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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**; 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 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 Plaintiffs listed in the attached Exhibit B were originally 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 Case Management Order #28 ("CMO") 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 the Plaintiffs included in the below Exhibit B did not appoint an estate representative, did not substitute the estate, and did not provide any updates. 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 Plaintiff Richard Dewese's, Docket # 4154-18, and Plaintiff Vickie Carr's, Docket # 3614-20, complaints 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 opposition, Plaintiffs' Counsel represents the Ms. Carr passed away on January 18, 2021. After receiving information detailing Ms. Carr's death, Plaintiffs' Counsel searched for a next of kin and mailed a copy of this Court's most recent Order to Ms. Carr's last known address. To date, Plaintiffs' Counsel has not received any response from Ms. Carr's next of kin. Plaintiffs' Counsel requests additional time, as the Court sees fit, to locate a next of kin and produce outstanding discovery. In regard to Richard Deweese, Plaintiffs' Counsel represents that their office diligently and repeatedly notified Mr. Deweese's next of kin, Julie Thomas, of her obligations to appoint a formal estate representative and substitute the estate as plaintiff. Specifically, Plaintiff's Counsel asserts that they called Ms. Thomas seven (7) times, mailed her five (5) notices, and emailed her four (4) times about the need to substitute, or the case could be dismissed. Plaintiffs' Counsel mailed, via regular and certified mail, a copy of the Order dismissing the case without prejudice and a copy of the instant motion. To date, Ms. Thomas has not responded or complied with any attempts to substitute the estate. Again, requests additional time, as the Court sees fit, to substitute the estate.

The Court finds that despite notice and opportunity, Plaintiffs have not provided the outstanding discovery and has not reinstated the complaint. Plaintiffs' Counsel has not been able to locate a next of kin for Ms. Carr and Mr. Deweese's next of kin, Ms. Thomas, has not shown any interest in continuing this litigation. 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 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**

<b>Docket No.</b>	<b>Plaintiff</b>
MID-L-004154-18	Deweese, Richard
MID-L-003614-20	Carr, Vickie