924-19	Centeno, Elbanyvea
MID-L-003353-20	Campbell, Ralph
MID-L-003445-20	Owens, James
MID-L-003453-20	Johnson, Shelia
MID-L-004265-20	Merideth, Donald
MID-L-004853-20	Beberg, Harlan