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

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IN RE ZOSTAVAX LITIGATION

*Bonnie Finch 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-006797-18

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 April 23, 2020 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 **GRANTED**; 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

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OPPOSED

SEE STATEMENT OF REASONS ATTACHED

Statement of Reasons

This matter comes before the Court upon Plaintiff, Bonnie Finch's, Motion to Vacate (a) a voluntary Stipulation of Dismissal with prejudice entered on April 23, 2020¹; and (b) this Court's February 13, 2020 Orders 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"). Specifically, Plaintiff argues, amongst other things, that a substantially complete and verified PFS was served on March 29, 2021 and thus vacating Plaintiff's dismissal with prejudice is warranted. 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"), first argue that this Motion should be denied because Plaintiff was not listed in any compliance list sent to defense counsel by March 29, 2021, as required by this Court's Case Management Orders ("CMO") 14 and 16. Moreover, Defendant argues that plaintiff's counsel voluntarily requested dismissal of this Plaintiff's case with prejudice over a year ago. Furthermore, at the time of Plaintiff's voluntary dismissal with prejudice, 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 Orders 3 and 4, dated 2/13/20. Accordingly, Plaintiff's case was initially dismissed when this Court entered the February 13, 2020 dismissal Orders with prejudice and again voluntarily via Stipulation on April 23, 2020. 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 the Stipulation of Dismissal was not entered until August 17, 2020 and that even if this Motion is untimely under R. 4:50-1(a) that Plaintiff also relies on R. 4:50-1(f), which, according to plaintiff's counsel, allows vacation of a final judgment "regardless of time."

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 November 1, 2019.² Subsequently, when Plaintiff failed to comply with this Court's deadline, the Court gave Plaintiff another opportunity to serve a substantially complete PFS by December 31, 2019. See CMO 7. In extending the PFS deadline to December 31, 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 January 2, 2020, counsel for Defendant submitted proposed Orders dismissing the

¹ Although this Stipulation of Dismissal was submitted to the Court and signed by both parties on April 23, 2020, the Court did not formally sign same until August 17, 2020 due to the COVID-19 pandemic and transition from paper filing to eCourts with regards to Multi-County Litigation ("MCL"). As of April 1, 2021, this Court no longer requires a formal signature on a stipulation of dismissal as same delays the process of dismissing a case.

² Plaintiff's Complaint was filed on October 24, 2018 and Plaintiff served a deficient PFS on November 5, 2019. See Plt.'s Mt., ¶¶ 4, 8. Accordingly, Plaintiff had the benefit of fifteen (15) months to gather information and serve a sufficient PFS prior to Plaintiff's dismissal with prejudice in February 2020.

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 two (2) of these proposed Orders. While these proposed Orders were pending, on February 3, 2020, plaintiff's counsel requested Stipulations of Dismissal for "approximately 70 cases," to which defense counsel agreed. Following this agreement, Plaintiff's case was dismissed with prejudice, twice, by Orders dated February 13, 2020 and then again by Stipulation of Dismissal signed by the parties on April 23, 2020 and entered by the Court on August 17, 2020. See Orders 3 and 4, dated 2/13/20.

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:

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.

In reply, plaintiff's counsel specified which enumerated reason given in R. 4:50-1 warrants vacating Plaintiff's dismissals, namely R. 4:50-1(a) and (f). 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).

Also, 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 February 13, 2020 Order of Dismissal with Prejudice and CMO 16

Plaintiff's counsel argues that a substantially complete PFS was served on March 29, 2021 and thus the February 13, 2020 Orders dismissing Plaintiff's case with prejudice have an "inequitable result" which warrants vacating said Orders under R. 4:50-1(f). The Court will be vacating Plaintiff's dismissal for the reasons stated below.

It should be noted that the Court, in entering Case Management Order No. 14, ordered

plaintiff's counsel to "provide counsel for Merck with a complete list of the cases previously dismissed, subject to dismissal, or subject to a motion to compel in which they now believe they have satisfied their discovery obligations." CMO 14, ¶ 10, dated 3/22/21. The Court's purpose in doing so was to set a cutoff date by which plaintiff's counsel could file a motion to vacate; this Plaintiff was included on counsel's list. See CMO 16.

Although the Court acknowledges that Plaintiff's name was not included in the compliance list sent to defense counsel on March 29, 2021, Plaintiff was nonetheless compliant with PFS obligations as of the Court's cut-off date for filing motions to vacate. As the Court already stated, when this Court directed plaintiff's counsel to file motions to vacate for cases fully compliant with discovery obligations and gave counsel until March 29, 2021 to do so, the Court's purpose was to establish March 29, 2021 as the cut-off date which the Court believed would be "reasonable" for purposes of filing motions to vacate in accordance with R. 4:50-2. See CMO 16; see also 3/2/21 CMC Trnsct, 33:12-35-3. Accordingly, consistent with the Court's CMOs 14 and 16, this Motion is brought within "a reasonable time," as required by R. 4:50-2.

In conjunction with the foregoing, the Court finds that "exceptional circumstances" exist to warrant vacating Plaintiff's dismissal with prejudice under R. 4:50-1(f). Namely, Plaintiff was complaint with her PFS obligations as of the Court's cut-off date. The entire purpose of setting said date was to permit Plaintiffs who were compliant as of March 29, 2021 the opportunity to proceed with their cases. Because Plaintiff was compliant as of March 29, 2021, the Court finds that this Motion to Vacate should be **GRANTED** in accordance with this Court's directive and intent in entering CMO 16 and R. 4:50-1(f).

B) The April 23, 2020 Stipulation of Dismissal with Prejudice

Plaintiff's counsel also 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.

At the time Plaintiff's case was dismissed with prejudice by Stipulation, Plaintiff's case had already been dismissed with prejudice pursuant to this Court's February 13, 2020 Orders for failure to provide a sufficient PFS. Accordingly, regardless of whether the operative date for the Stipulation was April 23, 2020 or August 17, 2020, the Stipulation was nothing more than a redundant and irrelevant Order that had no substantive legal effect as a case cannot, as a matter of fact and/or law, be dismissed with prejudice more than once. See Feinsod v. Noon, 261 N.J. Super. 82, 84 (App. Div. 1992) (finding that a dismissal with prejudice constitutes an adjudication of the merits as fully and completely as if the order had been entered after trial and res judicata bars relitigation of the claims dismissed in the prior suit).

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