

**FILED**

NOV 21 2014

RON C. JOHNSON, J.S.C.

DRINKER BIDDLE & REATH LLP  
A Delaware Limited Liability Partnership  
600 Campus Drive  
Florham Park, New Jersey 07932-1047  
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Attorneys for Defendants Daiichi Sankyo, Inc.,  
Daiichi Sankyo U.S. Holdings, Inc., Forest Pharmaceuticals, Inc.,  
Forest Laboratories, Inc., now known as Forest Laboratories, LLC,  
and Forest Research Institute, Inc.

CHRISTY BROOKS,

Plaintiff,

v.

DAIICHI SANKYO, INC., ET AL.,

Defendants.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: ATLANTIC COUNTY

DOCKET NO. ATL-L-2413-14

CIVIL ACTION

**ORDER DISMISSING PLAINTIFF'S  
COMPLAINT WITHOUT PREJUDICE  
FOR FAILURE TO PRODUCE  
MEDICAL RECORDS SHOWING A  
DIAGNOSIS OF SPRUE-LIKE  
ENTEROPATHY AS ALLEGED IN  
THE COMPLAINT PURSUANT TO R.  
4:23-5(a)(1)**

**THIS MATTER** having been opened to the Court by Drinker Biddle & Reath LLP, attorneys for Defendants Daiichi Sankyo, Inc., Daiichi Sankyo U.S. Holdings, Inc., Forest Research Institute, Inc., Forest Laboratories, Inc., now known as Forest Laboratories, LLC, and Forest Pharmaceuticals, Inc. (collectively, "Daiichi U.S. Defendants and Forest Defendants"), for an Order pursuant to R. 4:23-5(a)(1) dismissing Plaintiff's Complaint without prejudice for failure to produce medical records showing a diagnosis of sprue-like enteropathy as alleged in the Complaint, and the Court having considered the papers submitted and for good cause shown;

IT IS ON this 21<sup>st</sup> day of November, 2014,

**ORDERED** as follows:

1. The Motion of Daiichi U.S. Defendants and Forest Defendants to dismiss Plaintiff's Complaint without prejudice for failure to produce medical records showing a diagnosis of sprue-like enteropathy as alleged in the Complaint be and hereby is ~~granted~~ *Denied*;

2. ~~Plaintiff's Complaint is hereby dismissed without prejudice pursuant to R. 4:23-5(a)(1); and~~ *NCS*

3. A true copy of this Order be served on all counsel of record within 7 days from the date hereof.

*Nm C Johnson 11-21-14*  
\_\_\_\_\_  
Nelson C. Johnson, J.S.C.

This motion was:

Opposed  
 Unopposed



FILED

NOV 21 2014

NELSON C. JOHNSON, J.S.C.

SUPERIOR COURT OF NEW JERSEY

NELSON C. JOHNSON, J.S.C.

1201 Bacharach Boulevard  
Atlantic City, NJ 08401-4527  
(609) 594-3384

**MEMORANDUM OF DECISION ON MOTION**  
**Pursuant to Rule 1:6-2(f)**

**TO:** Daniel B. Carroll, Esq.  
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*Attorneys for Defendants, Daiichi Sankyo, Inc., Daiichi Sankyo U.S. Holdings, Inc., Forest Pharmaceuticals, Inc., Forest Laboratories, Inc. aka Forest Laboratories, LLC, and Forest Research Institute, Inc.*

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*Attorney for Plaintiff Christy Brooks*

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**RE:** Brooks v. Daiichi Sankyo, Inc., et al.                      **DOCKET NO.** ATL-L-2413-14

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**NATURE OF MOTION(S): Dismiss Complaint Without Prejudice for Failure to Provide Medical Records**

**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**

Defendants, Daiichi Sankyo, Inc., Daiichi Sankyo U.S. Holdings, Inc., Forest Pharmaceuticals, Inc., Forest Laboratories, Inc. aka Forest Laboratories, LLC, and Forest Research Institute, Inc. (“Defendants”), bring this motion to dismiss Plaintiff’s Complaint without prejudice pursuant to R. 4:23-5(a)(1) for failure to produce medical records showing a diagnosis of sprue-like enteropathy. Plaintiff, Christy Brooks (“Plaintiff”), opposes this motion.

Plaintiff filed her Complaint on June 5, 2014. On June 25, 2014, this case was consolidated for pre-trial management with several other cases all alleging injuries as a result of

treatment with the prescription medication Benicar (*olmesartan medoxomil*), which is manufactured, marketed and sold by the Defendants for the treatment of hypertension. On July 8, 2014, the Daiichi U.S. Defendants filed an Answer and separate defenses, and served on Plaintiff Form A Interrogatories, Supplemental Interrogatories, Document Requests, a Deposition notice, Preliminary Information Request, and requests for medical records and employment authorizations.

### Parties' Contentions

**Defendants:** In support of their motion, Defendants argue that to set forth a cause of action under the New Jersey Products Liability Act, N.J.S.A. 2A:58C-1, Plaintiff must prove that she actually experienced an injury which is attributable to the allegedly defective product. Defendants' Document Request No. 16 and the Preliminary Information Request ask for proof that Plaintiff took the medication and experienced an event. To date, Plaintiff has not provided any evidence that she has been diagnosed with sprue-like enteropathy. Defendants assert that they have sent letters to Plaintiff requesting discovery responses and also raised the issue during a meet and confer with Plaintiff's counsel.

**Plaintiff:** In opposition to the Defendants' motion, Plaintiff argues that there is no language in R. 4:32-5(a)(1) that requires Plaintiff to produce medical records showing a specific diagnosis by a treating physician of sprue-like enteropathy for her case to proceed. The two cases cited by the Defendants involved appeals of trial court decisions that were rendered in response to post-trial motions and do not provide any support for the argument that Plaintiff must produce medical records showing a specific diagnosis at the outset of litigation. Plaintiff also states that Defendants do not have standing to bring this motion because of their own discovery defaults. Regardless, Plaintiff has served responses to all discovery requests at issue.

Additionally, Plaintiff asserts that Defendants mischaracterize the injuries alleged in Plaintiff's Complaint. Plaintiff not only alleges that she suffered from sprue-like enteropathy, but also that while taking the recommended dosage of Benicar, Plaintiff developed personal injuries, including but not limited to intestinal and colonic disease manifestations known as sprue-like enteropathy and/or lymphocytic colitis, microscopic colitis, or collagenous colitis. The Complaint goes on to allege that Plaintiff suffered from chronic diarrhea, rapid and substantial

weight loss, malnutrition and dehydration. Rather than a specific diagnosis, these are injuries that Plaintiff will seek to prove during and throughout the discovery phase.

Plaintiff also argues that Defendants are aware that many plaintiffs will not have a diagnosis of sprue-like enteropathy because Defendants failed to warn that their drug causes that condition, so physicians did not know the patients suffering could be alleviated by simply discontinuing the medication. Since physicians were not aware that Benicar could cause these injuries, patients were oftentimes misdiagnosed.

Furthermore, Plaintiff states that Defendants are attempting to bring a premature motion for summary judgment through the improper use of R. 4:32-5(a)(1). R. 4:32-5(a)(1) is limited to situations involving a failure to respond to discovery requests. Defendants' motion would require that Plaintiff prove an injury before the conclusion of the case-specific discovery phase. A motion for summary judgment should not be brought until after the conclusion of the case-specific discovery phase. According to a recently submitted jointly proposed case management order, case-specific depositions are not scheduled to be completed in Plaintiff's case until at least after December 2, 2015. The deadlines to exchange expert reports have not even been discussed.

**Defendants:** In reply to Plaintiff's opposition, Defendants argue that the discovery conducted to date establishes that Plaintiff has had a host of medical conditions unrelated to the ingestion of Benicar. These conditions include: diverticulosis, gastric and esophageal ulcers, past smoking history, alcohol abuse, GERD, hypertension, back pain, migraines, pancreatitis, diarrhea, gastric ulcers, upper gastrointestinal bleeds, peptic ulcer disease, esophagitis and alcoholic gastritis. Defendants assert that this litigation is about sprue-like enteropathy and should not become a dumping ground for lawsuits by multiple plaintiffs who had gastrointestinal events of any kind during or after alleged treatment with olmesartan.

### **Discussion**

R. 4:23-5(a)(1) states,

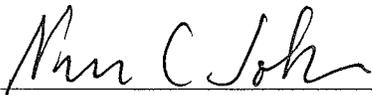
If a demand for discovery pursuant to R. 4:17, R. 4:18-1, or R. 4:19 is not complied with and no timely motion for an extension or a protective order has been made, the party entitled to discovery may, except as otherwise provided by paragraph (c) of this rule, move, on notice, for an order dismissing or suppressing the pleading of the delinquent party. The motion shall be supported by an affidavit reciting the facts of the delinquent party's default and stating that the moving

party is not in default in any discovery obligations owed to the delinquent party. Unless good cause for other relief is shown, the court shall enter an order of dismissal or suppression without prejudice.

In this instance, Defendants Document Request No. 16 requests “all documents, records, reports, and tests relating to the diagnosis and treatment of plaintiff’s hypertension, intestinal disease, colonic disease, sprue-like enteropathy, or colitis.” Defendants claim that since Plaintiff has not provided discovery indicating that she was diagnosed specifically sprue-like enteropathy, her Complaint should be dismissed without prejudice.

However, Plaintiff’s Complaint alleges a broad spectrum of injuries that are not limited to sprue-like enteropathy. Plaintiff alleges that she developed personal injuries, including but not limited to, intestinal and colonic disease manifestations known as sprue-like enteropathy and/or lymphocytic colitis, microscopic colitis, or collagenous colitis. The Complaint goes on to allege that Plaintiff suffered from chronic diarrhea, rapid and substantial weight loss, malnutrition and dehydration. Because of the broad spectrum of injuries alleged in her Complaint, the Plaintiff is not deficient in her discovery responses if she does not provide Defendants with a specific diagnosis of sprue-like enteropathy.

Accordingly, Defendants’ motion to dismiss the Complaint without prejudice is DENIED. An appropriate order has been entered. Conformed copies accompany this Memorandum of Decision.



NELSON C. JOHNSON, J.S.C.

Date of Decision: 11-21-14