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FILED

January 10, 2024

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

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

ANNE CHALELA,

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-002426-23

ORDER: DISMISSAL WITH PREJUDICE

THIS MATTER having been brought before the Court upon motion by Fox Rothschild LLP, attorneys 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 completed authorizations, and the Court having read and considered the papers submitted in this matter, opposition filed, and for good cause having been shown;

IT IS on this 10th day of January, 2024;

ORDERED that Defendant Merck's Motion to Dismiss with prejudice is **DENIED**; 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.

OPPOSED

151 Bruce J. Kaplan
HONORABLE BRUCE J. KAPLAN, J.S.C.

Statement of Reasons

This matter comes before the Court by way of Fox Rothschild LLP, attorneys for Defendants, Merck & Co., Inc., and Merck Sharp & Dohme Corp for an Order to Dismiss Plaintiffs' Complaint with prejudice as well as request for attorney's fees and costs totaling \$1,430.00. The Court has received Plaintiff's opposition. After consideration of same, this Opinion and Order follows. In entering same, the Court notes that on October 6, 2023, this Court entered an Order granting Defendants, Merck & Co., Inc., motion to dismiss without prejudice. Both parties agree and it is not in dispute that the Plaintiff has provided the PFS and that this case should not be dismissed with prejudice as this time. Thus, the sole question before this Court is whether the Defendant's are entitled to attorney's fees.

LEGAL STANDARD

R. 4:23-2(b) "provides explicit authority to impose an attorney's fee as a sanction." Summit Trust Co. v. Baxt, 333 N.J. Super. 439, 449 (App. Div. 2000). R. 4:23-2(b)(4) details the failure to comply with court order, and states in relevant part,

"(b) Other Matters. If a party or an officer, director, or managing or authorized agent of a party or a person designated under R. 4:14-2(c) or 4:15-1 to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under R. 4:23-1, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

[...]

(4) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." R. 4:23-2(4).

As the Appellate Division articulated in Canino v. D.R.C. Co., 212 N.J. Super. 620 (App. Div. 1986), the "authority of R. 4:23-2(b)(4) which authorizes a court to treat, ' . . . as a contempt of court the failure to obey any [discovery] orders. . . .' must comply "with the procedures set

forth in R. 1:10-1, et seq.” Canino v. D.R.C. Co., 212 N.J. Super. 620, 622 (App. Div. 1986) (quoting R. 4:23-2(4)).

R. 1:10-1 details, “summary contempt in presence of court.” R. 1:10-1 states, “A judge conducting a judicial proceeding may adjudicate contempt summarily without an order to show cause if:

- (a) the conduct has obstructed, or if continued would obstruct, the proceeding;
- (b) the conduct occurred in the actual presence of the judge, and was actually seen or heard by the judge;
- (c) the character of the conduct or its continuation after an appropriate warning unmistakably demonstrates its willfulness;
- (d) immediate adjudication is necessary to permit the proceeding to continue in an orderly and proper manner; and
- (e) the judge has afforded the alleged contemnor an immediate opportunity to respond.

The order of contempt shall recite the facts and contain a certification by the judge that he or she saw or heard the conduct constituting the contempt and that the contemnor was willfully contumacious. Punishment may be determined forth with or deferred. Execution of sentence shall be stayed for five days following imposition and, if an appeal is taken, during the pendency of the appeal, provided, however, that the judge may require bail if reasonably necessary to assure the contemnor’s appearance.” R. 1:10-1.

DISCUSSION

After review of the relevant facts and applicable law, the Court must deny Defendant’s motion pursuant to R.1:10. Specifically, there is no evidence currently before the Court to indicate that the Plaintiff’s attorney was willfully withholding these records. The Plaintiff’s attorney represents that his client was overwhelmed by the nature of this proceeding and ultimately became delinquent on their discovery obligations. Subsequently, the Plaintiff provided the required documentation, but used the wrong date on the document causing further confusion. Plaintiffs counsel then subsequently updated their PFS with a properly dated document. Absent any evidence of willful misconduct on the part of Plaintiff, the Court will deny Defendant’s request for attorney fees at this time. However, the Court will note that ongoing occurrences of this kind will constitute evidence of a pattern which may result in future motions for counsel fees being granted.

CONCLUSION

For the foregoing reasons, Defendant’s motion to dismiss with prejudice and Defendant’s motion for attorney fees are both **DENIED**.