

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

FILED

August 4, 2023

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

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

JAY WOHL and MARJORIE WOHL,
Plaintiffs,
v.
MERCK & CO., INC., *et al.*,
Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY

DOCKET NO.: MID-L-001481-19

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 May 12, 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 4th day of August, 2023;

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

ORDERED that Plaintiffs' complaint, as to Merck & Co. Inc. and Merck Sharp & Dohme Corp., 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 January 20, 2023, this Court entered an Order granting Merck's motion to compel a materially complete PFS for plaintiff Jay Wohl by February 3, 2023. The Court's February 3, 2023 deadline passed and Plaintiffs' counsel failed to provide a materially complete PFS. As a result, Merck filed a motion to dismiss plaintiff Wohl's complaint without prejudice on April 18, 2023. On May 12, 2023, this Court granted Merck's unopposed motion to dismiss plaintiff Wohl's complaint without prejudice. In addition to dismissing plaintiff Wohl's complaint without prejudice, this Court provided plaintiff Wohl with sixty (60) days to provide a materially complete PFS before Merck could file a motion to dismiss with prejudice. Plaintiff has not complied, and Defense Counsel has brought the instant unopposed motion to dismiss plaintiff Wohl's complaint 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.” 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, 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.