

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 LLC*

FILED

January 9, 2024

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

GENELL CHAMBERS,

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-007857-18

ORDER: DISMISSAL WITH PREJUDICE

WHEREAS, Defendant Merck Sharp & Dohme Corp., by and through its attorneys Fox Rothschild LLP, upon notice to all interested parties, has moved before this Court for the dismissal of this matter against Defendants in this matter; On October 6, 2023, this Court dismissed the claims against Merck without prejudice for failure to effectuate the probate process to appoint a formal estate representative and substitute the estate. The Court having read and considered the papers submitted in this matter, the opposition thereto, and for good cause having been shown;

IT IS on this 9th day of January 2024;

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

ORDERED that Plaintiff Genell Chamber's Complaint is hereby **DISMISSED WITH PREJUDICE** as to Defendants Merck Sharp & Dohme Corp.; and

IT IS FURTHER ORDERED that service of this Order shall be deemed effectuated upon all parties upon its upload to eCourts. Pursuant to *R. 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

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

Statement of Reasons

This matter having been brought before the Court upon motion by Merck Sharp & Dohme Corp., by and through its attorneys Fox Rothschild LLP, for an Order to Dismiss the Plaintiff's complaint 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 notes that Plaintiff has filed an opposition.

By way of relevant procedural history, on July 10, 2023, the Court entered Case Management Order #33, memorializing the Court's June 28, 2023, Case Management Conference. In the CMO #33, this Court ordered Plaintiff's Counsel to provide an update as to the plaintiff's next of kin's request for oath of office in probate court for Genell Chambers (MIDL-7857-18) by August 18, 2023. The Order further specified that if no meaningful update or motion to substitute were filed by August 18, 2023, the Court would reserve the right to dismiss the case on motion made during the August 2023 Case Management Conference without the need for a separate motion. On August 29, 2023, this Court held a Case Management Conference, where Counsel discussed the continued necessity of Plaintiff Counsel's need to make a diligent effort to obtain documents confirming Plaintiff's next of kin's oath of office, scheduling, and/or process. This understanding was memorialized in the Court's August 29, 2023 Case Management Order #35, which stated that Counsel for Genell Chambers "shall provide documentation confirming plaintiff's next of kin's request for oath of office in probate court, any scheduling related to the probate process and/or confirmation of the probate process has commenced by September 6, 2023," and further holding that "[i]f there is no documentation produced or motion to substitute filed by September 6, 2023, counsel for Merck may file a motion to dismiss without prejudice." The Court notes that Plaintiff's Counsel did not file a motion to substitute on eCourts by September 6, 2023. The Court received the motion to dismiss without prejudice on September 11, 2023. On October 6, 2023, this matter was dismissed without prejudice. More than 60 days have elapsed since the matter was dismissed without prejudice, to date, Plaintiff has yet to amend the complaint to appoint a formal estate representative.

In opposition, Counsel represents that Plaintiff, Genell Chambers, died on November 5, 2020. However, Plaintiff's Counsel represents that Mr. Clint Smith is Ms. Chambers's next of kin, and their office was able to speak to Mr. Smith in October 2022. Counsel represents that Mr. Smith reported that he was appointed his mother, Ms. Chambers's, power of attorney prior to her passing and was independent executor of her will and estate.

Counsel notified Mr. Smith of the steps needed to be substituted in as Plaintiff on behalf of the estate, including calling client thirteen (13) times, mailing him six (6) notices about the need to provide the necessary documentation and warning him that if he did not respond with paperwork showing that the probate process has begun, that this case could be dismissed.

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 paperwork and has not reinstated the complaint.

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 Schlusser 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." Schlusser, 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 sixty (60) days have passed since Plaintiff's Complaint was dismissed without prejudice and Plaintiff has failed to substitute the estate and has failed to file a Motion to Reinstate the case. As a result, Defendant Merck's motion to dismiss with prejudice is granted.