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

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IN RE ZOSTAVAX LITIGATION

*Bettye Ekperikpel 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, and the papers filed in reply along with supporting Exhibits, and for good cause having been shown,

IT IS on this 14th day of May 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).

OPPOSED

/s/ Bruce J. Kaplan

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

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, as well as the papers in opposition and 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 and the Court's Proof of Use Order ("POU Order"), dated August 23, 2019.¹

In furtherance of this Motion, Plaintiff's counsel claims that she 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. In opposition, counsel for Defendants, Merck Sharp & Dohme Corp. and Merck & Co., Inc. (hereinafter "Defendant"), argues that this Motion should be denied given that Plaintiff is not in "full" compliance with her discovery obligations. Specifically, while defense counsel acknowledges that Plaintiff has served Defendant with a PFS at the time this Motion was filed, it is argued that Plaintiff still has not provided Defendant with any proof of use connecting her alleged injuries to the Zostavax vaccine and therefore has not satisfied this Court's Proof of Use Order. Thereafter, in reply, Plaintiff's counsel represents that attempts to obtain adequate proof of use from the pharmacy have been unsuccessful.

Accordingly, the narrow issue before the Court is whether Plaintiff's motion should be granted, when POU has still not been provided.

With that being said, the Court finds it necessary to highlight for counsel that this Motion should not have been filed at this time. Even assuming *arguendo* that the Court found this proof of use adequate, discussed below, the proof of use document(s) was not provided to defense counsel under AFTER this Motion and the opposition thereto was filed. Given the backlog of over 950 Motions filed by plaintiff's counsel to vacate this Court's dismissal Orders on cases where Plaintiffs were still not fully compliant, Plaintiffs' counsel was asked to withdraw the Global Motions and to re-file Motions to Vacate for individual Plaintiffs that were fully compliant with their threshold discovery obligations. The Court specifically indicated that it would "like to resolve all the ones first where there is no opposition ... where there is compliance and no opposition." See Ex. D, 4/8/21 CMC Tr., 32:10-15. The Court specifically requested that Motions be filed in "bundles," first starting with the "unopposed" bundle; in this regard, the Court stated that it wants "the ... group to be where there is total compliance on both sides of the aisle, both in terms of proof of use, as well as plaintiffs' fact sheet." See Ex. D, 4/8/21 CMC Tr., 32:16-21. As noted, this Plaintiff did not fall into the category of cases cited above. Notwithstanding same, the Court's goal is to advance this litigation and for that reason alone chooses to decide this Motion at this time.

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:

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.

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.² "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).

Here, plaintiff's counsel notes that Plaintiff's claims are meritorious and that, because a PFS has been served as of February 2020, that Plaintiff's case should be reinstated. Plaintiff's counsel relies on Farrell v. TCI of N.J., 378 N.J. Super. 341, 354 (App. Div. 2005), for the proposition that motions to vacate should be liberally viewed when no prejudice is demonstrated by the defense. However, in opposition, defense counsel argues just that – that Defendants have suffered and continue to suffer prejudice due to plaintiff's counsel's non-compliance with discovery obligations. While defense counsel acknowledges that a PFS has been served, at the time this Motion was filed, Plaintiff's non-compliance with proof of use obligations was outstanding. It is defense counsel's position that Plaintiff's case should not be vacated despite counsel's production of the PFS when Plaintiff has had over a year to come into full compliance and had not done so, especially in light of the fact that plaintiff's counsel has been on notice as early as August 2019 of their proof of use obligations.

In reply, Plaintiff's counsel informs the Court that counsel has requested records from a Louisiana Walgreens Pharmacy on Plaintiff's behalf, but the requests have been denied because Walgreens has not accepted Plaintiff's HIPAA authorization. Attorneys for Plaintiff are working to obtain a new HIPAA authorization from Plaintiff but have been unable to reach Plaintiff regarding this issue. Plaintiff's counsel maintains that the POU non-compliance is due to an inability to obtain the records, not due to purposeful non-compliance.

Plaintiff's case was dismissed in February 2020 and this Motion comes before the Court

² 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." See Plaintiff's Motion, ¶ 17.

in May 2021.³ Accordingly, counsel has had the benefit of over one (1) year to gather the necessary proof of use to substantiate Plaintiff's claims against Defendant. Although the Court acknowledges that Plaintiff's case was dismissed for PFS reasons and not specifically for proof of use reasons, see Order 5, dated 2/13/20, vacating the entry of a final judgment and permitting a case to proceed, especially a dismissal with prejudice, is extraordinary relief that is unwarranted where there has not been full compliance with obligations. See Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 4:50-1 (2021); see also US Bank Nat. Ass'n v. Guillaume, 209 N.J. 449, 467 (2012) (holding that motions for relief from judgment should be granted sparingly and in the discretion of the trial court). Under the circumstances of this individual case, the Court finds that vacating dismissal with prejudice is warranted given counsel's production of the PFS. However, the Court will not permit Plaintiff's case to proceed until adequate proof of use has been provided; accordingly, Plaintiff's case will remain dismissed, *without prejudice*, for thirty (30) days.

The Court notes that counsel was aware at the time Plaintiff's case was dismissed in February 2020 that the Lone Pine Order entered by this Court in August 2019 required plaintiffs to provide documentation to defense counsel for the purpose of objectively identifying which plaintiffs suffered injuries which could credibly attributed to the defendant's product. See In re Zostavax, MCL 629 4/15/21 Order, pg. 6. Also, as recently as April 15, 2021, this Court issued its "Proof of Use" Order/Opinion, further clarifying what constitutes "sufficient" proof of use. The Court's focus was on definitive proof of use that would help the Court objectively determine which Plaintiffs had credible claims; indeed, this is the very purpose of a Lone Pine Order. 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, 4/16/21 Order.⁴ Plaintiff filed this Motion despite the inability to obtain vaccination records to establish proof that Plaintiff received the Zostavax vaccine.

In accordance with this Court's April 15, 2021 Proof of Use decision, the Court finds the proof of use to be lacking. However, 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.

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.

³ The Court appreciates and acknowledges the fact that the Global Motion for Reconsideration was pending since February 2020 in the meantime and was not addressed by the Court until April 2021.

⁴ Black's Law Dictionary defines "corroborative evidence" as "evidence that confirms or reinforces an allegation"

