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

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IN RE ZOSTAVAX LITIGATION

Hugh Hurtt 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-006904-18

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 the Court's February 13, 2020 orders dismissing Plaintiff's complaint with prejudice, and the Court having considered the moving papers, papers filed in opposition, and reply thereto, and for good cause being shown;

IT IS on this 1st day of June 2021, hereby:

ORDERED that the Motion to Vacate be and is hereby **GRANTED** in part and **DENIED** in part, and it is further

ORDERED that Plaintiff's Motion to Vacate this Court's Order of dismissal is hereby **GRANTED**; and it is further

ORDERED that Plaintiff's Complaint shall remain **DISMISSED** but without prejudice; and it is further

ORDERED that plaintiff's counsel has thirty (30) days from the date of this Order to serve defense counsel with sufficient proof of use as defined by this Court's Proof of Use Order, dated April 15, 2021; and it is further

ORDERED that should plaintiff's counsel fail to comply with this Order, then defense

counsel may move to have Plaintiff's case dismissed with prejudice pursuant to R. 4:23-5(a)(2);
and it is further

ORDERED that a copy of 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 in accordance with Rule 1:5-1(a).

/s/ Bruce J. Kaplan

HONORABLE BRUCE J. KAPLAN, J.S.C.

OPPOSED

SEE STATEMENT OF REASONS ATTACHED

Statement of Reasons

This matter comes before the Court upon Plaintiff's Motion to Vacate this Court's February 13, 2020 Order dismissing Plaintiff's case with prejudice. The Court notes that it has read the moving papers, papers in opposition and in reply.

The facts giving rise to this Motion are largely undisputed. By way of a brief background, Plaintiff was one of several hundred Plaintiffs whose cases were dismissed with prejudice pursuant to R. 4:23-2 for counsel's repeated failure to comply with numerous Court Orders, including the Court's Plaintiff Fact Sheet Case Management Order ("PFS CMO"), dated June 12, 2019.¹ See Order 3, dated 2/13/20.²

In furtherance of this Motion, Plaintiff's counsel claims that Plaintiff is in compliance with his discovery obligations to date; specifically, that counsel has served a substantially complete and verified Plaintiff Fact Sheet ("PFS") on defense counsel as of February 24, 2020. 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. 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 argues counsel's signature on this dismissal was a clear inadvertence because Plaintiff's materially complete and verified PFS were served several months prior to this stipulation. Counsel further argues that the instant motion to vacate was filed on May 3, 2021, and therefore is timely pursuant to Rule 4.50-2.

On January 2, 2019, counsel for Defendant submitted proposed Orders dismissing the claims of *hundreds* of plaintiffs with prejudice for failure to abide by several Court's Orders regarding PFS obligations; Plaintiff's case was included in two 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, a stipulation dismissing Plaintiff's case was filed on May 7, 2020. The Court, however, did not sign and enter Plaintiff's Stipulation of Dismissal with prejudice until August 7, 2020. Prior to entering the stipulation, on February 13, 2020, when deciding the proposed Orders for dismissal, the Court also dismissed Plaintiff's case with prejudice. Accordingly, after violation of three (3) Court Orders requiring compliance with threshold discovery obligations, Plaintiff's case was dismissed with prejudice by Court Order pursuant to R. 4:23-2, and thereafter voluntarily by Stipulation of Dismissal.

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

¹ Numerous Court ordered deadlines were disregarded by plaintiffs' counsel with regards to their proof of use and PFS obligations; notwithstanding same, this Court continued to extend deadlines on multiple occasions to permit Plaintiffs additional time to come into compliance with their obligations. Eventually, the Court decided that the continued and flagrant disregard of its Court Orders warranted sanctions and dismissed hundreds of cases with prejudice via numerous Orders dated February 13, 2020.

² Plaintiff thereafter filed a Global Motion for Reconsideration on March 3, 2020. Counsel was instructed to withdraw the Global Motion so that the Court could decide compliance on a case-by-case basis.

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.

Accordingly, the narrow issue before the Court is whether to vacate Plaintiff’s dismissal when Plaintiff is now in full compliance with PFS obligations and when Plaintiff’s name was included on counsel’s compliance list, sent to defense counsel by March 29, 2021 as instructed by the Court.

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.

While plaintiff’s counsel does not 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) or (f) can be applicable to this Motion.³ 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).

The Court acknowledges that Plaintiff came into compliance with PFS obligations prior to entry of the Court’s February 13, 2020 Order dismissing Plaintiff’s case with prejudice, and did not move to vacate same for fifteen (15) months. The Court also acknowledges that Plaintiff’s counsel entered into a stipulation of dismissal with prejudice after the Court entered the February

³ Plaintiff’s counsel indicates that “[b]ecause Plaintiff served a verified and complete PFS on Defendants, the February 13, 2020 Order has an inequitable result and Plaintiff should respectfully be relieved from the final judgment.”

13, 2020 Order. That being said, the Court will be granting this Motion notwithstanding same for the reasons stated below.

A) The February 13, 2020 Order of Dismissal with Prejudice

Plaintiff's counsel argues that a substantially complete PFS was served on February 24, 2020 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.

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 compliant 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 to proceed with their cases.

B) Proof Of Use Issues

Defendant argues, and Plaintiff concedes, that Plaintiff, regardless of the stipulation or the February 13, 2020 dismissals, is still not in compliance with proof of use ("POU") requirements. Plaintiff asserts that he has not submitted POU because efforts to obtain said records from a third party have been unsuccessful to date, not due to purposeful non-compliance and asks that the February 13, 2020 Orders should be vacated, and Plaintiff's case should be dismissed without prejudice.

Having found Plaintiff to have come into compliance with his PFS, the Court will vacate the February 13, 2020 dismissal with prejudice, however his Complaint will remain dismissed *without prejudice*. The Court does find, based on Plaintiff's own concession, that Plaintiff is not in compliance with POU requirements. Thus, like similarly situated Plaintiffs, because Plaintiff's case was dismissed with prejudice on PFS grounds, and not because of insufficient proof of use, and because dismissal with prejudice is the ultimate sanction which "should be imposed only sparingly," Zaccardi, 88 N.J. at 253, the Court will grant Plaintiff's request to vacate the dismissal with prejudice. At this time, Plaintiff's case will remain dismissed *without prejudice* for thirty (30) days in order to allow Plaintiff's counsel one final attempt at obtaining sufficient proof of use. Should counsel be unable to do so, Defendant may move to dismiss Plaintiff's case with prejudice.

C) The May 7, 2020 Stipulation of Dismissal

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 May 7, 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).

D) Conclusion

In sum, this Motion is **GRANTED** to the extent that the dismissal with prejudice is vacated. Plaintiff's case remains dismissed, without prejudice, for failure to provide sufficient proof of use.