No. 18-7093

IN THE

SUPREME COURT OF THE UNITED STATES

Deidre Holmes Clark — PETITIONER
(Your Name)

vs.

Allen & Overy LLP — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

New York Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Deidre Holmes Clark
(Your Name)

2503 Noyac Road
(Address)

Sag Harbor, NY 11963
(City, State, Zip Code)

631-899-4292
(Phone Number)

QUESTIONS PRESENTED

Whether a sexual harassment motion can be dismissed, solely on the basis of her right to free speech.

Whether a requirement that a sexual harassment victim see a psychiatrist to determine her "emotional stability" means that the State has control what she says in such meeting.

Whether due process and the First Amendment are violated when such Plaintiff speaks freely during such forced psychiatric evaluation.

Whether a sexual harassment victim can be forced to be emotionally evaluated by a psychiatrist.

LIST OF PARIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page.
A list of all parties to the proceeding in the cour whose judgment is the subject of this petition is as follows:

Allen & Overy, LLP, Defendant

Deidre Holmes Clark, Plaintiff

TABLE OF CONTENTS

INDEX TO APPENDICES

[1] Whilst the Court of Appeals Decision references "non -finality" the New York Supreme Court has deemed the litigation closed and disposed of (See Appendix D), as a search of the New York Supreme Court's website will confirm.

TABLE OF AUTHORIES CITED

Cases

Statutes and Rules

Other

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be issued to the review the judgement below

OPINIONS BELOW

[] For cases from **federal courts**

The opinion of the United States court of appeals appears at Appendix ___ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or
[] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[] reported at _____; or
[] has been designated for publication but is not yet reported; or
[] is unpublished.

[X] for cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[X] reported at NY Court of Appeals website, September 6, 2018 2018-405;or,
[] has been designated for publication but is not yet reported;
[] is unpublished

The opinion of the Supreme Court of the State of New York Appellate Division, First Department appears at Appendix B to the petition and is

[X] reported at 2018 NY App. Div. Lexis 1488; or
[] has been designated for publication but is not yet reported; ot
[] is unpublished

The opinion of the Supreme Court of the State of New York appears at Exhibit C to the petition and is

[] reported at _____;or,
[] has been designated for publication but is not yet reported;

[X] unpublished

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts**:

The date on which the highest state court decided my case was September 6, 2018. A copy of that decision appears at Appendix A.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUIONAL AND STATUTORY PROVISIONS INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or **of the** press; or the right **of the** people peaceably to assemble, and to petition the government for a redress of grievances" U.S Const. amendment I

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amendment 14

"No person .... Shall be deprived of life, liberty or property, without due process of law" U.S. Const. amend V

"If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party." New York CPLR Section 3126

"Physical or mental examination. (a) Notice of examination.
After commencement of an action in which the mental or physical condition or the blood relationship of a party, or of an agent, employee or person in the custody or under the legal control of a party, is in controversy, any party may serve notice on another party to submit to a physical, mental or blood examination by a designated physician, or to produce for such examination his agent, employee or the person in his custody or under his legal control. The notice may require duly executed and acknowledged written authorizations permitting all parties to obtain, and make copies of, the records of specified hospitals relating

to such mental or physical condition or blood relationship; where a party obtains a copy of a hospital record as a result of the authorization of another party, he shall deliver a duplicate of the copy to such party. A copy of the notice shall be served on the person to be examined. It shall specify the time, which shall be not less than twenty days after service of the notice, and the conditions and scope of the examination." New York CPLR Section 3121(a)

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." New York Const, Amendment 1

STATEMENT OF THE CASE

A. Defendant's Sexual Harassment of Plaintiff

In 2008, Plaintiff complained of being sexually harassed by her direct supervisor (Tony Humphrey) per a grievance filed with the Defendant's Human Resources Department. Among the sexual harassment actions Plaintiff was subjected to were being given sexually explicit materials, receiving no work assignments and having insulting personal remarks made to her at her annual performance review.

Defendant's Retaliatory Dismissal of Plaintiff

Plaintiff was 43 when she was dismissed by Defendant, thus ending her long and distinguished career in banking law. Plaintiff has no litigation experience.

Plaintiff was terminated for "gross misconduct" after filing the sexual harassment grievance against Tony Humphrey. This "gross misconduct" consisted of writing an entirely fictional novel based in Russia in 2008 concerning the employees of an American oil company.

The person who had Plaintiff fired for writing the novel was Plaintiff's harasser. The complaint about Plaintiff's novel came from Mr. Humphrey after she had filed her sexual harassment grievance against him, continuing his pattern of abuse towards Plaintiff. In that complaint, Mr. Humphrey asserted to Human Resources that Plaintiff should be "summarily dismissed," and Plaintiff was so dismissed. She commenced this action in New York County on June 9, 2011 and Defendant answered her complaint on May 24, 2012. Between the filing of Plaintiff's Complaint and Defendant's Answer, Defendant made a Motion to Dismiss, which was rejected by Judge Marcy Friedman.

B. Procedural History

(i) *The Sealing Orders*

At Defendant's request, Sealing Orders were placed on Plaintiff's action by Judge York on October 16 and 17, 2013 (hereinafter, the "Sealing Orders"). According to the order of the Supreme Court, dated August 18, 2016 and entered on August 22, 2016 that dismissed Plaintiff's sexual harassment and retaliatory dismissal case against Defendant, Allen & Overy, LLP (hereinafter "A&O" or "Defendant") (hereinafter, the "Order") not only "failed" to comply with the Conference Directive dated September 29, 2015 (hereinafter, the "Conference Directive") but also sanctioned her for over $110,000 for an imaginary and alleged failure to comply with the Sealing Orders. (Motion. Seq. No. 7) and refused to lift the Sealing Orders on Plaintiff's lower court action in violation of Plaintiff's right to a transparent legal process and in violation of her due process and free speech rights.

Also, according to the Order (Plaintiff had provided "deposition testimony and attorney-client privileged information to various media outlets and non-parties." However, that is not a correct statement.

In his Sealing Orders, Judge York said Plaintiff's actions "embarrassed" the Defendant and made absolutely no mention of any violation of attorney/client privilege. The Order's

recitation of the factual history of the Sealing Orders written with a clear bias against Plaintiff and thus were an abuse of judicial discretion which the First Department should never have permitted and should have been overturned by the New York Court of Appeals.

(ii) *The Forced Examination Pursuant to N.Y. CPLR 3121(a)*

Subsequently and protected by the secrecy of the proceedings they had obtained by the Sealing Orders, at Defendant's request for a forced mental examination order, such order was obtained on July 23, 2014. (hereinafter, the "FME Order") Such FME Order was obtained by the use by Defendant of Plaintiff's personal email love letters shown to Judge York and cited by him as the reason for granting the FME Order. Plaintiff appealed the FME Order to the Supreme Court, Appellate Division, First Department on November 10, 2014 (hereinafter "Plaintiff's FME Appeal") and requested a stay of Judge York's FME Order.

Judge Gische of the First Department granted a stay of the FME Order and vociferously refused to seal Plaintiff's FME Appeal in the Appellate Division, First Department as Defendant demanded the Judge to do. Defendant was forced to admit this to Judge Freed during the oral argument held on January 12, 2016. *"Ms. McKenna: What we asked Judge Gische is the clerk's office had indicated that when there is a seal below sometimes the seal is adopted by the First Department. Judge Gische said no, that if we wanted to move for a seal we should move for a sealing order. We did not."*

Therefore, **all documents filed at the First Department were publicly available documents.**

By order dated July 25, 2014 and entered July 28, 2014, Judge York extended the time to conduct the examination due to the First Department's stay. The First Department denied Plaintiff's FME Appeal on February 17, 2015. Plaintiff then appealed to the Court of Appeals on the basis that the First Department never addressed the love letters upon which the FME Order was made (amongst other things) but had, instead, made its own, new findings of fact. The Court of Appeals refused to overturn the First Department's decision solely on the basis of non-finality on May 7, 2015. Plaintiff then appealed to the United States Supreme Court which granted Plaintiff's writ on October 5, 2015 but ultimately denied her Certiorari on November 30, 2015.

C. Motion Sequence No. 7

The Order appealed from in this Appeal began with Motion Sequence No. 7 that Plaintiff filed as a Motion to Renew in order to have the Sealing Orders lifted. Among the reasons Plaintiff wanted the Sealing Orders lifted were that Plaintiff's Appeal of the FME Order at the United States Supreme Court was moving ahead and Plaintiff was in desperate need of *amicus curie* briefs in order to have any hope of being granted certiorari according to the United States Supreme Court Procedures posted on its website.

Plaintiff's Petition for a Writ of Certiorari to the US Supreme Court stood a much greater chance of being granted if Plaintiff could have provided legal *amicus* briefs. Plaintiff was seeking the help of various women's rights groups and privacy groups.

Defendant cross-moved for contempt and sanctions on September 25, 2015 for Plaintiff's purported failure to comply with the Sealing Orders. Defendant then amended such cross-motion on December 1, 2015 (hereinafter together "Defendant's Cross-Motion").

Defendant's Memorandum of Law in Support of Defendant's Cross-Motion for Contempt and Sanctions dated September 25, 2015 and Defendant's Supplemental Memorandum of Law in Support of Defendant's Cross-Motion for Contempt and Sanctions (hereinafter together "Cross-Motion Memorandum") did not address the question of the Sealing Orders at all, but only sought to sanction Plaintiff for her alleged non-compliance with the Conference Directive and Sealing Orders.

Every action complained of in Defendant's Cross-Motion Memorandum and the affirmations related thereto that Plaintiff took were, firstly, entirely irrelevant to the question presented regarding removing the Sealing Orders and, secondly, entirely permissible within the law, particularly everything posted on her social media **was publicly available and in the public sphere**. Plaintiff has every right, as an American citizen, to avail herself of all laws, rights and protections granted to her.

When Plaintiff had her action dismissed by the lower court and was sanctioned in the Order for pursuing her rights in an entirely legal manner and those sanctions were upheld at the First Department, those rights ceased to exist entirely. That alone makes the Order and the First Department Decision and the Court of Appeals Order an egregious abuse of judicial power with far-reaching and terrifying consequences.

As to the psychiatric evaluation on November 11, 2015: Plaintiff was fully prepared, after exhausting her appeal rights in the courts, to be evaluated and audiotaped and did "attend the examination" per the Conference Directive but Defendant's psychiatrist refused to conduct the exam after Plaintiff exercised her well-established right to free speech under both the United States and New York Constitutions.

Motion Sequence No. 8

Motion Sequence No. 8 was a Motion to Reargue the Additional Directives contained in the Conference Directive insofar as the Additional Directives permitted summary judgement motions to be made within 60 days of the filing of a Note of Issue.

The Additional Directives were passed out at the end of the long conference held on September 29, 2015 with Judge Freed's law secretary without any mention that it was being entered that day and without any discussion or oral argument. In fact, the Supreme Court overlooked a prior order made by Judge York that had been entered setting forth the time for summary judgement motions, which time had long expired.

The lower court should not have overruled a prior specific order with what it referred to as a "Form Order." Therefore, the Additional Directives referred to as the "Form Order" should have been vacated insofar as it permitted summary judgement motions.

Judge York had struck down a prior Note of Issue issued on March 4, 2014 and then ruled, however, that summary judgement motions had to be made within 60 days of his July 28, 2014 order (hereinafter, the "July 28th Order").

Plaintiff had already submitted her expert disclosure and Defendant complied with the July 28th Order in serving expert disclosure, showing its complete comprehension of the contents and orders set forth therein.

When Plaintiff appealed the FME Order to the First Department, Judge Gische tolled the time for summary judgement motions and stayed the FME Order on August 21, 2014.

Thereafter, the First Department granted Plaintiff a preliminary injunction on October 2, 2014 (hereinafter, the "Stay"). That Stay **did not** toll the time for summary judgement motions as Defendant had requested of the First Department.[2]

As the day that Judge Gische tolled the time for summary judgement was August 21st, there were still 38 days left for summary judgement motions under the July 28th Order.

38 days later was November 10, 2014 and no summary judgement motions had been brought.

After the denial of Plaintiff's appeal by the First Department, even if the toll had been extended, summary judgement motions were due by March 25, 2014.

No such summary judgement motions were brought.

D. Motion Sequence No. 10

Defendant's Motion Sequence No. 10 was a Motion to Strike the Note of Issue and For Sanctions, dated December 1, 2015 because Doctor Kleinman refused to perform the mental examination.

As Dr. Kleinman was the party who **refused** to perform the examination, discovery was, however, clearly complete.

E. <u>The Morning of November 11, 2015</u>

After Plaintiff had pursued and concluded her legal rights to appeal the forced mental examination, Plaintiff presented herself to be examined by Defendant's psychiatrist on November 11, 2015 as ordered by the New York Supreme Court for an audiotaped 8-hour evaluation.

Contrary the New York Supreme Court's statement in the Order that Plaintiff "refused to undergo the audio taped examination" of said examination Plaintiff was prepared to do so and told the doctor that but Defendant's psychiatrist would not perform the examination.

Conspicuously, in the Affidavit prepared by Dr. Kleinman for Defendant's Motion, he himself says "I would not force her to participate in the examination." In other words, the

[2] Due to the fact that any mental examination would have no relevance to a summary judgement motion but would clearly only raise triable issues of fact.

courts of New York were willing to force me to undergo an invasive mental rape, but the doctor was not.

Had Dr. Kleinman conducted the examination without Plaintiff's consent Plaintiff would have had recourse to the criminal justice system according to her research of medical ethics and New York's criminal laws.

Dr. Kleinman, Defendant, the Order and the First Department Decision call this a "threat" when it was simply a statement of fact made by Plaintiff and clearly protected speech under the US and NY Constitutions.

Plaintiff is an American citizen with the rights attendant thereto and was well within her rights to pursue criminal charges had the issue arose and to say that she would. The State cannot restrict what a person says during a forced mental examination under NY CPLR 3121.

All Plaintiff did was tell Dr. Kleinman that she knew her rights under the laws regarding consent (including the criminal laws).

The conversation between Plaintiff and Dr. Kleinman was in no way hostile as Plaintiff was simply informing the doctor that she would pursue all legal remedies available to her. The Order and Affirmation hold that she was forbidden to pursue those remedies or speak of them.

F. The Order

The Supreme court dismissed Plaintiff's action (Mot. Seq. No. 7) in its entirety for her "refusing" to attend the forced mental examination and be audiotaped when Plaintiff did no such thing and sanctioned her for over $110,000 for violating the Sealing Orders, even though no sealing orders existed at the First Department regarding the matters the Supreme Court complained of in its Order. As to Motion Sequences 7, 8 and 10, the New York Supreme Court deemed them moot due to such dismissal, though they are not as the dismissal was entirely unjustified.

Plaintiff then appealed the dismissal of her action and the onerous sanctions placed on her. Such appeal to the Appellate Division, First Department failed, and it affirmed the order of the lower court Order, as did the New York Court of Appeals.

REASONS FOR GRANTING THE PETITION

The Order and First Department Decision holding for the dismissal of Plaintiff's causes of action and the inordinate amount of monetary sanctions placed on her are completely unprecedented, unwarranted and in violation of our most cherished bedrock legal principals.

The New York Supreme Court erred by failing to properly apply these fundamental principles and clearly abused its discretion under N.Y. CPLR Section 3126 and the Court of Appeals erred when it affirmed the First Department Decision, in violation of Plaintiff's right to a transparent legal process and in an astounding violation of her due process and free speech rights.

Here, in a sexual harassment action, the Supreme Court of NY erred by failing to properly apply fundamental legal principals, particularly as related to due process, the importance that actions be tried on their merits and that sanctions should fit the crime under N.Y. CPLR 3126 (see New York Law Practice, 4th Edition by David Siegel at page 609: "to make the punishment fit the crime is what CPLR 3126 is after."

Accordingly, the First Department Decision should be reversed in its entirety and Motion Sequences 7, 8 and 10 remanded for decisions by the Supreme Court, particularly as Plaintiff has committed absolutely no "crime" for the purposes of N.Y. CPLR 3126 at all.

Even if the courts had the authority to order a person to consent, which they do not, Plaintiff was not ordered to "consent" by the Conference Directive. While this may appear to be semantics, it is not. It goes to the very heart of this Appeal. As an obvious example, millions of people are incarcerated, but they surely do not "consent" to such denial of their liberty nor can they be forced to do so.

Without such consent, the psychiatrist hired by Defendant **absolutely refused** to proceed with the examination although Plaintiff explained to him that she was there by court order, and as she assumed the doctor would conduct the examination and audiotape it despite the fact that Plaintiff was there not of her free will, but by order of the Supreme Court's Conference Directive.

1. **Motion Sequence No. 7: The Appellate Division and the Lower Court erred in not lifting the Sealing Orders and in Sanctioning Plaintiff for "Frivolous" Actions Supposedly Violating Such Orders in the Amount of over $110,000.**

The Order cites the following actions by Plaintiff as cause for grossly large financial sanctions: starting a petition on Change.Org in support of her United States Supreme Court Action, disseminating such petition in order to obtain signatures thereto, criticizing officers of the court for improperly sealing documents that were not sealed (as admitted by Defendant's Counsel to Judge Freed during oral argument), posting on her Facebook page that she could bring certain matters to the Federal Courts, sending a letter to human rights groups and the United States Supreme Court citing the violations of her due process and rights to transparency in her litigation, posting on her LinkedIn Page a video interview she had given over **five** years

before the Sealing Orders were issued and that had been in the public sphere on both her Facebook page and the local television station's website during that entire time, filing another lawsuit for Fraud on the Courts in Suffolk County[3] and putting such lawsuit on her Facebook page (a lawsuit easily and publicly accessible), for refusing to execute HIPAA forms from her cardiologist and for asserting her rights to speak to law enforcement officials should crimes be committed. One must be compelled to inquire in this country: So what? These are the rights of every citizen and so the questions presented certainly merit review.

A party to a court action can only be sanctioned with financial penalties for "frivolous" conduct which Judge Freed remarkably labelled the above actions in her Order and which the First Department affirmed and the New York Court of Appeals did not overturn.

Yet "frivolous conduct "has been defined by the New York Court of Appeals itself as behaviour that is completely without merit in law and cannot be supported by a reasonable argument or reversal of the law. There is simply no way of interpreting Plaintiff's actions as frivolous.

Additionally, the New York Courts have held that the added sanction of an attorney's fee is generally found to be too harsh (see *Nomako v. Ashton*, 22 A.D.2d 883, 247 N.Y.S. 230 (1st Dept. 1964), *Dibartolo v. American & Foreign Ins. Co.*, 48 Misc.2d 843 (Sup. Ct., Suffolk County), aff'd 26 A.D.2d 992 (2nd Dept. 1966) and Siegel at page 610.

A. The Sealing Orders Violated Plaintiff's Due Process and Equal Protection Rights

As framed, the Sealing Orders violated Plaintiff's right to Due Process and Equal Protection under both the Constitution of New York and the United States Constitution. There is absolutely no compelling reason for the New York Courts to have abridged Plaintiff's Constitutional Rights and there is also no competing interest of Defendant's that could justify such abridgement of Plaintiff's rights.

Particularly, by keeping the FME Order sealed, Plaintiff was subject to, in effect, "secret laws" applicable only to women. Such a situation should be an anathema to this or any court and would be to our society.

B. The Sealing Orders Were Overly Broad and Should Have Been Lifted

Part 216 of the Uniform Rules sets a high bar for the sealing of court records and demands that there be "good cause" for any such sealing. It also allows for sealing "in whole or in part."

By sealing the **entire** file, the effect of the Sealing had been to prevent motions and the FME Order relating to the mental examination of Plaintiff to be entered into the public record. Part 216 requires the Court to consider the "interests of the public as well as the parties."

The public (and especially the women of New York) have a keen interest in knowing the Supreme Court's FME Order compelling Plaintiff's mental examination.

There is no case law supporting the sealing of an entire file and therefore the Sealing Orders should have been lifted with respect to all court records in light of the public's need to know about the Supreme Court's decision regarding CPLR Section 3121(a) and Plaintiff's urgent need and right at the time to obtain *amicus* briefs for the United States Supreme Court.

Plaintiff has clearly shown that she did not violate the Sealing Orders in any manner but that her actions were perfectly legal as there was no seal in place at the First Department and all her actions dealt only with the forced mental examination, posting information on social media that was already in the public sphere and writing letters seeking the assistance of human rights groups. Nothing she did violated the Sealing Orders in the least.

Finally, as Plaintiff's sexual harassment action should never have been dismissed, the issue of the lifting of the Sealing Orders is not "moot."

2. Motion Sequence No. 7: The New York Court of Appeals and the Appellate Division and the Supreme Court Erred when it Dismissed Plaintiff's Sexual Harassment Action for her Alleged Violation of the Conference Directive as she Completely Complied with Such Directive

After Plaintiff had pursued and concluded her legal rights to appeal and seek stays of the forced mental examination, Plaintiff presented herself to be examined by Defendant's psychiatrist on November 11, 2015 as ordered by the NY Supreme Court for an 8-hour evaluation, to be audiotaped. **Thus, the Order and First Department Decision and the denial of Plaintiff's appeal by the New York Court of Appeals hold that she was forbidden to say certain things during such examination and punished her for it which clearly violates her most basic constitutional rights.**

Kihl v. Pfeffer, 94 N.Y.2d 188, 700 N.Y.S.2d (NY Ct. of Appeals 1999) involved a litigant who ignored court orders with impunity and the Court of Appeals held that dismissal can **only** be warranted if the Plaintiff acted with "impunity." There is no evidence at all to show that Plaintiff did so here. Therefore, the First Department Decision goes against an important decision of the Court of Appeals itself!

The dismissal of Plaintiff's actions in the Order are utterly contrary to New York and United States common and and statutory law on the subject and should never have been affirmed:

1. there was no contumacious conduct on Plaintiff's part;
2. Plaintiff never acted with "impunity";
3. Plaintiff received only one scrawled hand-written warning that sanctions might include dismissal from a law secretary;
4. the Order shows no prejudice to Defendant; and

5. Plaintiff had a "reasonable excuse" as the doctor refused to perform the discovery desired by Defendant.

A. The Order Lacks The Attributes of Due Process

One serious aspect of due process overlooked by the Supreme Court and the First Department and the NY Court of Appeals was the absence of any notice to Plaintiff that she would able to respond to a motion seeking dismissal, as the Order notes. Thus, the Supreme Court dismissed Plaintiff's case *sua sponte.*

The Court also denied Plaintiff her due process rights when it did not analyse the extrinsic evidence tendered by Plaintiff at all it appears, as **none** were mentioned in her 28-page opinion. The court erred by not undertaking that analysis and, indeed, was required to carefully consider such evidence.

Under Uniform Rule 202.7, in addition, a motion under CPLR 3126 must be accompanied by the moving attorney's affirmation that a good faith effort was made with opposing counsel to resolve the dispute, but it didn't succeed. Here, we have a judge's law secretary making up requirements and neither opposing counsel nor the judge's secretary nor even the judge made any attempt to resolve the disputes. This is another clear violation of Plaintiff's due process rights. And certainly, of course, there is no affirmation that says any effort was made at all, because it did not occur.

But According to the First Department itself in *Myung Chun v. N. Am Mortg. Co.*, 285 A.D.2d 42, 45, 729 N.Y.S.2d 716 (1st Dept. 2001) where the Supreme Court did the exact same thing "...under these circumstances the [lower] **court was virtually without jurisdiction** to dismiss her action or grant the relief afforded to defendant" as it was a "serious aspect of due process overlooked by the IAS court" (see *Myung* at 44)

B. The Dismissal is Contrary to the Goals of N.Y. CPLR 3126 and a Clear Abuse of Judicial Discretion which the First Department and the New York Court of Appeals should have Recognized

Particularly given the overriding public policy of resolving cases on the merits, the Order and the First Department Decision and the Court of Appeals Order ignore long-established New York law resulting in great injustice to Plaintiff. In *S.R.Garden City, LLC v. Magna Care LLC,* 114 A.D.3d 925, 981 N.Y.S.2d 133 (2nd Dept. 2014) (ironically cited in the Order), citing *Korchak v. Santana*, 102 A.D.3d 928, 958 N.Y.S.2d 484 (2nd Dept. 2013) and *Lopes v. Metropolitan Tr. Auth.* 66 A.D.3d 744, 886 N.Y.S.2d 762 (2nd Dept. 2009) called dismissal a "drastic" remedy only appropriate for wilful, contumacious and bad faith conduct on the part of a plaintiff, the Order should be reversed.

The First Department itself emphasized in *Wehringer v. Brannigan*, 232 A.D.2d 206, 647 N.Y.S.2d 770 (1st Dept. 1996) to emphasize that "the use of the *sua sponte* power of dismissal must be restricted to the **most extraordinary circumstances.**"

Even in the dissent to *Myung*, the dissenting judge noted that the power to dismiss should be used "sparingly" (see *Myung* at 51).

Dismissal is the harshest punishment and Plaintiff has clearly shown that the disclosure is not possible as the doctor would not proceed in a manner that would violate his legal and ethical obligation.

Therefore, the NY Supreme Court was barred from dismissing Plaintiff's case.

Additionally, there were other courses the Supreme Court could and should have taken.

The first in N.Y. CPLR 3126 is the resolving order, which can be used when the refusal to disclose relates to an isolatable matter. It results in an order deeming the matter to be established as the seeking party claims (N.Y. CPLR 3126(1)).

The second is also available in that kind of situation, it involves a preclusion order akin to that which punishes a failure to furnish a bill of particulars: it precludes the resisting party from supporting or opposing a given claim, defence or contention, or from giving evidence on a designated issue or from using a particular witness (N.Y. 3126(2)). Where, for example a defendant refused to produce books reflecting on the value of certain stock, he was precluded from contending that the stock was worth less than X dollars (*Feingold v. Walworth Bros., Inc.*, 238 N.Y. 446 (NY Ct. of Appeals 1924). Thus, the First Department Decision once again goes against the New York Court of Appeals long-standing precedent, which the Court of Appeals Order should have recognized.

The NY Supreme Court, if it were going to invoke N.Y. CPLR 3126(a) at all, should have used either a resolving or preclusion order if it truly believed that Plaintiff had no right to remind Dr. Kleinman of his ethical and legal obligations.

The Order and First Department Decision and the Court of Appeals Order should be set aside as Plaintiff has shown a clear abuse of judicial discretion (see *Arts4all v. Hancock*, 54 A.D.3d 286, 863 N.Y.S.2d 193 (1st Dept. 2008), aff'd 12 N.Y.3d 846, 881 N.Y.S.2d 390 (NY Ct. of Appeals 2009) at 286). Again, the First Department Decision goes against law made by the Court of Appeals itself.

C. <u>There is No Evidence That Plaintiff acted in a Willful and Contumacious Manner Because She Did Not</u>

The cases all hold that there must be a **pattern** of willful noncompliance and bad faith. There was none here at all.

Appealing decisions, applying for and receiving stays, educating oneself, attempting to obtain *amicus* briefs or beginning a petition on Change.Org can in no way be considered a pattern of acting in willful noncompliance nor bad faith.

The Order and the First Department Decision and the Court of Appeals refusal to overturn them effect is that researching, knowing and informing people of knowledge is now illegal and sanctionable under New York law. Therefore, the First Department Decision cannot stand and must be reversed.

Plaintiff's examination was the first such examination ordered for a sexual harassment plaintiff in the State of New York. Plaintiff feared, and continues to fear, that going forward all sexual harassment victims will be forced to suffer further torture, humiliation and invasion and that such a degrading experience will also have a chilling effect on women coming forward when they are being sexually abused.

3. **Motion Sequence No. 8: The Appellate Division and the Lower Court Erred When it Entered the Additional Directives in the Form Order and When it Refused to Reverse its Decision in the Order Directly Violating Plaintiff's Right to Due Process and Erred When it Decided the Matter Was "Moot," as Plaintiff's Complaint Should Never Have Been Dismissed**

At the end of the Compliance Conference held on September 29, 2015 with the law secretary, he mentioned the Form Order, but did not state that it was being entered that day. When Plaintiff's counsel received the Additional Directives, it was received at the same time as the Conference Directive and was the first time either Plaintiff or her counsel had seen them.

The Judge's denial of Plaintiff's rights to argue the Additional Directives during the Compliance Conference was a direct violation of her due process rights.

In addition, Plaintiff's complaint should never have been dismissed and therefore the matter of the Additional Directives is not "moot" as the Order holds.

Therefore, the Order's decisions regarding Motion Sequence No. 8 should be reversed and remanded for decision to the lower court.

4. **Motion Sequence No. 10: The Appellate Division and the Lower Court's Order Granting Defendant's Motion to Strike the Note of Issue as Moot is Incorrect as Plaintiff's Complaint Should Never Have been Dismissed and as Discovery Had Been Completed**

As discovery was complete, the Note of Issue should not have been vacated.

Therefore, the Order's decisions regarding Motion Sequence No. 10 should be reversed and remanded for decision to the lower court.

In summary, there can be no doubt that:

1. The Decision of the Court of Appeals of New York is a dangerous precedent that will have a chilling effect on sexual harassment lawsuits

and upholds incorrect statements of long held United States Constitutional law regarding women's rights to free speech, due process and equal protection;

2. The Court of Appeals affirmation of the First Department Decision does not conform to changed societal norms with respect to women's rights and their roles in society and the gravity of sexual harassment;

3. The Constitutional rights to freedom of speech and due process were violated in such a way that implicates grave public policy concerns, particularly concerning sexual harassment victims;

4. A question of law raised in this Appeal has not been passed upon by this Court: if a state can force a woman to undergo a psychiatric evaluation, does it also have the right to dictate what she says there?

CONCLUSION

For the reasons set forth herein, Plaintiff respectfully submits that the issues presented for appeal are worthy of this Court's consideration and that leave to appeal should, therefore be granted.

Dated: Sag Harbor, New York
December 3, 2018

DEIDRE HOLMES CLARK
Pro Se Attorney, Plaintiff-Appellant
2803 Noyac Road
Sag Harbor, NY 11963
631-899-4292