

**Swadi-Chuto v City of New York**

2013 NY Slip Op 33524(U)

November 20, 2013

Supreme Court, New York County

Docket Number: 114981/2009

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT  
*Justice*

PART 5

Index Number : 114981/2009  
SWADI-CHUTO, ASWIN  
vs.  
CITY OF NEW YORK  
SEQUENCE NUMBER : 001  
STRIKE ANSWER CAL: #71

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

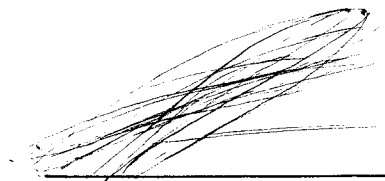
Upon the foregoing papers, it is ordered that this motion is

**FILED**  
NOV 26 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 11-20-13  
NOV 20 2013

  
\_\_\_\_\_, J.S.C.  
HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 5

-----X  
ASWIN SWADI-CHUTO,

Plaintiff,

-against-

DECISION/ORDER  
Index No. 114981/2009  
Seq. No. 001

THE CITY OF NEW YORK, NEW YORK CITY  
FIRE DEPARTMENT, THE NEW YORK CITY  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION and VILLAGE VIEW  
HOUSING CORPORATION OF SANITATION,

Defendants.

**FILED**

NOV 26 2013

X  
NEW YORK  
COUNTY CLERKS OFFICE

-----X  
KATHRYN E. FREED, J.S.C:

RECITATION, AS REQUIRED BY CPLR2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ATTACHED.....	.....1-2.....
ORDER TO SHOW CAUSE.....	.....
ANSWERING AFFIDAVITS.....	.....10-15.....
REPLYING AFFIDAVITS.....	.....
EXHIBITS.....	.....3-9.....
OTHER.....	.....

UPON THE FORGOING CITED PAPERS, THIS DECISION/ORDER OF THE MOTION IS AS FOLLOWS:

Plaintiff moves for an Order pursuant to CPLR §3126 striking the Answers of The City of New York, New York City Fire Department, and the New York City Department of Environmental Protection (“the City”), for the continued failure to comply with the Compliance Conference Orders dated July 10, 2012 and October 23, 2012. The City opposes.

After a review of the papers presented, all relevant statutes and case law, the Court **denies** the motion.

Factual and procedural background:

Plaintiff seeks monetary damages for personal injuries allegedly sustained on December 19, 2009, when he slipped and fell “on a patch of ice located on the curb and/or sidewalk adjacent to the pedestrian crosswalk at the southeast corner of East 3<sup>rd</sup> Street and First Avenue, New York, New York.” ( See Notice of Claim annexed to Aff. in Opp., as Exh. A, ¶ 3). As a result, plaintiff sustained a traumatic hip fracture requiring hip replacement surgery which she alleges was due to a known leaky fire hydrant which created an unsafe icy condition on the City sidewalk and street.

Positions of the parties:

Plaintiff argues that pursuant to a preliminary conference order of Justice Barbara Jaffe dated October 23, 2012, defendants were directed to comply with plaintiff’s Post EBT Notice for Discovery and Inspection dated May 24, 2011, namely, “all work tickets” with hand written notes from Manhattan Repairs Shop identified by Mr. Crimarce concerning the fire hydrants identified as 125-9631, 125-0626, from June 1, 2008 through June 1, 2009.” Plaintiff’s counsel asserts that he made a good faith effort to attempt to resolve the issues concerning this motion in that on May 14, 2012, July 20, 2012 and August 30, 2012, he sent written requests to defendants’ counsel in an attempt to obtain the outstanding discovery. However, defendants failed to respond to these communications.

Plaintiff’s counsel also asserts that on January 15, 2013, he sent yet another request to defendants’ counsel which included a courtesy copy of Justice Jaffe’s October 23, 2012 Order. A compliance conference was subsequently held on March 5, 2013. Defendants provided a response to plaintiff’s requests for discovery, however, the response still failed to produce the subject work tickets.

Defendants argue that plaintiff misrepresents the Order dated October 23, 2012, which actually required the “City to respond to [Plaintiff’s Post EBT Discovery and Inspection] dated 5/24/11...”

This Court has reviewed the various Orders annexed to the papers presented. The Order dated July 10, 2012 states in pertinent part that “ 1) City to respond to plaintiff’s Notice To Take depositions dated 05/14/12 within 30 days. 2) Plaintiff’s EBT to be held on 9/21/12 ( second deposition of plaintiff being scheduled due to added party). EBT to be held at 52 Duane Street unless City waives. Location to be determined if City waives. 3) Plaintiff to provide courtesy copy of Post-EBT D&I dated 05/24/11 within 30 days. 4) If City agrees to additional EBT of FDNY as requested in plaintiff’s Notice To Take Deposition dated 05/14/12, EBT to be scheduled at next compliance conferece. 5) EBT of defendant Village View Housing to be held on 10/21/12. EBT to be held at 52 Duane Street unless City waives. 6) Plaintiff to respond to defendant Village View Housing’s D&I dated 9/8/11 within 30 days to the extend not already provided. As these items were previously marked final, failure to comply will result in sanctions. 7) Defendant Village reserves right to conduct plaintiff’s IME.” This Order bears the signatures of Counsel all named parties.

The next Order dated October 23, 2012 states that “1) plaintiff acknowledges receipt of City’s response to plaintiff’s 05/14 12 D&I. 2) City to produce additional witness from Engine Company #28 of FDNY to testify to Fire Hydrant. Inspection Cards exchanged in City’s response to plaintiff’s 08/27/10 D&I, to the extent any such individual is still employed by FDNY. EBT to be held on 01/09/13 subject to witness’ RDO at 52 Duane Street. 3) City to respond to plaintiff’s Post-EBT D&I dated 05/24/11 within 45 days.....” Said Order bears the signatures of both plaintiff’s and defendants’ respective counsel.

The next Order dated March 5, 2013 states that “plaintiff acknowledges receipt of City’s response to plaintiff’s Post-EBT Further Notice for D&I dated 5/24/10 by hand.”

It should be noted that in the “RESPONSE TO PLAINTIFF’S POST-EBT FURTHER NOTICE FOR DISCOVERY AND INSPECTION DATED 05/24/11, under the heading “SPECIFIC OBJECTIONS AND RESPONSES,” the City states that it “objects to all “Work Order tickets” with hand written notes from the Manhattan Repair Shop Identified by Mr. Crimarco concerning the fire hydrants identified as I25-0631, I25-0626, from June 1, 2008 through June 1, 2009.” The City objects, *inter alia*, that it objects because this demand “is outside the scope of the Case Scheduling Order and that it purports to impose obligations on the City other than those imposed or authorized by the CPLR.” ( see Aff. in Opp., Exh. C, pp. 2-3 ).

The City argues that plaintiff repeatedly misleads this Court by claiming that it has failed to comply with the aforesaid Orders. It argues that it has responded plaintiff’s Post-EBT Further Notice for Discovery and Inspection dated May 14, 2011, to plaintiff’s Notice to Take Depositions dated May 14, 2012, and has also produced an additional witness from Engine Company #28 from the FDNY on January 9, 2012 as directed by the Order dated October 23, 2012. The City also argues that in consideration of this, its actions cannot be considered willful or contumacious. Therefore, the instant motion has only succeeded in wasting the Court’s time.

Conclusions of law:

“[I]t is well settled that the drastic remedy of striking a party’s pleading pursuant to CPLR 3126 for failure to comply with a discovery order is appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith” ( *McGilvery v. New York City Tr. Auth.*, 213 A.D.2d 322, 324 [1<sup>st</sup> Dept. 1995]; see also *Ventura v.*

*Ozone Park Holding Corp.*, 84 A.D.3d 516 [1<sup>st</sup> Dept. 2011]; *Pezhman v. Department of Education of the City of New York*, 79 A.D.3d 543 [1<sup>st</sup> Dept. 2010] ). Willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses ( see *Johnson v. City of New York*, 188 A.D.2d 302 [1<sup>st</sup> Dept. 1992]; *Nunez v. City of New York*, 37 A.D.3d 434 [2d Dept. 2007]; *Touray v. Munoz*, 96 A.D.3d 623 [1<sup>st</sup> Dept. 2012]; *Silverio v. Arvelo*, 103 A.D.3d 401 [1<sup>st</sup> Dept. 2013] ).

In the case at bar, contrary to plaintiff’s allegations, a review of the subject orders do not reveal that the City was directed by the court to provide all work tickets with hand written notes from Manhattan Repairs Shop identified by Mr. Crimarce concerning the fire hydrants identified as 125-9631, 125-0626, from June 1, 2008 through June 1, 2009. Indeed, there is no indication that the City acted in any willful or contumacious manner, thereby establishing this motion as unnecessary.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that plaintiff’s motion to strike the City’s Answer is denied; and it is further

ORDERED that the parties are directed to appear at a compliance conference on December 10, 2013 at 2:00 pm, 80 Centre Street, Room 103; and it is further

ORDERED that this constitutes the decision and order of the Court.

**FILED**

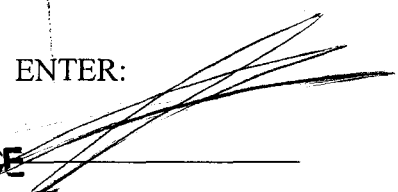
DATED: November 20, 2013

NOV 26 2013

ENTER:

**NEW YORK  
COUNTY CLERK'S OFFICE**

NOV 29 2013

  
Hon. Kathryn E. Freed  
J.S.C.  
**HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT**