

FILED

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

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IN RE ZOSTAVAX LITIGATION

*Brenda Sellers 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-004575-18

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 this Court’s February 13, 2020 Order dismissing Plaintiff’s complaint with prejudice, and the Court having considered the moving papers, papers filed in opposition, papers filed in reply along with supporting exhibits, and for good cause having been shown,

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

ORDERED that the Motion to Vacate be and is hereby **GRANTED**; and it is further

ORDERED that Plaintiff’s dismissal with prejudice is hereby **VACATED**; and it is further

ORDERED that Plaintiff’s case may be reinstated upon counsel filing an individual Complaint for Plaintiff under an individual docket number in accordance with CMO 8 and Order dated March 17, 2020; Plaintiff will not be reinstated to docket number 4575-18 and instead the Court will mark Plaintiff as “disposed” under 4575-18; and

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'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 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 Orders 3 and 4, dated 2/13/20.²

In furtherance of this Motion, Plaintiff's counsel claims that Plaintiff is in compliance with her discovery obligations to date; specifically, that counsel has served a substantially complete and verified Plaintiff Fact Sheet ("PFS") on defense counsel as of February 17, 2020. In opposition, counsel for Defendants, Merck Sharp & Dohme Corp. and Merck & Co., Inc. (hereinafter "Defendant"), acknowledges that Plaintiff provided a substantially complete and verified PFS but argues that this Motion should be denied given that Plaintiff's compliance came late, despite multiple deadline extensions, and not until Plaintiff's case was dismissed with prejudice.

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.

Accordingly, the narrow issue before the Court is whether to vacate Plaintiff's dismissal when Plaintiff is now in full compliance with PFS and proof of use ("POU") 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 dismissal, the Court notes that none of the enumerated reasons other than (f) can be applicable to this Motion.³ "The very essence of (f) 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." DEG LLC v. Township of Fairfield, 198 N.J. 242 (2009) (citing Court Inv. Co. v. Perillo, 48 N.J. 334, 341, 225 A.2d 352 (1966)). 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 four (4) days after her case was dismissed with prejudice yet waited another fifteen (15) months to move to vacate that dismissal. Notwithstanding same, the Court will be granting Plaintiff's Motion for the reasons stated below.

It is well settled that the ultimate goal of our judicial system is to secure an adjudication on the merits. State v. Farrell, 320 N.J. Super. 425, 447 (App. Div. 1999). In accordance with the foregoing principle, "dismissal with prejudice is the ultimate sanction," and vacating a dismissal with prejudice involves competing policies such as "[t]he defendant's right to have the plaintiff comply with procedural rules [and] the plaintiff's right to an adjudication of the controversy on the merits." Zaccardi, 88 N.J. at 252-53 (citing Crews v. Garmonney, 141 N.J. Super. 93, 96 (App. Div. 1976)). As noted in Zaccardi, "[a]ttorneys must comply with the time limits in the procedural rules in order to further public policies of expeditious handling of cases, avoiding stale evidence, and providing uniformity, predictability and security in the conduct of litigation." Id. at 252.

³ Plaintiffs' 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." See Plaintiff's Motion, ¶ 24.

On March 2, 2021, 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 provide a list of compliant plaintiffs to defense counsel. See 3/2/21 CMC Trnscpt, 33:12-35-3. The Court's purpose for doing so was to establish March 29, 2021 as a 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. Defendant notably does not allege that counsel failed to include Plaintiff on this list. That, taken in conjunction with the date of Plaintiff's PFS compliance, leads the Court to believe that vacating Plaintiff's dismissal is appropriate in the interest of justice.⁴ While the Court certainly understands Defendant's concerns about Plaintiff "parking" her case "on the sidelines" avoiding bellwether discovery, the Court does not find this to be such a grave concern, given the vast number of cases involved in this MCL.

In light of the foregoing, this motion is **GRANTED** and the dismissal of Plaintiff's Complaint with prejudice is hereby vacated.

⁴ For the sake of thoroughness, the Court does note that neither party directly indicates whether or not Plaintiff is also in compliance with her POU requirement. The fact that Defendant does not argue that Plaintiff is not in compliance with POU requirements, leaves the Court satisfied that there is POU compliance, and that same should not affect the outcome of this motion.