

**FILED**

FEB 03 2017

Superior Court of New Jersey  
County of Atlantic



**SUPERIOR COURT OF NEW JERSEY**

**NELSON C. JOHNSON, J.S.C.**

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**MEMORANDUM OF DECISION ON MOTION**

**Pursuant to Rule 1:6-2(f)**

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**RE:** Christine Zarrilli v. Johnson & Johnson,  
Et. Al.

**DOCKET NO.** ATL-L-1480-16

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**NATURE OF MOTION(S):** Dismissal of Plaintiff's Complaint

**HAVING CAREFULLY REVIEWED THE MOVING PAPERS AND ANY RESPONSE FILED, I HAVE RULED ON THE ABOVE CAPTIONED MOTION(S) AS FOLLOWS:**

### **Nature of Motion and Procedural History**

This matter comes before the Court via Motion to Dismiss Plaintiff's complaint without prejudice, filed by Christine Zarrilli, (hereinafter "Plaintiff"), based upon the contention that Plaintiff's health may deteriorate in the near future, and dismissal would provide her with the opportunity to evaluate the most appropriate time and place to prosecute her claims. The answering Defendants are Johnson & Johnson, Johnson & Johnson Consumer Inc., and Imerys Talc America, Inc. (hereinafter collectively referred to as "Defendants").

### **Findings of Fact**

Based upon the Court's review of the parties' submissions, together with the oral arguments of Counsel on January 30, 2017, the Court makes the following findings of fact:

1. Plaintiff is a fifty-one year old single mother of two children. Plaintiff is a resident of New Jersey. She was a resident of New Jersey when she used the product at issue, and when she was diagnosed with ovarian cancer.
2. Plaintiff originally filed her complaint on July 7, 2016.
3. Subsequently, Plaintiff filed an amended complaint on September 1, 2016.
4. On September 2, 2016, the Court granted summary judgment to Defendants in two consolidated talc cases (hereinafter the "Carl" case).
5. Defendants, Johnson & Johnson and Johnson & Johnson Consumer Inc. (hereinafter "Johnson & Johnson Defendants"), answered the amended complaint on October 10, 2016.
6. Defendant, Personal Care Products Council, answered the amended complaint on October 28, 2016.

### **Movant's Contentions**

#### **Plaintiff's Arguments in Support of her Motion to Dismiss Without Prejudice**

Plaintiff, Christine Zarrilli, seeks to dismiss her complaint without prejudice, so that she may "explore other options that may provide her and her family with a faster resolution of her claims."

Plaintiff contends that this case, along with all other cases in the Talc Based Products Litigation, are at a "standstill" due to the pending appeal in *Carl*, and because of Case Management

Order No. 2. Plaintiff believes that these talc cases will remain halted for the foreseeable future. Additionally, Plaintiff asserts that at the time she filed her complaint, she was unaware of the Court's Case Management Order No. 2, entered on May 14, 2015. Plaintiff states that she is very ill. She is concerned that her health could soon deteriorate, or that she will die while waiting for this case to be litigated in New Jersey.

Plaintiff argues that a plaintiff's motion for voluntary dismissal, after a defendant has answered, is governed by R. 4:37-1(b), which states in pertinent part that, "an action shall be dismissed at the plaintiff's instance only by leave of court upon such terms and conditions as the court deems appropriate." Plaintiff further asserts that Defendants will not suffer prejudice as a result of her motion being dismissed because Defendants have not incurred any litigation costs relating to this matter. Therefore, Plaintiff contends that "[a]llowing the dismissal of [her] complaint without prejudice will afford [her] the opportunity to evaluate the most appropriate time and place to prosecute her claims."

#### **Defendants' Opposition to Plaintiff's Motion to Dismiss**

Defendants argue that Plaintiff should not be allowed to dismiss her complaint without prejudice in an effort to find a more preferable forum. Defendants assert that if Plaintiff's true motive is to promptly litigate her claim, then the Case Management Order No. 2 stay on discovery should be lifted so that this case may proceed.

First, Defendants assert that Plaintiff is a New Jersey resident who brought claims against the Johnson & Johnson Defendants, who are also a New Jersey residents. Defendants argue that New Jersey is an appropriate forum for this case, as it is where Plaintiff claims to have used the product at issue, where Plaintiff was diagnosed with ovarian cancer, and where the majority of the relevant documents and witnesses are located. Thus, Defendants argue that any harm Plaintiff may suffer as a result of the current stay on discovery could be cured by the Court lifting Case Management Order No. 2.

Second, Defendants argue that Plaintiff's Motion should be denied because her motive in moving for the dismissal of her complaint is improper. Defendants assert that Plaintiff's true intention in bringing this motion is to avoid the effect of this Court's Kemp rulings. Therefore, Defendants argue that Plaintiff is essentially seeking to shop for a more favorable forum.

### Standard

R. 4:37-1 provides that a plaintiff may move for dismissal of their complaint, either through stipulation by the adverse party, or by order of the Court. Specifically, R. 4:37-1 provides that voluntary dismissal, without prejudice, may be achieved:

(a) By Plaintiff; By Stipulation. Subject to the provisions of R. 4:32-2(e) (class actions), R. 4:53-1 (receivership actions) and R. 4:60-18 (attachment actions), an action may be dismissed by the plaintiff without court order by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs; or by filing a stipulation of dismissal specifying the claim or claims being dismissed, signed by all parties who have appeared in the action. Unless otherwise stated in the notice or stipulation, the dismissal is without prejudice.

(b) By Order of Court. Except as provided by paragraph (a) hereof, an action shall be dismissed at the plaintiff's instance only by leave of court and upon such terms and conditions as the court deems appropriate. If a counterclaim has been filed and served by a defendant prior to being served with plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

### Ruling

The Court begins its analysis by noting that a plaintiff's motion for voluntary dismissal of their complaint, after a defendant has answered, is governed by R. 4:37-1(b). In pertinent part, R. 4:37-1(b) provides that "an action shall be dismissed at the plaintiff's instance only by leave of court upon such terms and conditions as the court deems appropriate." "A motion based on R. 4:37-1(b) involves three sequential inquiries: (a) whether the matter should be dismissed without prejudice, (b) if so, whether the terms should be imposed, and (c) if so, what terms will alleviate any prejudice to the defendant and prevent injury to the efficient administration of justice generated by the ensuing delay and duplication of effort." *Burns v. Hoboken Rent Leveling & Stabilization Bd.*, 429 N.J. Super. 435 (App. Div. 2013); citing *Shulas v. Estabrook*, 385 N.J. Super. 91, 98 (App. Div. 2006).

Whether to dismiss an action without prejudice is a matter that lies within the Court's sound discretion. *Mack Auto Imports, Inc. v. Jaguar Cars, Inc.*, 244 N.J. Super. 254, 258 (App. Div. 1990). In exercising its discretion, the Court is "chiefly required to protect 'the rights of the defendant.'" *Shulas, supra*, 385 N.J. at 97. "An examination into the propriety of a voluntary

dismissal without prejudice requires an investigation into the reasons why the order was sought as well as the actions or inactions of the parties that preceded its entry.” *Id.* at 101-02.

The case law in New Jersey addressing the factors to be considered by courts in deciding whether to grant a motion to dismiss under *R. 4:37-1(b)* does not provide for an exact standard of review. Federal courts have considered this issue extensively under *F.R.C.P. 41(a)(2)*. Because both rules are indistinguishable, it is appropriate to look to decisions by federal courts interpreting the federal rule. *See Brown v. Brown*, 86 *N.J.* 565, 581-82 (1981) (When the same principle is applicable in state and federal rules, “references to federal decisions ... is pertinent.”); *Adler v. Shelton*, 343 *N.J. Super.* 511, 523 (Law Div. 2001) (when state and federal rules are identical, “it is appropriate to look to federal decisions for guidance.”).

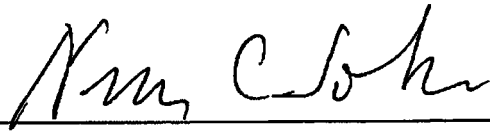
It is apparent to the Court that Plaintiff’s primary motivation is that she would prefer to explore other forums in the hopes of finding one where the science on the claimed cause of action has been resolved to claimants’ favor, and cases are moving to trial without the need for a scientific hearing akin to our Courts’ *Kemp* Hearing. This Court concludes that “buyer’s remorse” is not a legitimate reason to dismiss without prejudice. As noted by the Court in *Mehle v. Trinity Highway Prods. LLC*, 131 *F. Supp. 3d* 857 (D. Minn. 2015): “... in the Court’s view the only possible reason [to voluntarily dismiss] is a tactical one ... In light of these facts, the Court believes Plaintiff has had buyer’s remorse about filing in federal court and now hopes to gain an advantage by having her action heard in state court.” *Mehle, supra*, 131 *F. Supp. 3d* at 860.

The Court is mindful of the general policy goal of deterring forum shopping. Courts abhor forum shopping and accordingly have held that “discouraging forum shopping is a proper judicial goal.” *Glukowsky v. Equity One, Inc.*, 180 *N.J.* 49 (2004). Adhering to these principles, this Court finds that Plaintiff’s request for dismissal of her complaint to “explore other options” is ultimately a request for the Court to dismiss this claim from its proper forum and allow her to refile in a jurisdiction where she hopes to receive more favorable treatment. That is an unknown. What is known is that this Court will afford Plaintiff the opportunity to more promptly preserve her testimony than any other venue.

Plaintiff is not alleging that the Superior Court of New Jersey is an improper forum under the doctrine of *forum non conveniens*. Plaintiff is a resident of New Jersey, she used the talcum powder based product in New Jersey, and she originally filed her complaint in New Jersey.

Therefore, Plaintiff's "buyer's remorse," if any, is not an adequate justification for dismissal of her complaint.

Accordingly, Plaintiff's Motion to Dismiss is DENIED. An appropriate order has been entered. Conformed copies accompany this Memorandum of Decision. Finally, as per the Court's colloquy with counsel, the Court anticipates receipt of a consent order establishing date(s) for Ms. Zarrilli's deposition.



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NELSON C. JOHNSON, J.S.C.

Date of Decision: 2-3-17