

FILED

JUNE 1, 2021

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

Margaret E. Cordner, Esquire
NJ Bar No: 104432014
MARC J. BERN & PARTNERS LLP
60 E. 42nd St. Ste 950
New York, New York 10165
Tel: (212) 702-5000
Fax: (212) 818-0164
Attorneys for Plaintiffs

IN RE ZOSTAVAX LITIGATION

*TIM McCALLISTER, INDIVIDUALLY, AND
AS PERSONAL REPRESENTATIVE OF
LESTER DALE MCCALLISTER 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-05086-19

ORDER

WHEREAS, Plaintiff, by and through their attorneys Marc J. Bern & Partners LLP, upon notice to all interested parties, have moved before this Court to Reinstate Plaintiff's Complaint, which is currently dismissed without prejudice for failure to provide proof of use, and the Court having read 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 the Motion to Reinstate is **GRANTED**, and Plaintiff's Complaint is hereby **REINSTATED**; 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 in accordance with R. 1:5-1(a)

/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's Motion to Reinstate his Complaint, which was dismissed without prejudice on February 13, 2020 for failure to comply with several Court Orders requiring proof of product usage. The Court notes that it has considered the moving papers, papers in opposition and reply along with all supporting exhibits.

By way of background, this Motion was one of several Motions to Reinstate that were granted as unopposed in late 2020 in accordance with R. 1:6-2. The Court was recently informed that Defendants, Merck Sharp & Dohme Corp. and Merck & Co., Inc. (hereinafter "Defendant"), having not filed appearances in those cases, did not receive notice of said Motions. As such, on May 4, 2021, this Court entered an Order *sua sponte* vacating the Order granting the instant Motion to Reinstate for the purpose of allowing Defendant to file opposition thereto, which was filed on May 10, 2021.

The crux of Defendant's argument is that Plaintiff's proffered Proof of Use is insufficient and does not comport to this Court's August 23, 2019, February 20, 2020, and April 15, 2021 Proof of Use Orders.

Accordingly, the issue before the Court is whether the documents Plaintiff produced are sufficient Proof of Use.

A) The Proof of Use Orders

a) August 23, 2019 Initial Proof of Use Order

On August 23, 2019, Judge Hyland entered the Initial "Proof of Use" Order in this MCL, requiring plaintiffs to provide "documentary evidence of proof of use of Zostavax ... within 35 days of the date of th[e] Order." See Order dated 8/23/19. Subsequently, at a February 4, 2020 Case Management Conference ("CMC"), Judge Hyland became aware that the August 23, 2019 Order inadvertently did not apply to cases filed after the Order due to the specific language used.¹ To remedy what seemed like an oversight, defense counsel proposed that the next Case Management Order ("CMO") should address this issue and provide that cases filed after the August 23, 2019 Order should similarly provide Proof of Use. At that time, Plaintiffs' counsel had

¹ The August 23, 2019 Order specifically stated, "[t]he remaining Plaintiffs ... shall provide ... counsel with documentary evidence of proof of use" See Order dated 8/23/19.

no objections and agreed to produce such documentary evidence of Proof of Use within thirty (30) days of the Court's next CMO.²

b) Case Management Order No. 8

Following the Court's February 4, 2020 CMC, Judge Hyland entered CMO 8, dated February 20, 2020. CMO 8, ¶ 4, provides the following language regarding Proof of Use:

Within 30 days of the date of this Order, Plaintiffs in all cases filed after August 23, 2019 shall provide liaison counsel for Plaintiffs ... with documentary evidence of proof of use of Zostavax. Any cases filed after the date of this Order shall provide this same information within 30 days after the complaint is filed with the court. Plaintiffs' liaison counsel shall forward the documentary evidence of proof of use to defense liaison counsel within 35 days of the date of this Order and for cases filed after the date of this Order within 35 days of the date the complaint is filed. Proof of use is clarified to include definitive proof the plaintiff received the Zostavax vaccination, such as a medical record confirming the vaccination was provided on the date of that record or a vaccine administration record.

Thereafter, Plaintiffs filed a Motion for Reconsideration, arguing that many Plaintiffs subject to CMO 8 did not have specific vaccination records because Zostavax is widely distributed throughout pharmacies, without a prescription, and retention requirements for pharmacies are not uniform nationwide. Plaintiffs requested that the Court reconsider the definition set forth in CMO 8 to further include additional documentation which may be sufficient in establishing Proof of Use.

c) April 15, 2021 Proof of Use Opinion re: Reconsideration of CMO 8

On April 15, 2021 this Court rendered its "Proof of Use" Order/Opinion" ("hereinafter the "POU Order") denying reconsideration of CMO 8. Consistent with Judge Hyland's prior Orders, the Court's focus was on definitive proof of use that would help the Court objectively determine which Plaintiffs had credible claims; indeed, the Court noted that this is the very purpose of a Lone

² Although the parties agreed that some Proof of Use should be provided to defense counsel as well as to the Court, the parties requested clarification from the Court as to what actually constitutes "Proof of Use". Judge Hyland explained that he "wanted something definite" such as a "vaccination record" or an "indication in the medical records that the vaccine was given on [a] particular day." Plaintiffs did not object to this discussion. See 2/4/20 Tr. 32:3-11.

Pine Order.³ The Court notified counsel that it would not accept a self-serving Affidavit or Certification from a Plaintiff certifying that they received the Zostavax vaccine, finding that same was not “something definite”. In fact, the Court noted that the current definition, in place since CMO 8, requires “corroborative documentation”. In re Zostavax, MCL 629, 4/15/21 Order. While the Court acknowledged certain types of sufficient Proof of Use in its POU Order, it reserved deciding disputes over whether other types of Proof of Use are sufficient to an appropriate time. Ibid.

B) Legal Standard: Reinstating Dismissal Without Prejudice

According to R. 4:23-5(a)(1), a “delinquent party may move on notice for vacation of the dismissal or suppression order [without prejudice] at any time before the entry of an order of dismissal or suppression with prejudice.” R. 4:23- 5(a)(1). The motion shall be supported by an affidavit that recites that the withheld discovery “has been fully and responsively provided.” Ibid. If an order without prejudice is not vacated, the party entitled to discovery may move for an order dismissing the case with prejudice “after the expiration of 60 days from the date of the order.” R. 4:23-5(a)(2).

C) Discussion Re: Plaintiff’s Proof of Use

Plaintiff argues that Defendant has been served with adequate Proof of Use and thus this Motion should be granted, and Plaintiff’s case thus reinstated. In opposition, Defendant argues that Plaintiff’s Proof of Use is not definitive of proof that Plaintiff received the Zostavax vaccination and thus this Motion should be denied as Plaintiff’s discovery has not “been fully and responsively provided” as required by R. 4:23-5(a)(1).

The Court notes that the Exhibits attached to Defendant’s Motion are medical records of Plaintiff’s decedent, Lester McCallister. These records, specifically in the “vaccines” chart, evidence that the decedent had received the “zoster” (shingles) vaccine on 4/23/12. The records further indicate that the decedent received Zostavax. In reply, Plaintiff maintains that these medical records, served on Merck on April 2, 2020 and again on February 17, 2021 meet the requirements of the POU Order.

Although the medical records do not provide a specific lot number or dosage, the Court is satisfied that they constitute sufficient proof of use under the POU Order. The “zoster” vaccine

³ Lore v. Lone Pine Corp., No. L-33606-85, 1986 WL 637507 (N.J. Super. Law Div. Nov. 18, 1986).

listing indicates a date of vaccination as well as initials for the vaccinator. This record is corroborated by the listing of “Zostavax” provided as Plaintiff’s reply exhibit 2. Moreover, the vaccination date is April 23, 2012, and the Court has previously addressed that Zostavax was the only shingles vaccine approved by the Food and Drug Administration (“FDA”) until late October 2017. Accordingly, no other shingles vaccine could have been administered to Plaintiff aside from Zostavax (as noted on this Immunization Record) as none were approved in the United States at the time Plaintiff received same.

D) Conclusion

In light of the foregoing, the Court finds that Plaintiff has produced sufficient Proof of Use. Accordingly, Plaintiff’s Motion is **GRANTED**.