FILED

MAY 14 , 2021

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 *Caroline Kioussis 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-006406-18 **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 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 be and is hereby **GRANTED**, and

IT IS FURTHER ORDERED that Plaintiff is reinstated to the active trial calendar; and

IT IS FURTHER ORDERED that within fourteen (14) days of the date of this Order, plaintiff's counsel shall file their opposition as to why sanctions in the form of attorneys' fees should not be imposed; 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).

/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 Vacate this Court's February 13, 2020 Order dismissing Plaintiff's case with prejudice. The Court notes that it has read the moving papers, the papers in opposition and reply, as well as Defendants' sur-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]

Now, 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 informs that Court that compliant POU was served upon Merck on May 5, 2021, as well as in November of 2019.

Accordingly, the narrow issue before the Court is whether Plaintiff's POU is sufficient to warrant vacating her dismissal with prejudice.

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 complaint, 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

---

[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.

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.[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. Defendant further argues that Plaintiff's purported POU is deficient in that it does not meet the definition of proof of use in CMO #8. Specifically, Defendant contends that the purported POU is a non-contemporaneous 2013 "Health Maintenance" list that does not provide any indicia of reliability such as a time stamp, lot number, and/or administrator's name.

In reply, plaintiff's counsel informs the Court that, on May 5, 2021, after Defendant's opposition was filed, counsel served sufficient proof of use. Counsel submitted to the Court

---

[2] Plaintiffs' counsel indicates that "[b]ecause Plaintiff served a verified and compete 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.

Exhibit 1, which evidences Plaintiff's immunization summary and lists "Zoster Live (Shingles) Vaccine, Zostavax," dated 9/14/2009 .

In defense counsel's sur-reply, counsel acknowledges that Plaintiff's May 10, 2021 submission constitutes sufficient proof of use. However, counsel takes significant issue with the fact that plaintiff's counsel "wast[ed] the time of both the Court and Merck's counsel." Def.'s Sur-Reply, pg. 2. Specifically, defense counsel notes that plaintiff's counsel was previously asked to withdraw this Motion as Plaintiff was not fully compliant with proof of use. Had plaintiff's counsel done so and subsequently provided the defense with proof of use, counsel for Merck would not have opposed a subsequent Motion to Vacate. However, instead, plaintiff's counsel chose to proceed with this Motion, resulting in defense counsel expending numerous hours to appropriately oppose this Motion, only for plaintiff's counsel to then produce sufficient proof of use after defense counsel's opposition.

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.[3]

Although compliance is late, at this time, plaintiff's counsel has supplied defense counsel with a document evidencing the details of Plaintiff's Zostavax vaccine. In light of the fact that dismissal with prejudice is the ultimate sanction which "should be imposed only sparingly," Zaccardi, 88 N.J. at 253, and the competing policies involved – i.e., "[t]he defendant's right to have the plaintiff comply with procedural rules [and] the plaintiff's right to an adjudication … on the merits," Crews v. Garmoney, 141 N.J. Super. 93, 96 (App. Div. 1976), the Court finds that Plaintiff's case is objectively credible and thus extraordinary circumstances exist to vacate the dismissal with prejudice in order to achieve an equitable result and an adjudication on the merits. Plaintiff's POU is certainly sufficient and warrants an adjudication of Plaintiff's claims on the merits.

Regarding sanctions, defense counsel argues that plaintiff's counsel's disregard of multiple Court Orders requiring sufficient proof of use since 2019 to only produce same after this Motion and formal opposition was filed warrants sanctions in the amount of $1,000.00 for defense counsel's attorney's fees pursuant to R. 4:23-2(b)(4).[4] This is especially in light of the

[3] Black's Law Dictionary defines "corroborative evidence" as "evidence that confirms or reinforces an allegation …."

[4] Defense counsel's Certification, attached to counsel's sur-reply, certifies that approximately ten (10) hours were spent opposing Plaintiff's Motion and that the hourly rate Defendant pays its attorneys far exceeds $100.00 per hour.

fact that defense counsel requested for plaintiff's counsel to withdraw this Motion until sufficient proof of use was served to avoid the extensive motion practice that ultimately resulted from the filing of this Motion.[5] Accordingly, with regards to the issue of sanctions, the Court will permit plaintiff's counsel to respond within fourteen (14) days of the date of this Order, by way of written submission, as to why sanctions in the form of attorneys' fees should not be imposed given the circumstances outlined above.

In sum, R. 4:50-1(f) justifies relief from final judgment in "exceptional circumstances", supra. Given that Plaintiff is in full compliance with discovery obligations, the Court finds that "exceptional circumstances" warrant the relief sought. In light of the foregoing, this Motion is **GRANTED.**

[5] Although the Court requested that counsel file Motions for Plaintiffs that are in full compliance and thus will be unopposed, in this matter the Court reviewed a Motion, opposition, reply and a sur-reply.