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FILED

May 12, 2023

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

SHARON MELILLO and GARY MELILLO, Plaintiffs, v. MERCK & CO., INC., *et al.,* Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MIDDLESEX COUNTY DOCKET NO.: MID-L-003452-19 **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. ("Merk"), for an Order to Dismiss the Plaintiffs' complaint with prejudice pursuant to R. 4:23-5(a)(2), for failure to provide a materially complete and certified Plaintiff Fact Sheet ("PFS") as this complaint was dismissed without prejudice on January 20, 2023, and the Court having read and considered the papers submitted in this matter, and for the reasons set forth in the attached Statement of Reasons, and for good cause having been shown;

IT IS on this 12th day of May, 2023;

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

ORDERED that Plaintiffs' complaint, as to Defendant Merck, is hereby dismissed with prejudice; 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.

UNOPPOSED

Statement of Reasons

This matter comes 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 with prejudice pursuant to R. 4:23-5(a)(2), for failure to provide a materially complete and certified Plaintiff Fact Sheet ("PFS"). The Court has read and reviewed the papers submitted and notes that Plaintiff has not filed an opposition.

By way of relevant procedural history, on August 15, 2022, this Court entered Case Management Order ("CMO") #26. Section three of that Order provided that "Plaintiffs' counsel shall file a motion to amend the PFS to remove the request for plaintiffs' complete social security number or provide the outstanding complete social security numbers for the below listed plaintiffs by July 27, 2022. If plaintiffs fail to provide their complete social security number or plaintiffs' counsel fails to file the aforementioned motion, Merck's counsel may file a motion to dismiss those complaints without prejudice." The Court's July 27, 2022 deadline passed and Plaintiffs' Counsel did not file a motion to amend the PFS, and plaintiffs failed to provide Ms. Melillo's social security number. As a result, Defense Counsel filed a motion to dismiss Plaintiffs' complaint without prejudice on December 14, 2022. On January 20, 2023, this Court granted Defendants' unopposed motion to dismiss because Plaintiffs' PFS remained materially deficient.

In addition to dismissing Plaintiffs' complaint without prejudice, this Court provided Plaintiff with sixty (60) days to provide a materially complete PFS before Defendants could file a motion to dismiss with prejudice. Plaintiff has not complied, and Defense Counsel has brought the instant unopposed motion to dismiss Plaintiffs' claims with prejudice.

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 this case with prejudice. The Court finds that despite notice and opportunity, Plaintiff has not provided the outstanding discovery, has not reinstated the complaint, and has not filed opposition.

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, the Court finds there is no "lesser sanction" that can suffice to remedy the violations of this Court's order.

As it has been more than 60 days since this case was dismissed without prejudice, and Plaintiff remains delinquent on discovery obligations, Defendant Merck's motion to dismiss with prejudice is granted.