

**FILED**

**JUNE 1 , 2021**

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

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IN RE ZOSTAVAX LITIGATION

*Cinderella Everett v. Merck & Co., Inc., Merck  
Sharp & Dohme Corp., and McKesson Corp.*

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION – MIDDLESEX COUNTY

MCL NO.: 629

DOCKET NO.: MID-L-003595-18

**ORDER**

**WHEREAS**, Plaintiff, by and through counsel, Marc J. Bern & Partners LLP, upon notice to all interested parties, has moved before this Court to vacate: 1) the January 29, 2020 Order entering the voluntary Stipulation of Dismissal of this matter; and 2) the February 13, 2020 Order dismissing Plaintiff's complaint with prejudice, and the Court having considered the moving papers and papers in opposition, and for good cause having been shown,

**IT IS** on this 1 day of June, 2021,

**ORDERED** that the Motion to Vacate is **DENIED**; and it is further

**ORDERED** that this Order shall be deemed served upon its filing to eCourts. Movant shall serve all parties not electronically served within seven (7) days of the date of this Order.

*/s/ Bruce J. Kaplan*

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

**OPPOSED**

**SEE STATEMENT OF REASONS ATTACHED**

### Statement of Reasons

This matter comes before the Court upon Plaintiff, Cinderella Everett's, Motion to Vacate (a) a voluntary Stipulation of Dismissal with prejudice entered on January 29, 2020; and (b) this Court's February 13, 2020 Order dismissing Plaintiff's Complaint with prejudice due to repeated non-compliance with Court Orders requiring Plaintiff to provide a substantially complete and verified Plaintiff Fact Sheet ("PFS"). The Court notes that it has read the moving papers, and papers in opposition and reply.

In opposition, Defendants, Merck & Co., Inc., and Merck Sharp & Dohme (hereinafter "Defendant"), argue that at the time of Plaintiff's voluntary dismissal, she had already violated multiple Court Orders regarding PFS obligations and that, contemporaneous to Plaintiff's voluntary dismissal, Plaintiff's name was also pending on a list of plaintiffs subject to numerous proposed Orders dismissing cases with prejudice for the same PFS violations. See Order 7, dated 2/13/20. Accordingly, Plaintiff's case was dismissed once voluntarily on January 29, 2020, and again when this Court entered the February 13, 2020 dismissal Orders with prejudice. According to Defendant, this Motion is not only procedurally barred, but the relief sought would contravene the very essence of coordinated proceedings, like Multi-County Litigation ("MCL").

In reply, plaintiff's counsel notes that this Motion is not untimely because Global Motions for Reconsideration were pending as early as March 3, 2020 and moreover, that this Motion should be granted because Plaintiff was in "full compliance before the Court entered both the January 29, 2020 and February 13, 2020 dismissals." Namely, that Plaintiff's PFS was served on February 6, 2020.

By way of background, this Court's Plaintiff Fact Sheet Case Management Order ("PFS CMO"), dated June 12, 2019, required Plaintiff to serve her PFS by October 1, 2019. Thereafter, despite non-compliance, this Court extended the deadline to serve a PFS through October 31, 2019.<sup>1</sup> Subsequently, when Plaintiff failed to comply with this Court's October 31, 2019 deadline, the Court gave Plaintiff another opportunity to serve a substantially complete PFS by December 11, 2019, which was then extended to December 17, 2019. See Order dated 10/20/19. In extending the PFS deadline to December 17, 2019, the Court cautioned plaintiff's counsel that, should Plaintiff fail to abide by this Court's Order, Plaintiff's case would be dismissed with prejudice.

On December 18, 2019, counsel for Defendant submitted proposed Orders dismissing the claims of *hundreds* of plaintiffs with prejudice for failure to abide by the Court's Orders regarding PFS obligations; Plaintiff's case was included within these proposed Orders. While these proposed Orders were pending, on January 7, 2020, plaintiff's counsel requested Stipulations of Dismissal for "approximately 70 cases," which defense counsel states is "135 cases," to which defense counsel agreed. Following this agreement, the Court entered Plaintiff's Stipulation of Dismissal with prejudice on January 29, 2020. Thereafter, on February 13, 2020, when deciding the proposed Orders for dismissal, the Court also dismissed Plaintiff's case with prejudice.

R. 4:50-1 governs relief from final judgments. The Rule provides, in pertinent part, that the Court may relieve a party from a final judgment or order for the following:

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<sup>1</sup> Plaintiff filed her Complaint on June 13, 2018. Over a year later, on October 30, 2019, Plaintiff served a deficient PFS. See Plt.'s Mt., ¶¶ 3,8. Accordingly, Plaintiff had the benefit of twenty (20) months to gather information and serve a PFS prior to the time her case was voluntarily dismissed with prejudice and then dismissed with prejudice again by the Court in February 2020.

a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R. 4:49; (c) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (d) the judgment or order is void; (e) the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or (f) any other reason justifying relief from the operation of the judgment or order.

While Plaintiff's Motion does not exactly specify which enumerated reason given in R. 4:50-1 warrants vacating Plaintiff's dismissals, the Court notes that none of the enumerated reasons other than (a) and (f) can be applicable to this Motion.<sup>2</sup> As for Plaintiff's Stipulation of Dismissal, Plaintiff explains that "counsel's request for a stipulation of dismissal was an inadvertent error ... thus constituting excusable neglect." Plt.'s Mt., pg. 4. R. 4:50-1(a) warrants relief from a final judgment when same was due to "mistake" or "excusable neglect," which is defined as "excusable carelessness attributable to an honest mistake that is compatible with due diligence or reasonable prudence." Mancini v. EDS, 132 N.J. 330, 335, 625 A.2d 484 (1993). The "kind of mistake contemplated by [this] rule has been described as one which the parties could not have protected themselves from during the litigation." DEG, LLC v. Township of Fairfield, 198 N.J. 242, 263 (2009).

As for Plaintiff's February 13, 2020 dismissal, counsel argues that "equity is not served by application of the Court's February 13, 2020 Order." Plt.'s Mt., pg. 4. R. 4:50-1(f)'s very essence is its capacity for relief in exceptional situations. And in such exceptional cases its boundaries are as expansive as the need to achieve equity and justice." Ibid. Of course, "the grant or denial of a motion for vacating dismissal rests in the sound discretion of the trial judge." Georgis v. Scarpa, 226 N.J. 244, 249 (App. Div. 1988) (citing Zaccardi v. Becker, 88 N.J. 245, 251 (1982)). In sum, "[t]he Court has discretion [to vacate a dismissal with prejudice] ... by the application of R. 4:50-1(f), which permits the court to relieve a party from the operation of an order to achieve essential fairness." Hodgson v. Applegate, 31 N.J. 29, 43 (1959).

It is well-settled that motions to vacate based on R. 4:50-1(a) must be brought within a year of final judgment, and motions to vacate based on R. 4:50-1(f) must be brought within a "reasonable time," which depends on the totality of the circumstances. See R. 4:50-2.

#### **A) The January 29, 2020 Stipulation of Dismissal with Prejudice**

Plaintiff's counsel argues that the Stipulation of Dismissal in this matter, as well as counsel's signature on the Stipulation to Dismiss, was an inadvertent error which is compatible with reasonable prudence, thus constituting excusable neglect pursuant to R. 4:50-1(a). In opposition, defense counsel argues that relief based on R. 4:50-1(a) is unavailable to Plaintiff as same is procedurally barred by R. 4:50-2.

First and foremost, the Court notes that R. 4:50-2 requires motions to vacate due to excusable neglect to be filed within one (1) year from the final judgment. Because Plaintiff's case was dismissed with prejudice via Stipulation on January 29, 2020, this ground for relief is

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<sup>2</sup> Plaintiffs' counsel indicates that "[b]ecause Plaintiff served a verified and compete PFS on Defendants, the February 13, 2020 Order has an inequitable result and Plaintiff should respectfully be relieved from the final judgment." See Plaintiff's Motion, ¶ 17.

unavailable to Plaintiff, who moved to vacate on May 3, 2021. Also, counsel's Global Motions for Reconsideration dealt with this Court's February 13, 2020 Orders of dismissal and had nothing to do with the January 29, 2020 Stipulation of Dismissal, which would have required a separate motion to vacate (not a motion for reconsideration as there is nothing for the Court to reconsider with regards to a voluntary Stipulation of Dismissal) within the appropriate time frame. Going further, counsel's argument that Plaintiff was in full compliance with PFS obligations prior to the Stipulation of Dismissal and the February 13, 2020 Orders is simply an incorrect statement of fact – Plaintiff was not compliant with PFS obligations when the Stipulation of Dismissal was entered on January 29, 2020 since Plaintiff's PFS was not served until February 6, 2020.

Accordingly, Plaintiff's Motion to Vacate based on R. 4:50-1(a) is procedurally barred pursuant to R. 4:50-2.

**B) The February 13, 2020 Order of Dismissal with Prejudice**

As noted, plaintiff's counsel argues that a substantially complete PFS was served on February 6, 2020 and thus the February 13, 2020 Order dismissing Plaintiff's case with prejudice has an "inequitable result" which warrants vacating same pursuant to R. 4:50-1(f).

At the time Plaintiff served a substantially complete and verified PFS on February 6, 2020, Plaintiff's case was already dismissed with prejudice via Stipulation of Dismissal, supra. Accordingly, the February 13, 2020 Order of dismissal with prejudice had no substantive legal effect as a case cannot, as a matter of fact and/or law, be dismissed with prejudice more than once.

In light of the foregoing, this Motion is **DENIED**.