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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

*Virginia Justice and Jimmy W. Justice 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-005654-20

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 23rd day of July 2021, hereby:

ORDERED that the Motion to Reinstate is **DENIED**; and it is further

ORDERED that that plaintiff's counsel has thirty (30) days from the date of this Order to obtain additional records; and it is further

ORDERED that should Plaintiff fail to obtain additional records providing proof of use within thirty (30) days, Defendants may move to dismiss the Complaint with prejudice; 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 ATTACHED STATEMENT OF REASONS

Statement of Reasons

This matter comes before the Court upon Plaintiff's Motion to Reinstate her Complaint, which was dismissed without prejudice on May 5, 2021 pursuant to Rule 4:23-2 after failing to comply with the Court's Product Usage Order. The Court notes that it has considered the moving papers, papers in opposition and reply, along with all supporting exhibits.

The crux of Defendant's argument in opposition 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 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:

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.

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.

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 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.

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

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 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). In reply, in addition to claiming that the purported POU is sufficient, Plaintiff indicates that efforts have been made by both Plaintiff and her counsel to obtain records from a medical clinic.

Turning first to the purported POU, the Court finds same insufficient under the controlling POU Orders. Plaintiff’s POU consists first of an affidavit signed by Plaintiff stating that she received Zostavax “on or about” 2014 or 2015, and that she attempted to call the Remote Area Medical Clinic and the Virginia Department of Health, both to no avail. See Reply, Ex. B. The Court has made it explicitly clear that uncorroborated self-serving affidavits will not suffice. Therefore, the Court turns to Plaintiff’s medical records. A thorough review of same warrants the finding that they are also insufficient.

The records provided with this motion mention Zostavax twice. See Def. Ex. D. Zostavax is first mentioned on page one of Exhibit D, which says “discussed needing Zostavax upon clearing of lesions.” It is axiomatic that this does not provide POU, and thus warrants no further discussion. The second instance is on page two, which states “she had Zostavax 3 years ago.” This is strikingly similar to this Court’s decision on a recent motion, in which the purported POU merely included, “she had shingles immunization about 5 years ago.” In denying that motion, this Court held that there was “no way for the Court to identify the source of this statement” and that there was “certainly no corroboration of same by way of specifics (e.g., a specific

vaccination date, vaccination location, dosage, etc.)” See Def. Ex. E, Order, Rabon v. Merck & Co., Inc., MID-L-004217, (June 1, 2021) at 5. In another recent decision, the Court, faced with a similarly deficient POU as of the time of filing, granted plaintiff’s motion to reinstate based on additional records received after Merck’s opposition was filed, but noted that the original set of records that stated “had shingles vaccine three years ago” “on their own would not constitute sufficient POU under the POU Order” because it was “nothing more than [p]laintiff’s recitation of previous vaccinations to a medical provider” and was the “functional equivalent of an affidavit or certification.” See Def. Ex. F, Order, Schieber v. Merck & Co., Inc., MID-L-000912-19 (June 1, 2021) at 4.

In the instant case, unlike in Schieber, Plaintiff has not provided any additional records in support of POU. Like Rabon, this Plaintiff’s medical records contain nothing more than an uncorroborated and potentially self-reported indication of Zostavax.

The Court now turns to the alleged efforts made by counsel in obtaining additional medical records. In reply, Plaintiff’s counsel states that they “also attempted to obtain a primary record of Proof of Plaintiff, Virginia Justice’s Zostavax usage. Plaintiffs’ counsel is in touch with the headquarters for Remote Area Medical volunteer corps. The staff at the Remote Area Medical Center headquarters is searching their physical files for Proof of Plaintiff’s Zostavax Usage.” See Reply at 2. Plaintiff’s affidavit, as well as counsel’s certification and reply are all void of any specifics regarding the attempts to obtain additional records (e.g., the date of the initial call to the medical clinic, whether and when any follow-up calls were made, how long the clinic indicated it would take to locate the records, etc.). The Court has no way of knowing this information as it has not been provided by Plaintiff or her counsel.

With that said, the Court has no choice but to deny this motion, leaving plaintiff’s Complaint dismissed without prejudice. And while the purported POU is insufficient to warrant reinstatement, in light of the fact that Plaintiff’s counsel is engaging in efforts to obtain further records, the Court will provide Plaintiff with thirty (30) days to obtain same before allowing Defendants to move for dismissal with prejudice.

D) Conclusion

Accordingly, in light of the foregoing, this motion is **DENIED**. However, Plaintiff will have thirty (30) days to obtain additional records, and as such Defendant may not move to dismiss this Complaint with prejudice prior to the expiration of that time.

