

FILED

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

Margaret Cordner Esq. (104432014)
MARC J. BERN & PARTNERS LLP
60 East 42nd Street, Suite 950
New York, New York 10165
Phone: (212) 702-5000
Facsimile: (212) 818-0164
E-mail: mcordner@bernllp.com
Attorneys for Plaintiff(s)

IN RE ZOSTAVAX LITIGATION

*Barbara Lombardo 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-003015-18

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 Order dismissing Plaintiff's complaint with prejudice, and the Court having considered the moving papers, papers in opposition and reply, and for good cause having been shown,

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

ORDERED that Plaintiff's Motion is **DENIED** in accordance with CMO 14 and CMO 16, 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.

OPPOSED

SEE STATEMENT OF REASONS ATTACHED

Statement of Reasons

This matter comes before the Court upon Plaintiff, Barbara Lombardo's, Motion to Vacate this Court's February 13, 2020 Order dismissing Plaintiff's case with prejudice for repeated failure to abide by Court Orders requiring Plaintiff to serve a complete and verified Plaintiff Fact Sheet ("PFS"). The Court notes that it has read the moving papers, and papers in opposition and reply.

The facts giving rise to this Motion are largely undisputed. Plaintiff was one of several hundred Plaintiffs whose cases were dismissed with prejudice pursuant to R. 4:23-2 for counsels' 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 7, dated 2/13/20.² Subsequently, plaintiff's counsel moved to globally reconsider the Orders of dismissal but was instructed to withdraw same and to re-file motions for individual plaintiffs that were fully compliant with their discovery obligations so that the Court could appropriately decide compliance on a case-by-case basis. Namely, the Court instructed 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 that have satisfied discovery obligations" by March 29, 2021. See CMO 14, § 10.

In opposition, Defendants, Merck & Co., Inc., and Merck Sharp & Dohme Corp. (hereinafter "Defendant") argue that vacating Plaintiff's dismissal with prejudice is unjustified when Plaintiff "defied" this Court's Case Management Order No. 14 ("CMO 14"), dated March 22, 2021, which required plaintiff's counsel to submit a list of plaintiffs fully compliant with their discovery obligations to defense counsel by March 29, 2021. According to Defendant, this specific Plaintiff was not identified on plaintiff's counsel's March 29, 2021 submission and the PFS was not served on defense counsel until April 9, 2021.

In reply, plaintiff's counsel argues that the PFS was not served until April 9, 2021 because counsel's Global Motions for Reconsideration were pending, and counsel was unable to reach get in contact with Plaintiff. Plaintiff's counsel further argues that the March 29, 2021 date was not in fact a cut-off date for filing this motion, thus same is timely.

The Court finds Plaintiff's argument in reply as to why a PFS was not served until April 9, 2021 without merit. Counsel argues that while the Global Motions for Reconsideration were pending, counsel was unaware as to whether the Court would accept discovery served for cases dismissed with prejudice. It is undisputed that plaintiff's counsel had served discovery upon defense counsel in other cases in this MCL while same were dismissed with prejudice and, in any event, counsel could have sought guidance from the Court on this issue.

For example, the Court decided nearly sixty (60) Motions to Vacate on May 14, 2021 and counsel was serving proof of use in certain cases dismissed with prejudice while those very Motions were pending.

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 filed this instant action on May 16, 2018. See Plt.'s Mt., ¶ 4.

Moreover, Plaintiff's Global Motion for Reconsideration was filed on March 3, 2020 and was pending for over a year during the COVID-19 pandemic, which prompted the Court to transition from paper filing onto electronic filing, and during which time the MCL docket went through a transition of Judges upon Judge Hyland's February 2021 retirement. Accordingly, Plaintiff had the benefit of over a year to serve the necessary PFS.

Thus, the only conclusion the Court can gather from this argument is that counsel moved the Court to reconsider dismissals with prejudice on March 3, 2020 for plaintiffs dismissed for non-compliance with discovery obligations, while still non-compliant with the same discovery obligations that prompted the dismissal with prejudice. Thus, counsel should have never moved the Court to reconsider those cases.

With that being said, the Court finds it necessary to highlight for counsel that this Motion should not have been filed given the fact that this Plaintiff was not identified in plaintiff's counsel's March 29, 2021 submission and because a PFS was not served until after March 29, 2021. Although Plaintiff's Global Motion for Reconsideration was pending, had that Motion been decided at the time it was filed, Plaintiff's case would have remained dismissed with prejudice. At the time this Court directed counsel to withdraw the Global Motion for Reconsideration, Plaintiff was still non-compliant with her PFS obligations. Moreover, at the March 2, 2021 CMC, the Court instructed plaintiff's counsel to compile and send a list of fully compliant plaintiffs to defense counsel by March 9, 2021. When this Court entered CMO 14, dated March 22, 2021 it *sua sponte* extended the date to March 29, 2021 to afford plaintiffs additional time to become compliant with discovery obligations. Further, at the May 4, 2021 CMC, the Court explained that the March 29, 2021 date was a cut-off date to file motions to vacate by expressly referring to March 29, 2021 as "the deadline" and indicating that the Court gave counsel "guidance [as to when to file motions to vacate] when [it] gave those dates...." Also, in entering CMO 16, the Court firmly reiterated that the Court's intent "in setting the March 29, 2021 date [was] to set a cut-off for the filing of motions to vacate dismissals with prejudice." CMO 16, pg. 4.

Despite the foregoing, Plaintiff was not compliant with PFS obligations until after March 29, 2021. Plaintiff has had the benefit of a total of at least three (3) extensions by which to serve a PFS and years to do so. Specifically, the Plaintiff's case was filed on May 16, 2018. Between the filing of Plaintiff's Complaint and the first September 1, 2019 deadline to serve a PFS, Plaintiff had the benefit of over one year to gather the information necessary to do so. Plaintiff was then afforded an extension through December 31, 2019, affording Plaintiff almost an additional two months to gather this threshold information to serve upon the Defendant. Thereafter, Plaintiff's case was dismissed with prejudice on February 13, 2020, affording Plaintiff roughly an additional month and a half to serve a PFS between the deadline and the entry of the dismissal Order. Thereafter, Plaintiff's Global Motion for Reconsideration was pending as of March 3, 2020 and was not decided for another year during which time Plaintiff remained non-compliant with PFS obligations. After the Global Motion for Reconsideration was withdrawn, Plaintiff then had at least an additional two (2) extensions by which to come into compliance – the March 9, 2021 and March 29, 2021 extensions. Despite all of these extensions and circumstances, Plaintiff's PFS was not served until April 9, 2021. There are no "exceptional circumstances" or the like to warrant vacating this Plaintiff's dismissal.

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