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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

Plaintiff

**LEE KENWORTHY as the administrator
of the ESTATE OF SHAYLING
KENWORTHY and LEE KENWORTHY,
individually,**

vs.

Defendants

**LYNDHURST POLICE DEPARTMENT;
POLICE OFFICER PHILLIP REINA, in
his individual capacity; POLICE
OFFICER HAGGERTY, in his individual
capacity, LYNDHURST POLICE
OFFICER PHILLIP REINA, in his
individual capacity; SERGEANT
RICHARD PIZZUTI, in his individual
capacity; LYNDHURST TOWNSHIP
AMBULANCE SQUAD; TOWNSHIP OF
LYNDHURST; ROBERT MARTIN; ANN
MARTIN; RICHARD ANDERSON;
LAUREN ANDERSON; HOUSING
AUTHORITY OF BERGEN COUNTY;
ADAPT PHARMA—Distributor of
Naloxene**

CASE NO. 2:18-cv-12822- MCA-JAD

CIVIL ACTION

**MOTION RETURN DATE:
FEBRUARY 19, 2019**

**BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE
TO FILE AN AMENDED COMPLAINT**

Gregory J. Irwin, Esq.
Of Counsel

Paul E. Kiel, Esq.
On the Brief

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PRELIMINARY STATEMENT

This brief is submitted on behalf of Defendants Robert Martin and Ann Martin (collectively “the Martin Defendants”) along with Defendants Richard Anderson and Lauren Anderson (collectively “the Anderson Defendants”) in opposition to Plaintiff’s Motion for Leave to File an Amended Complaint.

Plaintiff Lee Kenworthy (“Plaintiff”) brings this action *pro se* as the husband of the late Shayling Kenworthy (“Decedent”) and administrator *ad prosequendum* of her estate.

After all the Defendant’s in this case filed motions to dismiss Plaintiff’s Complaint based on lack of jurisdiction, Plaintiff engaged in a series of dilatory tactics calculated to avoid the dismissal based on Defendants’ motions. His last attempt at delaying dismissal to request a continuance based on his representation that he would be represented by counsel. The Court responded by generously giving allowing another month for the filing of opposition.

Instead of having an attorney file opposition, Plaintiff abruptly changed course and filed a Motion for Leave to File an Amended Complaint. It is respectfully submitted that this constitutes bad faith based on his representation to the Court that he would be represented by counsel. In fact, as detailed below, Plaintiff’s conduct in litigating this action, as well as his conduct in litigating the related state court action that preceded it, represents an abuse of the judicial

system.

Based on Plaintiff conduct that exhibits a dilatory motive and bad faith, it is respectfully submitted that Plaintiff's Motion for Leave to File an Amended Complaint should be denied.

STATEMENT OF FACTS

Plaintiff brings this action as the husband of Decedent and administrator ad prosequendum of her estate. *See* ECF No. 1. The Parties and Facts Common to All Counts, ¶ 1.

I. Background: Plaintiff's Allegations

Plaintiff and Decedent rented an apartment from the Martin Defendants and the Anderson Defendants. *See* ECF No. 1, Statement of Claim, ¶ 1. Plaintiff alleges that the apartment was in disrepair when it was rented and was full of "animal fur, feces and urine" that Decedent was allergic to. *See id.*, ¶ 2. He also alleges that he and Decedent repeatedly complained about these conditions but the Martin Defendants and the Anderson Defendants refused to correct them. *See id.*, ¶ 3. Plaintiffs further alleges, among other things, that "defendants" filed false charges against Plaintiff, Decedent and their family in order to make Plaintiff and Decedent "remain silent" and pay rent in advance. *See id.*, ¶ 5.

Plaintiff alleges that on August 17, 2016, he and Decedent were in the process of moving out of the apartment when Decedent suffered an asthma attack

“due to the deteriorating conditions of the apartment.” *See* ECF No. 1, Statement of Claim, ¶ 6. Decedent was eventually pronounced dead at Meadowlands Medical Center. *See id.*, ¶ 10. Plaintiff’s principle claim against that the Martin Defendants and the Anderson Defendants alleged in his initial Complaint were that they were negligent in “failing to provide a clean apartment free of animal fur, feces and urine, decedent was caused to suffer pain, asthma attacks, on August 17, 2016, her death.” *See* ECF No. 1, First Count, ¶ 7.

Plaintiff also makes claims against the other defendants in his initial Complaint. Plaintiff alleges that Defendant Lyndhurst Police Department wrongfully failed to file charges against Defendant Robert Martin for his alleged threats of retaliation and other alleged conduct. *See* ECF No. 1, Statement of Claim, ¶ 4. Plaintiff also claims that “All Public Entities and Public Individual Defendants” wrongfully failed to assist Decedent thereby causing her pain, suffering and death. *See* ECF No. 1, Second Count.

In his original complaint, Plaintiff alleges that individual officers of the Defendant Lyndhurst Police Department deprived Plaintiff and Decedent of rights under the New Jersey Constitution and *N.J.S.A.* 10:6-2, the New Jersey Civil Rights Act. *See* ECF No. 1, Third Count, ¶¶ 1-3. He also alleges that the police officers falsified evidence and reports in addition to engaging in misconduct. *See id.*, ¶¶ 4-5. Plaintiff also claims that the police officers were negligent in

administering Naloxene to Decedent and that they were improperly trained in the use of Naloxene. *See id.*, ¶¶ 6-8.

In his original Complaint, Plaintiff also alleges that the Defendant Housing Authority of Bergen County was negligent in failing to inspect and approve “the house as a government subsidized approved home as require by law.” *See* ECF No. 1, Fourth Count, ¶ 1. He further alleges that Defendant Adapt Pharma failed to properly train officers and medical personal in administering Naloxene. *See id.*, Fifth Count, ¶ 1.

II. Procedural History

The relevant facts include, not only the procedural history of this action, but also that of Plaintiff’s state court action involving the same occurrences.

A. The Bergen County Action

On October 19, 2017 the law firm of Franzblau Dratch, P.C. initiated an action on behalf of Plaintiff in the Superior Court of New Jersey, Law Division, Bergen County captioned as *Kenworthy v. Lyndhurst Police Department, et al* under Docket No. BER-L-7141-17 (“the Bergen County action”) with the filing of a Complaint. *See* Exhibit “A”.¹ The Lyndhurst Police Department, Police Officer Phillip Reina, Police Haggerty, Sergeant Richard Pizzuti, Lyndhurst Ambulance

¹ Attached to the Certification of Gregory J. Irwin (“Irwin Cert.”) which accompanies this brief.

Squad and the Township of Lyndhurst (collectively “the Lyndhurst Defendants”), the Martin Defendants and the Anderson Defendants were named as defendants in the Bergen County action. *See* Exhibit “A.”

On February 9, 2018 Franzblau Dratch, P.C. filed a motion to be relieved as Plaintiff’s counsel in the Bergen County action. *See* Exhibit “B.” The motion was based on counsel’s assertions that Plaintiff’s demands on his firm had “become unreasonable and frankly irrelevant to the fact of the case at hand.” *See* Exhibit “C” ¶ 5. Counsel also asserted that he had been “unable to communicate with plaintiff in a reasonable manner which has caused a breakdown of the attorney client relationship.” *See* Exhibit “C”, ¶ 6. The motion to be relieved as counsel was granted by Order of the Hon. Robert C. Wilson, J.S.C. *See* Exhibit “D.” Plaintiff has assumed a *pro se* status ever since. *See* Irwin Cert., ¶ 6.

On June 1, 2018, Plaintiff’s claims against Defendants Lauren Anderson, Richard Anderson and Richard Pizzutti were dismissed without prejudice for lack of prosecution. *See* Exhibit “E.” On August 3, 2018, Judge Wilson entered an order granting the Martin Defendants’ motion dismissing Plaintiff’s Complaint against them without prejudice based on Plaintiff’s failure to answer interrogatories and respond to a Notice to Produce. *See* Exhibit “F.” On the same day, Judge Wilson entered granting the Lyndhurst Defendants’ motion dismissing Plaintiff’s Complaint against them without prejudice based on Plaintiff’s failure to

answer interrogatories. *See* Exhibit “G.”

On December 18, 2018, after Plaintiff initiated this action (*See* ECF No. 1), the Lyndhurst Defendants moved for a dismissal of Plaintiff’s Complaint with Prejudice under *N.J. Ct. R. 4:23-5(a)(2)* based on Plaintiff’s failure to restore his Complaint following its dismissal without prejudice within 60 days. *See* Exhibit “H.” Judge Wilson granted the motion. *See* Exhibit “I.”

Likewise, on January 7, 2019, the Martin Defendants moved for a dismissal of Plaintiff’s Complaint with Prejudice under *N.J. Ct. R. 4:23-5(a)(2)* based on Plaintiff’s failure to restore his Complaint following its dismissal without prejudice within 60 days. *See* Exhibit “J.” Judge Wilson granted the motion. *See* Exhibit “K.”

B. The Federal Action

Rather than restoring his Complaint in Bergen County Action by providing the discovery and complying with other routine requirements before the entry of the orders dismissing the Complaint with prejudice were entered, Plaintiff initiated this action by filing a Complaint in this Court on August 14, 2018. *See* ECF No. 1. Plaintiff’s claims asserted in this action and those asserted in the Bergen County action arise out of the same alleged occurrences. *Compare* ECF No. 1 with Exhibit “A.”

On November 11, 2018, a Motion to Dismiss in Lieu of an Answer was filed

on behalf of the Lyndhurst Defendants. *See* ECF No. 6. On November 16, 2018, a similar Motion to Dismiss was filed on behalf of the Martin Defendants. *See* ECF No. 7. On November 19, 2018 and November 20, 2018 Plaintiff filed documents for an automatic extension of time of time to file opposition to motions to dismiss on behalf of the Lyndhurst Defendants and the Martin Defendants. *See* ECF Nos. 11 and 13. Additional motions to dismiss were filed on behalf of Defendant Housing Authority of Bergen County (“the Housing Auth.”) Defendant Adapt Pharma, Inc. (“Adept”) and the Anderson Defendants on December 4, 2018, December 12, 2018 and December 11, 2012 respectively. *See* Nos. 14, 15 and 16.

On December 28, 2018, two days after his opposition to the various motions to dismiss were due, Plaintiff filed a Motion for “Emergent Meeting/in Chambers On Camera/In Court On Records/Judges Discretion upon certain matters raised & decision confidentially may take effect surrounding federal protection ordered requested/granted” along with a request for a 60 day extension. *See* ECF No.17. The motion was denied by the Letter Order of the Hon. Madeline Cox Arleo, U.S.D.J. dated January 3, 2019. *See* ECF No. 18.

On January 7, 2019 Plaintiff’s filed motions for continuance of each of the Pending motions to dismiss. *See* ECF Nos. No. 19-23, 25. Requesting a 30 to 60 day extension of time to respond to the motions to dismiss, Plaintiff represented that an attorney would be representing him within a week or so. *See* ECF Nos. No.

19-23, 25. Counsel for Adapt and the undersigned objected to Plaintiff's application. *See* ECF No. 24, 26. Nevertheless, the Judge Arleo allowed Plaintiff until February 15, 2019 to respond to the Motions to Dismiss. *See* ECF No. 27.

On January 18, 2019, Plaintiff filed a *pro se* Motion for Leave to File an Amended Complaint as a *pro se* litigant. *See* No. ECF 30.

ARGUMENT

PLAINTIFF'S MOTION TO FILE AN AMENDED COMPLAINT SHOULD BE DENIED BECAUSE PLAINTIFF HAS EXHIBITED A DILATORY MOTIVE AND BAD FAITH IN LITIGATING THIS MATTER.

Fed. R. Civ. P. 15(a) (2) provides that leave to file an amended pleading should be "freely" given "when justice so requires." As Plaintiff acknowledges, however, a court has discretion to deny leave to amend in situations where there is

undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.

Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222, 226 (1962); *United States ex rel. Customs Fraud Investigations, LLC v. Victaulic Co.*, 839 F.3d 242, 249 (3d Cir. 2016).

It is respectfully submitted that Plaintiff's Motion for Leave to File a Third Party Complaint should be denied because Plaintiff has exhibited a dilatory motive and bad faith in the course of the litigation of this action. In order to appreciate the

full extent of Plaintiff's abuse of the judicial system, one must with the examination of the proceedings in the Bergen County action.

Plaintiff's Complaint in the Bergen County action was filed on October 19, 2017 by the law firm of Franzblau Dratch, P.C. *See* Exhibit "A." Franzblau Dratch, however moved to relieved as counsel because Plaintiff's demands on the firm had become unreasonable and counsel had difficulties communicating with Plaintiff. *See* Exhibits "B" and "C." The motion to be relieved as counsel was granted (*see* Exhibit "D"). Plaintiff has assumed a *pro se* status ever since. *See* Irwin Cert., ¶ 6.

As a *pro se* litigant, Plaintiff did very little to advance his cause in the Bergen County action. *See* Irwin Cert., ¶ 6. Plaintiff claims against the Anderson Defendants and Defendant Richard Pizzutti were dismissed *without prejudice* for lack of prosecution. *See* Exhibit "E." His Complaint against the Martin Defendants and the Lyndhurst Defendants were dismissed *without prejudice* for failure to comply with discovery demands. *See* Exhibits "F" and "G."

Plaintiff could have restored his Complaint in the Bergen County action as to all of the defendants that had been dismissed. *N.J. Court Rules* 1:13-4(a) provides a procedure for restoration of a complaint that has been dismissed without prejudice for lack of prosecution. *N.J. Court Rules* 4:23-5(a)(1) permits a party whose complaint has been dismissed for failure to make discovery moving to

restore after providing the discovery in question. Instead, Plaintiff apparently abandoned the Bergen County action and initiated this action in federal court by filing a Complaint based on the same operative facts. *Compare* Exhibit “A” with ECF No. 1. There is no reason to believe that Plaintiff will comply with his discovery obligations in this action since he failed to do so in the Bergen County action.

After the Lyndhurst Defendants and the Martin Defendants filed each filed a Motions to Dismiss in Lieu of an Answer (*see* ECF Nos. 6 & 7), Plaintiff filed documents for an automatic extension of time of time to file opposition to the motions. *See* ECF Nos. 11 and 13. This extension of time made the motions returnable on January 7, 2019. Additional motions to dismiss filed thereafter on behalf of the Housing Auth., Adept and the Anderson Defendants were also made returnable on January 7, 2018. *See* ECF Nos. 14, 15 and 16.

Thereafter, Plaintiff’s dilatory tactics to avoid dismissal of his Complaint began. On December 28, 2018, *two days after* his opposition to the various motions to dismiss were due, Plaintiff filed his so-called Motion for “Emergent Meeting/in Chambers On Camera/In Court On Records/Judges Discretion upon certain matters raised & decision confidentially may take effect surrounding federal protection ordered requested/granted” along with a request for a 60 day extension. *See* ECF No.17. Judge Arleo denied the motion on January 3, 2019.

See ECF No. 18.

Plaintiff's next move was to file motions for continuance of each of the Pending motions to dismiss. See ECF Nos. No. 19-23, 25. Requesting a 30 to 60 day extension of time to respond to the motions to dismiss, Plaintiff represented that an attorney would be representing him within a week or so. See ECF Nos. No. 19-23, 25. Counsel for Adapt and the undersigned objected to Plaintiff's application. See ECF No. 24, 26. Nevertheless, the Judge Arleo generously allowed Plaintiff until February 15, 2019 to respond to the Motions to Dismiss. See ECF No. 27.

Now, with the February 15th deadline approaching, Plaintiff has completely and abruptly changed course and filed a Motion for Leave to File an Amended Complaint (see No. ECF 30) *pro se* after obtaining a substantial extension of time to file opposition to various motions to dismiss based on a representation that an attorney would be entering an appearance on his behalf shortly.

Thus, not only has Plaintiff engaged on in dilatory tactics in the face of Defendants' Motions to Dismiss, he has exhibited bad faith by misleading the Court in to granting an extension of time to oppose the motions based on the representation that he would be represented by counsel. Misleading the Court constitutes "bad faith" within the context of the exceptions to the rule that leave to amend a complaint should be freely given as articulated in *Foman v. Davis, supra*.

See United States ex rel. B & R, Inc. v. Donald Lane Constr., 19 F. Supp. 2d 217, 221 n. 6 (D. Del. 1998).

CONCLUSION

It is respectfully submitted that because Plaintiff's conduct in this action has demonstrated both a dilatory motive and bad faith, his Motion for Leave to File an Amended Complaint should be denied.

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