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FILED

January 6, 2023

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

*Attorneys for Defendants Merck & Co., Inc.
and Merck Sharp & Dohme LLC*

JAMES WYANT and BEULAH WYANT,

Plaintiffs,

v.

MERCK & CO., INC., MERCK SHARP &
DOHME CORP., "JOHN DOE," "JANE
DOE," AND "XYZ CORP." (FICTITIOUS
NAMES),

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY

DOCKET NO.: MID-L-006444-21

ORDER

THIS MATTER having been brought before the Court upon motion by Fox Rothschild LLP, attorney for Defendants, Merck & Co., Inc., and Merck Sharp & Dohme Corp., for an Order to Dismiss the Plaintiffs' complaint with prejudice pursuant to R. 4:23-5(a)(2), for failure to provide a materially complete and certified Plaintiff Fact Sheet ("PFS") as this complaint was dismissed without prejudice on October 21, 2022, and the Court having read and considered the papers submitted in this matter, and for the reasons set forth in the attached Statement of Reasons, and for good cause having been shown;

IT IS on this 6th day of January, 2023;

ORDERED that Defendants' Motion to Dismiss with prejudice is hereby **GRANTED**;

and it is further

ORDERED that Plaintiffs' complaint is hereby dismissed with prejudice; and it is further

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.

151 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 motion by Fox Rothschild LLP, attorney for Defendants, Merck & Co., Inc., and Merck Sharp & Dohme Corp., for an Order to dismiss Plaintiffs' complaint with prejudice pursuant to R. 4:23-5(a)(2), for failure to provide a materially complete and certified Plaintiff Fact Sheet ("PFS"). The Court notes that it has read and reviewed the papers submitted in this matter and Plaintiffs' opposition.

By way of relevant procedural history, Plaintiffs' PFS was originally due on April 18, 2022, as set forth in the June 12, 2019, PFS Case Management Order. On May 10, 2022, Plaintiffs' Counsel provided a materially deficient PFS and was provided an opportunity to cure within thirty (30) days, pursuant to the PFS CMO. After no response was received, Defense Counsel moved to compel Plaintiff to provide discovery and this Court granted that motion on August 5, 2022. Additionally, this Court's August 5, 2022 Order to compel discovery provided Plaintiffs with sixty (60) days, or until October 4, 2022, to provide a materially complete PFS. Plaintiff did not comply with this Court's October 4, 2022 deadline. As a result, on October 21, 2022, this Court granted Defendants' motion to dismiss Plaintiffs' complaint without prejudice. In addition to dismissing Plaintiffs' complaint without prejudice, this Court provided Plaintiff with sixty (60) days to provide a materially complete PFS before Defendants could file a motion to dismiss with prejudice. Plaintiff has not complied, and Defense Counsel has brought the instant motion to dismiss Plaintiffs' claims with prejudice.

In opposition, Plaintiffs' Counsel represents that their office notified Plaintiff of their discovery obligations under the PFS CMO, including calling their client five (5) times and mailing them two (2) notices about the need to respond to discovery. Additionally, Plaintiffs' Counsel notifies the Court that Plaintiff Beulah Wyant informed their office that her husband James Wyant had passed away on June 28, 2022. On August 10, 2022, Plaintiffs' Counsel mailed Ms. Wyant a copy of this Court's Order compelling discovery, filed on August 5, 2022. Plaintiffs' Counsel states that their office diligently and repeatedly notified Ms. Wyant of the need to comply with the Court's August 5, 2022 Order by calling her three (3) times and mailing her two (2) notices. Plaintiffs' Counsel have also advised Ms. Wyant of this Court's October 21, 2022 Order dismissing Plaintiffs'

complaint without prejudice by way of certified and regular mail. Additionally, Plaintiffs' Counsel has notified Plaintiff of the instant motion to dismiss her complaint with prejudice. To date, Ms. Wyant has not provided any additional information and has not filed a materially complete PFS. Plaintiffs' Counsel requests additional time, as the Court sees fit, to produce the required discovery.

In light of Plaintiffs' failure to comply with this Court's Orders and in light of the additional time provided previously, this Court will be entering an Order dismissing this case with prejudice. The Court finds that despite notice and opportunity, Plaintiff has not provided the outstanding discovery and does not provide justification for additional time.

In so doing, the Court notes pursuant to R. 4:23-5(a)(2), if "an order of dismissal ... without prejudice has been entered pursuant to paragraph (a)(1) of this rule and not thereafter vacated, the party entitled to the discovery may, after the expiration of 60 days from the date of the order, move on notice for an order of dismissal with prejudice." It is well-settled that "dismissal with prejudice is the ultimate sanction, [and that] it will normally be ordered only when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party," Zaccardi v. Becker, 88 N.J. 245, 253 (1982) (internal citations omitted), "or when the litigant rather than the attorney was at fault." Ibid. (citing Schlosser v. Kragen, 111 N.J. Super. 337, 341 (1970)).

Our Supreme Court has also held that, "[t]he dismissal of a party's cause of action, with prejudice, is drastic and is generally not to be invoked except in those cases where the order for discovery goes to the very foundation of the cause of action ... or where refusal to comply is deliberate and contumacious." Schlosser, 111 N.J. Super. at 341 (citing Tsibikas v. Morrof, 5 N.J. Super. 306 (App. Div. 1949)).

The unfortunate reality is given the length of time of non-compliance, the Court finds there is no "lesser sanction" that can suffice to remedy the violations of this Court's order.

As it has been more than 60 days since this case was dismissed without prejudice, and Plaintiff remains delinquent on discovery obligations, Defendants' motion to dismiss with prejudice is granted.