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

**FILED**

May 12, 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 Order to dismiss the Complaints of the Plaintiffs listed in the attached Exhibit A 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 this case was dismissed without prejudice on December 2, 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 12th day of May, 2023;

**ORDERED** that Defendant Merck's Motion to Dismiss with prejudice, the Complaints of Plaintiffs listed in the attached Exhibit A, **is hereby GRANTED**; 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.

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

**OPPOSED**

**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 the Complaints of the Plaintiffs listed in the attached Exhibit A 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, this Court entered Case Management Order ("CMO") #29 on December 13, 2022. That Order stated that Plaintiffs' Counsel were to provide detailed explanations as to the status of the probate process for the case listed in Exhibit B to CMO #29 by January 1, 2023. Additionally, CMO #29 provided notice to Plaintiffs' Counsel that if motions to substitute the estate were not filed by February 1, 2023, then the Court reserves the right to dismiss the complaints of plaintiffs in Exhibit B to CMO #29 without prejudice at the February 2, 2023 Case Management Conference ("CMC"). The Court notes that the Plaintiffs subject to the instant motion, Exhibit A, were all included in Exhibit B to CMO #29. The Court further notes that the plaintiffs in the attached Exhibit A did not file motions to substitute the estate by February 1, 2023, and at the February 2, 2023 CMC the Court gave Defendants permission to file a Five-Day Order to dismiss plaintiffs' complaints without prejudice. On February 13, 2023, the Court, after receiving no opposition, uploaded Defendants' Five-Day Order and dismissed plaintiffs' complaints without prejudice. Defendant Merck brings the instant motion to dismiss Plaintiffs' complaint with prejudice because more than 60 days has passed since this case was dismissed without prejudice and plaintiffs' next of kin has failed to appoint a formal estate representative and substitute the estate as the plaintiff in this matter.

In opposition for Plaintiffs Perry McCluskey on behalf of Teresa McCluskey, Docket # 6740-20, Plaintiffs Counsel represents that Teresa McCluskey passed away on September 23, 2022. Additionally, Counsel asserts that they have diligently and repeatedly notified Mr. McCluskey of the need to establish an estate and for a personal representative to be appointed. However, Mr. McCluskey has not responded to his attorney's correspondences and has not responded to Counsel's phone calls. Plaintiffs' Counsel provided Mr. McCluskey with a copy of this Court's February 13, 2023 dismissal without prejudice and a copy of the instant motion. To date, Mr. McCluskey has not responded or taken any affirmative action to establish and estate and appoint a personal representative.

In opposition for Plaintiffs Gary and Lydia Shorb, Docket # 2954-20, Plaintiffs' Counsel represents that Gary Shorb passed away on January 14, 2022, however the family did not probate Mr. Shorb's estate. Plaintiffs' Counsel informed Lydia Shorb and Virginia Haines, decedent's daughter, of the need to establish an estate and for a personal representative to be appointed. In January 2023, Lydia Shorb informed her counsel that neither her nor Virginia Haines were going to move forward with establishing an estate for Gary Shorb. Plaintiffs' Counsel provided Lydia Shorb with a copy of this Court's February 13, 2023 dismissal without prejudice and a copy of the instant motion. Lydia Shorb has not responded to either of these correspondences and has not responded to Counsel's phone calls.

In opposition for Plaintiff Angeline Brown, Docket # 6467-17, Plaintiffs' Counsel represents that Angeline Brown passed away on November 26, 2020. Additionally, Plaintiffs' Counsel states that Steven Greene had been named affiant of the small estate for Ms. Brown, but the estate did not include the lawsuit pending in this Court. Plaintiffs' Counsel represents that Mr. Greene originally informed Counsel that he was in the process of obtaining a second affidavit to include the instant lawsuit, however Counsel have been unable to reconnect with Mr. Greene. The last time that Counsel heard from Mr. Greene was October 2022, where Mr. Greene stated that he was experiencing health issues. For the last seven months, Mr. Greene has not communicated with Plaintiffs' Counsel, despite notice of this Courts February 13, 2023 dismissal and instant motion to dismiss with prejudice.

The Court finds that despite notice and opportunity, Plaintiffs have not provided the outstanding discovery, has not reinstated the complaint, or filed opposition. Specifically, for Plaintiff Brown, the Court finds that Mr. Greene has taken no affirmative action and has not remained in contact with Counsel for over six months despite notice and numerous warnings that plaintiff's case was in risk of being dismissed with prejudice. For Plaintiff McCluskey, the Court finds that the record is devoid of any action taken by Mr. McCluskey to establish an estate and appoint a personal representative. Instead, the record reflects that Mr. McCluskey has not complied with this Court's Orders and has failed to respond to his attorney. For Plaintiff Shorb, the Court finds that the next of kin affirmatively informed Counsel that they were not going to move forward with the litigation and were not going to open an estate. 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.

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 Plaintiff has failed to substitute the estate, has failed to file a Motion to Reinstate the case, and Plaintiff has failed to respond to Plaintiffs’ Counsel’s numerous correspondences. As a result, Defendant Merck’s motion to dismiss with prejudice is granted.

**Exhibit A**

<b>Docket No.</b>	<b>Plaintiff</b>
MID-L-006467-17	Brown, Angeline
MID-L-002954-20	Shorb, Gary
MID-L-006740-20	McCluskey, Teresa McCluskey, Perry (POA)