

Bayer Gets Freebie As Atty Neglect Sinks Yasmin Suit

By Jessica Corso

Law360, Chicago (January 13, 2017, 11:20 PM EST) -- The Seventh Circuit on Friday threw out one of the many cases alleging Bayer Corp.'s birth control pill Yasmin causes blood clots because the attorneys running the case admittedly did "mostly nothing" for a year and a half.

A three-judge panel found that attorneys with the Chattanooga, Tennessee, law firm of Berke Berke & Berke couldn't explain away their failure to respond to a discovery request for their client Jennifer Dzik's medical records for 15 months or to a subsequent case management order, nor could they prove they had contacted Bayer Corp. about the case's dismissal before the window for opposing the dismissal closed.

"Considering that Dzik's lawyers — in their own words — did 'mostly nothing' after filing this lawsuit, the district court did not abuse its discretion by dismissing the case with prejudice," the court wrote.

Dzik's case was among thousands centralized in multidistrict litigation in Illinois that alleged the birth control treatment Yasmin causes blood clots. Dzik says she developed venous thromboembolism, or a blood clot in a deep vein, after taking the drug.

Evidence uncovered early in the case, however, showed that Dzik stopped filling her prescription for Yasmin 10 months before she developed the condition, according to Friday's opinion.

She says that her doctor was still providing her with samples, however, and Bayer asked attorneys with Berke to provide it with medical records backing Dzik's claims.

That was in May 2014, and while waiting for a response to the request Bayer settled many of the suits. The judge overseeing the MDL put the remaining cases on two tracks in August 2015, telling plaintiffs to either negotiate a possible settlement with Bayer or provide medical records and expert testimony to move their cases forward.

When Dzik's attorneys failed to reply to the case management order, however, Bayer moved to dismiss her case. After a 14-day deadline passed without a response to the motion, U.S. District Judge David R. Herndon signed off on dismissal in January 2016.

Marvin Berke, the lead attorney on the case, says he was on vacation with his wife when he received the dismissal notice. He called the situation "excusable neglect" and asked that the dismissal order be withdrawn.

The Seventh Circuit said that no reason was provided as to why another attorney at the firm wasn't monitoring the case or why the firm didn't say anything to Bayer's attorneys for over a year.

The court said that the case likely "slipped through the cracks, with no attorney (or paralegal or secretary) monitoring it, leaving Berke and [attorney Charles] Flynn scrambling to salvage what their motion for reconsideration concedes was 'neglect' by the firm."

In a statement sent to Law360 on Friday, a Bayer spokesman said the company was pleased with the decision.

"We are pleased that the Seventh Circuit Court of Appeals today ruled in favor of the district court's important efforts in this MDL to dispose of cases that plaintiffs' counsel were unwilling to pursue and that lacked evidence to support the claims," the statement said.

An attorney for Dzik didn't immediately respond to a request for comment late Friday afternoon.

U.S. Circuit Judges William Bauer, Joel Flaum and Michael Kanne sat on the panel for the Seventh Circuit.

Dzik is represented by Marvin Berke and Charles Flynn of Berke Berke & Berke.

Bayer is represented by Kaspar Stoffelmayr of Bartlit Beck Herman Palenchar & Scott LLP.

The case is Dzik v. Bayer Corp. et al., case number 16-1333, in the U.S. Court of Appeals for the Seventh Circuit.

--Editing by Mark Lebetkin.