

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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DOMINIQUE SHARPTON,

Plaintiff,

-against-

**AFFIRMATION IN
SUPPORT**

Index No.: 154284/2015

File No.: 2015-024570

THE CITY OF NEW YORK, THE CITY OF NEW YORK
S/H/A THE NEW YORK CITY DEPARTMENT OF
TRANSPORTATION, THE CITY OF NEW YORK S/H/A
THE NEW YORK CITY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Defendants.
----- X

MICHELLE FOX, an attorney admitted to practice in New York and an Assistant Corporation Counsel of the City of New York, affirms the truth of the following under penalty of perjury pursuant to C.P.L.R. § 2106, upon information and belief based upon the files and records maintained in the office of the Corporation Counsel.

1. This Affirmation is submitted in support of the motion of Defendants, THE CITY OF NEW YORK, THE DEPARTMENT OF TRANSPORTATION, AND THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION (hereinafter “City”), which seeks an Order pursuant to C.P.L.R. § 3216, striking Plaintiff’s complaint for failing to appear at numerous depositions.

I. FACTS AND PROCEDURAL HISTORY

2. This is an action to recover damages for personal injuries allegedly sustained by DOMINIQUE SHARPTON (hereinafter “Plaintiff”) on October 2, 2014 when she allegedly tripped and fell in a pothole located within the eastern crosswalk on Broome Street and Broadway

in the county, city, and state of New York. A copy of the Notice of Claim is annexed hereto as Exhibit A.

3. Plaintiff commenced this action by filing a Summons and Complaint on or about April 29, 2015, a copy of which is annexed hereto as Exhibit B. The City joined issue by service of its Answer on or about May 19, 2015, a copy of which is annexed hereto as Exhibit C. Plaintiff served a Verified Bill of Particulars on or about June 17, 2015, a copy of which is annexed hereto as Exhibit D.

4. On July 27, 2015, Plaintiff and the City entered into a Case Scheduling Order (hereinafter "CSO"), a copy of which is annexed hereto as Exhibit E. Pursuant to the CSO, depositions of all parties were scheduled to be held on November 4, 2015. Id. At Plaintiff's request, her deposition was adjourned. See Correspondence Dated November 2, 2015, annexed hereto as Exhibit F. The City was ready, willing, and able to proceed with Plaintiff's deposition on November 4, 2015. Id.

5. On December 2, 2015 the parties appeared for a compliance conference and entered into a stipulation wherein Plaintiff's deposition was rescheduled for January 20, 2016. A copy of the stipulation is annexed hereto as Exhibit G. For the second time, Plaintiff adjourned her deposition. See Correspondence Dated January 26, 2016, annexed hereto as Exhibit H. The City was ready, willing, and able to proceed with Plaintiff's deposition on January 20, 2016. The undersigned advised Plaintiff's counsel to have a record of his client's availability prior to the next compliance conference to avoid further delay in the litigation of this matter. Id.

6. The parties appeared for a second compliance conference on February 17, 2016. Plaintiff's deposition was rescheduled to May 10, 2016. A copy of the stipulation is annexed hereto as Exhibit I. On May 9, 2016, counsel for Plaintiff advised the City that, due to a calendaring error, Plaintiff's deposition had to be rescheduled to May 16, 2016. See

Correspondence Dated May 9, 2016, annexed hereto as Exhibit J. The City agreed to reschedule Plaintiff's deposition for the third time, and hold it on May 16, 2016. Id.

7. Notwithstanding the City's efforts to move forward with litigation, including accommodating Plaintiff's third request for an adjournment, Plaintiff again adjourned her May 16, 2016 deposition. See Correspondence Dated May 13, 2016, annexed hereto as Exhibit K. Plaintiff attempted to reschedule her deposition with the City's deposition clerk. However, because the City has accommodated Plaintiff's requests for adjournments on three prior occasions to no avail, the City seeks judicial intervention at this juncture.

II. ARGUMENT

PLAINTIFF HAS REPEATEDLY FAILED TO COMPLY WITH THE CSO AND COMPLIANCE CONFERENCE ORDERS, AND HAS WILLINGLY OBSTRUCTED DISCOVERY DESPITE THE CITY'S GOOD FAITH EFFORTS TO PROCEED WITH LITIGATION.

8. Despite the City's multiple attempts to resolve the discovery issues outlined herein, Plaintiff has failed to comply with the CSO and with the compliance conference orders dated December 2, 2015 and February 17, 2016. As Plaintiff has failed to appear for a deposition, thereby delaying discovery for over a year since this Court issued the CSO, the City respectfully requests that this Court strike Plaintiff's complaint.

9. The First and Second Departments have held that a party's pleadings may be stricken where nondisclosure is willful, contumacious, or amounts to bad faith. See Harris v. City of New York, 211 A.D.2d 663 (2d Dep't 1995); Lestingi v. City of New York, 209 A.D.2d 384 (2d Dep't 1994); Jeffcoat v. Andrade, 205 A.D.2d 374 (1st Dep't 1994); Read v. Dickson, 150 A.D.2d 543 (2d Dep't 1989); Dauria v. Terry, 127 A.D.2d 459 (1st Dep't 1987); Bassett v. Bando Sangsa Company, Ltd., 103 A.D.2d 728 (1st Dep't 1984). A party's willful, contumacious, or bad faith conduct may be manifest or inferred by a culmination of that party's conduct. Argenio v. Cushman

& Wakefield, Inc., 642 N.Y.S.2d 968 (2d Dep't 1996); Herzog v. Progressive Equity Funding Corp., 606 N.Y.S.2d 101 (3rd Dept. 1993). Repeated failure to comply with discovery orders constitutes willful and contumacious behavior. See Xina v. City of New York, 785 N.Y.S.2d 709, 709 (2d Dep't 2004).

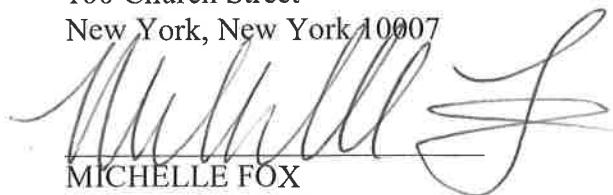
10. In the present matter, Plaintiff has failed to comply with the CSO, which directed Plaintiff to appear for a deposition in November of 2015. See Exhibit E. Plaintiff thereafter failed to comply with the compliance conference orders dated December 2, 2015 and February 17, 2016, both of which directed Plaintiff to appear for a deposition. As of the date of this motion, Plaintiff still has not appeared for a deposition, thereby delaying all other discovery in this matter, including the City's deposition and independent medical examinations.

11. For the foregoing reasons, the City respectfully requests that this Court grant the City's motion to strike Plaintiff's complaint.

WHEREFORE, the City respectfully requests that this Court issue an Order granting the City's motion and striking Plaintiff's Complaint in its entirety, and that this Court grant such further relief that it may deem just and proper.

Dated: New York, New York
June 8, 2016

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Assistant Corporation Counsel

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Defendants.

**NOTICE OF MOTION, AFFIRMATION OF GOOD FAITH,
AFFIRMATION IN SUPPORT, AND EXHIBITS**

ZACHARY W. CARTER
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Attorney for Defendant, The City of New York

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Assistant Corporation Counsel

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