SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN J.S.C. PART _____
Justice

Index Number : 159085/2012
FARACI, M.D., IRENE
vs.
NEW YORK STATE OFFICE OF
SEQUENCE NUMBER : 001
DISMISS

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

is decided in accordance with the annexed decision.

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

Dated: 10/17/13

CK
_____, J.S.C.
CYNTHIA S. KERN J.S.C.

1. CHECK ONE: ..... [X] 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 55

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IRENE FARACI, M.D.,

Plaintiff,

Index No. 159085/12

-against-

DECISION/ORDER

NEW YORK STATE OFFICE OF MENTAL HEALTH, SOUTH BEACH PSYCHIATRIC CENTER, CHARLES CAPPELLA, in his individual and official capacities and INTIKHAB AHMAD, M.D., in his individual and official capacities,

Defendants.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Cross-Motion and Affidavits Annexed.....	
Answering Affidavits to Cross-Motion.....	
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff Irene Faraci, M.D. ("plaintiff" or "Dr. Faraci") commenced the instant action asserting claims for employment discrimination, retaliation and hostile work environment pursuant to the New York City Human Rights Law ("NYCHRL") and the New York State Human Rights Law ("NYSHRL"), as well as negligent hiring and supervision, negligent infliction of emotional distress and breach of fiduciary duty against defendants New York State Office of Mental Health ("OMH"), South Beach Psychiatric Center ("South Beach"), Charles

Cappella ("Mr. Cappella") and Intikhab Ahmad, M.D. ("Dr. Ahmad"). Defendants now move for an order pursuant to CPLR § 3211(a) dismissing the complaint. For the reasons set forth below, defendants' motion to dismiss is granted.

The relevant facts are as follows. Dr. Faraci is a female psychiatrist at South Beach, a psychiatric hospital operated by OMH, where she has been employed since 2005. Plaintiff commenced her employment at South Beach in the Adolescent Inpatient Unit and after nine months, she was transferred to the Heights Hill Inpatient Unit ("HHIU"). Plaintiff alleges that as early as 2007, Mr. Cappella, the Chief of Service of HHIU, started singling her out, harassing her, embarrassing her, questioning her work and medical opinions and was generally disrespectful towards her. Plaintiff further alleges that she complained about such treatment from April 2007 through August 2012 but that no remedial actions were taken. Specifically, plaintiff alleges that she complained verbally and via e-mail to Dr. Ahmad, the Director of Psychiatry, but does not specify the nature of these complaints. Plaintiff further alleges that during the period from July 2009 through April 2010, she was the only psychiatrist responsible for treating twenty-eight patients despite the fact that the guidelines and requirements of South Beach and OMH dictate that each facility must have at least two treating psychiatrists and no more than twenty-four patients.

On or about November 19, 2010, plaintiff filed a contract grievance ("November 2010 Grievance") against Mr. Cappella alleging a violation of South Beach's Code of Conduct and Conflict. Specifically, the November 2010 Grievance alleged that

> For approximately 40 minutes on Oct. 20, 2010, [Mr. Cappella] behaved in a manner that was unprofessional and grossly inappropriate. He embarrassed and humiliated [plaintiff] in front of

> another psychiatrist. He was verbally abusive in that he was shouting and pointing his finger at her; he questioned her clinical and ethical judgement; he entered and exited her office 5-6 times repeatedly arguing with her; and when he finally left her office, he slammed the door shut behind him. [Mr. Cappella] has an extended history with [plaintiff], of behaving in an outrageous, totally unacceptable, disrespectful, and unprofessional manner.

Plaintiff alleges that as a result of the November 2010 Grievance, she and Mr. Cappella engaged in mediation during which Mr. Cappella agreed to alter his behavior towards her. However, plaintiff alleges that Mr. Cappella continued to be disrespectful. Plaintiff further alleges that she complained to Dr. Ahmad about "her concerns and discomfort at HHIU" but that Dr. Ahmad failed to resolve the situation and instead humiliated plaintiff in front of the entire medical staff "on multiple occasions," undermined her professional judgment, dismissed her input regarding patient care, questioned her treatment plans in front of colleagues and generally began to treat her with disrespect along with Mr. Cappella.

On or about June 13, 2011, plaintiff was transferred from HHIU to the Structured Treatment Unit ("STU") allegedly in retaliation for the complaints made against Mr. Cappella, Dr. Ahmad and South Beach. Plaintiff alleges that STU is the most dangerous adult inpatient unit in the facility and that she worked there as the sole full-time psychiatrist for approximately eleven months. In July 2011, plaintiff filed a second grievance, this time against Dr. Ahmad, alleging that he exhibited unprofessional, harassing and intimidating behavior and that he had created a "hostile work environment." Plaintiff further alleges that at some point in 2011, she received a negative performance evaluation from Mr. Cappella which she claims was in retaliation for the grievance she filed against Dr. Ahmad. Plaintiff alleges that she did not sign the 2011 evaluation and that she never received a copy.

On or about August 15, 2012, plaintiff filed a verified complaint with the New York State Division of Human Rights ("DHR") complaining of discrimination and retaliation based on plaintiff's gender. Plaintiff subsequently requested that the complaint be dismissed and her election of remedies annulled pursuant to Executive Law § 297.9 and received an order of dismissal on October 26, 2012. Plaintiff then commenced the instant action in December 2012.

As an initial matter, defendants' motion for an Order pursuant to CPLR § 3211(a)(2) dismissing plaintiff's second, fourth and sixth causes of action alleging gender discrimination, retaliation and hostile work environment pursuant to the New York City Human Rights Law ("NYCHRL") is granted as this court lacks subject matter jurisdiction over said claims. "It is a well-established rule that general, local legislation is inapplicable to the state or its agencies unless there is express language subjecting the sovereign to the terms thereof." *Khalil v. State of New York, City University of New York, City College*, 17 Misc.3d 777, 786 (Sup. Ct. N.Y. Cty. 2007). "The City of New York is not empowered to waive the State's immunity and, even if it were, the NYCHRL lacks the language required to effectuate such a waiver." *Id.*

In the instant action, plaintiff's second, fourth and sixth causes of action must be dismissed on the ground that defendants have sovereign immunity from suit. Plaintiff's claims pursuant to the NYCHRL against state entities OMH and South Beach based on the actions of Mr. Cappella and Dr. Ahmad are claims against the state. As such, they can only be asserted to the extent and under the conditions that the state has waived its sovereign immunity against such claims. Here, plaintiff has not established that the state has waived its sovereign immunity for claims brought in Supreme Court under the New York City Administrative Code. Thus, the second, fourth and sixth causes of action must be dismissed.

Additionally, plaintiff's claims against Mr. Cappella and Dr. Ahmad in their individual

capacities must be dismissed on the ground that they are not plaintiff's employers for the purposes of the NYCHRL and the New York State Human Rights Law ("NYSHRL"). Individuals are not subject to suit under either the NYCHRL or the NYSHRL unless the individual is an "employer" for purposes of these laws. *See Patrowich v. Chemical Bank*, 63 N.Y.2d 541 (1984)("[a] corporate employee, though he has a title as an officer and is the manager or supervisor of a corporate division, is not individually subject to suit with respect to discrimination...under [NYSHRL]...if he is not shown to have any ownership interest or any power to do more than carry out personnel decisions made by others"); *see also Comm'n on Human Rights ex rel. Manning v. HealthFirst*, OATH Index No. 462/05 (Mar. 15, 2006), adopted, Comm'n Dec., 2006 NYC HRC LEXIS 1, 2-3 (May 10, 2006)(finding that individual employees are only liable under NYCHRL if they are "employers" whereby they either "possess ownership interests in the employing company or have discretionary authority to make final personnel decisions"). Here, the claims against Mr. Cappella and Dr. Ahmad in their individual capacities must be dismissed as they are not "employers" for the purposes of the NYCHRL or the NYSHRL. Plaintiff does not allege that Dr. Ahmad or Mr. Cappella have an ownership interest in OMH or South Beach or that these defendants have discretionary authority to make final personnel decisions. Further, plaintiff's reliance on *Fletcher v. Dakota, Inc.*, 99 A.D.3d 43 (1st Dept 2012) for the proposition that defendants may be sued in their individual capacities pursuant to NYSHRL and NYCHRL is misplaced as *Fletcher* involved the individual liability of directors or officers of a cooperative building and did not involve discrimination in the employer/employee setting.

Defendants' motion for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's

first cause of action alleging gender discrimination pursuant to the NYSHRL is granted on the ground that it fails to state a claim. In general, employment discrimination claims brought pursuant to the NYSHRL are analyzed under a three-part burden-shifting test. *See Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295 (2004). A plaintiff alleging employment discrimination must demonstrate (1) membership in a protected class; (2) qualification for the employment; (3) an adverse employment action; and (4) circumstances that give rise to an inference of discrimination. *See id.; see also McDonnell Douglas Corp. v Green*, 411 U.S. 792 (1973). If the plaintiff establishes his prima facie case using this analysis, the burden then shifts to defendant to articulate a legitimate, non-discriminatory reason for the challenged action. *See McDonnell Douglas Corp.*, 411 U.S. at 802-04. The burden then shifts back to plaintiff to show that defendant's stated reason was merely a pretext for discrimination. *See id.* At the pleading stage, "employment discrimination cases are themselves generally reviewed under notice pleading standards" and plaintiff is not required to establish his prima facie case with any heightened level of specificity beyond what is required pursuant to the CPLR. *See Vig v. New York Hairspray Co., L.P.*, 67 A.D.3d 140 (1st Dept 2009). However, CPLR § 3013 still requires statements in a pleading alleging employment discrimination to be "sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." *Phillips v. City of New York*, 66 A.D.3d 170, 189 (1st Dept 2009).

In the instant action, defendants' motion to dismiss plaintiff's first cause of action alleging gender discrimination is granted as plaintiff has failed to allege an adverse employment action taken by defendants based on her gender. In order to constitute an adverse employment

action on a discrimination claim, courts have required a "materially adverse change" in the terms and conditions of employment, including, but not limited to, termination, demotion, material loss of benefits or a significant diminution of responsibilities. *See Galabya v. New York City Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000) (citations omitted). Indeed, such a change must be "more disruptive than a mere inconvenience or an alteration of job responsibilities." *Forrest*, 3 N.Y.3d at 306. It is well-settled that scrutiny or criticism of work, harsh treatment and differences of opinion in the employment context do not constitute adverse employment actions. *See Forrest*, 3 N.Y.3d at 307 (holding that plaintiff's allegations that defendant's "snatching of a pad from her hands,...patting of a seat in an allegedly humiliating way,...shouting at her in a meeting,...circling of her name on a time sheet, [and]...rolling of eyes when she spoke" does not "constitute[] a materially adverse change in the terms and conditions of [plaintiff's] employment"); *see also Smalls v. Allstate Ins. Co.*, 396 F.Supp. 2d 364 (S.D.N.Y. 2005)(finding that being yelled at, receiving unfair criticism and receiving unfavorable schedules or work assignments do not rise to the level of adverse employment actions). Here, plaintiff remains employed by South Beach and has not alleged any change in her salary or benefits. Her allegations of criticism and being humiliated by Mr. Cappella and Dr. Ahmad do not rise to the level of adverse employment actions and she alleges no actions taken by defendants on account of her gender. Additionally, plaintiff's allegation that an adverse employment action was taken by defendants when she was transferred to the STU in 2011 is without merit as she makes no allegation that such transfer was based on her gender or that such transfer was a "materially adverse change" in the terms of her employment. Finally, plaintiff's assertion that the negative employment evaluation she received by Mr. Cappella in 2011 constitutes an adverse employment

action is also without merit. Negative employment evaluations, without tangible consequences, do not constitute adverse employment actions. *See Garcia v. NYC Admin. of Children's Services*, 2007 WL 2822153 at *6 (S.D.N.Y. Sept. 27, 2007). As plaintiff has failed to allege an adverse employment action taken by defendants, the court need not turn to the last element of a discrimination case under the pretext framework, circumstances that give rise to an inference of discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

Defendants' motion for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's third cause of action alleging retaliation is granted on the ground that it fails to state a claim. To sufficiently plead a claim for retaliation, a plaintiff must allege that (1) she engaged in a "protected activity" (that is, opposed or complained about unlawful discrimination); (2) the protected activity was known to defendant; (3) defendant took an adverse employment action and; (4) there is a causal connection between the protected activity and the adverse employment action. *See Forrest*, 3 N.Y.3d 295. The burden then shifts to defendant to show that it had legitimate, non-retaliatory reasons for the adverse employment action. *See Williams v. The City of New York*, 38 A.D.3d 238 (1st Dept 2007). The burden then shifts back to the plaintiff to show that the non-retaliatory reasons were pretextual. *See id.*

As an initial matter, plaintiff's third cause of action alleging retaliation must be dismissed on the ground that she has failed to allege that she engaged in any "protected activity." To sufficiently allege engagement in a protected activity, a plaintiff must demonstrate she was "opposing or complaining about unlawful discrimination." *Forrest*, 3 N.Y.3d at 313. Plaintiff alleges that she was subjected to two acts of retaliation: (1) on June 13, 2011, she was transferred to STU "in retaliation for [] repeated complaints of discrimination and harassment at HHIU,"

including the November 2010 Grievance; and (2) in 2011, she received a negative employment evaluation "because of and in retaliation to the grievance plaintiff filed against Dr. Ahmad" in July 2011. However, neither plaintiff's November 2010 Grievance nor her 2011 grievance against Dr. Ahmad constitutes a complaint about unlawful discrimination. The November 2010 Grievance alleges that Mr. Cappella violated South Beach's Code of Conduct and Conflict but does not contain any allegations of gender discrimination or animus nor does it reference gender in any way. Rather, it is a union "contract grievance" relating to allegations of a workplace dispute. Although plaintiff's complaint does not provide the exact language of her 2011 grievance against Dr. Ahmad, she alleges she complained that he exhibited unprofessional, harassing and intimidating behavior and that he had created a "hostile work environment." However, generalized complaints of inappropriate behavior or harassment are not protected activity under the law. *See Forrest*, 3 N.Y.3d at 313; *see also Pezhman v. City of New York*, 47 A.D.3d 493 (1st Dept 2008)("filing a grievance complaining of conduct other than unlawful discrimination is not a protected activity subject to a retaliation claim under the State and City Human Rights Laws.") To the extent plaintiff's complaint alleges that she made informal complaints about Mr. Cappella and Dr. Ahmad's behavior from 2007 through 2012, these allegations are insufficient to demonstrate any protected activity. While informal complaints may rise to the level of protected activity under certain circumstances, nowhere in the complaint does plaintiff allege that the substance of any of the complaints actually communicated her belief that she was being subjected to discrimination based on her gender.

Assuming, *arguendo*, that plaintiff has sufficiently pled engagement in a protected activity, which she has not, her third cause of action for retaliation must be dismissed on the

ground that she has failed to allege an adverse employment action. The standard for what constitutes an adverse employment action is lower for a claim for retaliation than a claim for discrimination. *See Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S.53, 68 (2006); *see also Kessler v. Westchester County Dept. of Social Services*, 461 F.3d 199, 207 (2d Cir 2006) (citations omitted). Unlike in a discrimination case where an adverse employment action must materially affect the terms and conditions of plaintiff's employment, in a retaliation context, an adverse employment action is one which "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington*, 548 U.S. at 68; *Kessler,* 461 F.3d at 207. Neither plaintiff's transfer to STU nor her negative employment evaluation constitutes an adverse employment action for purposes of her retaliation claim. Negative employment evaluations alone are not actionable in a retaliation claim. *See Pacheco v. N.Y. Presbyterian Hosp.*, 593 F. Supp. 2d 599 (S.D.N.Y. 2009). Further, plaintiff's transfer to STU, which defendants allege was a lateral transfer, is insufficient to establish an adverse employment action. *See Eugenio v. Walder*, 2009 U.S. Dist. LEXIS 56450 (S.D.N.Y. July 2, 2009)(transfer of plaintiff to another unit was not an adverse action for purposes of retaliation because it is not sufficient to deter a person of ordinary firmness from exercising his or her free speech rights).

Defendants' motion for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's fifth cause of action alleging hostile work environment is granted on the ground that it fails to state a claim. In order to sufficiently plead hostile work environment, a plaintiff must allege the existence of a "workplace [which] is permeated with discrimination, intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Forrest,* 3 N.Y.3d at 310 (citation omitted).

Moreover, "[p]laintiff should not be permitted to 'bootstrap' [her] alleged discrete acts of discrimination and retaliation into a broader hostile work environment claim... discrete acts constituting discrimination or retaliation claims...are different in kind from a hostile work environment claim that must be based on severe and pervasive discriminatory intimidation or insult." *Khalil v. State of New York*, 17 Misc.3d 777, 784-85 (Sup Ct, N.Y. County 2007) (citations omitted); *Magadia v. Napolitano*, 2009 WL 510739 at *17 (S.D.N.Y. Feb. 26, 2009). Hostile work environment claims cannot be predicated on discrete employment decisions regarding assignments and promotions or on negative evaluations. *See Magadia*, 2009 WL 510739 at 17. Rather, a claim for hostile work environment is "a wholly separate cause of action designed to address other types of work place behavior, like constant jokes and ridicule or physical intimidation." *Id.*

As an initial matter, plaintiff's hostile work environment claim based on severe discrimination must be dismissed as she fails to allege that gender was a motivating factor for her alleged treatment. Plaintiff's allegations of general harassment and humiliation is insufficient to state a claim for hostile work environment. *See Davis-Bell v. Columbia Univ.*, 851 F. Supp. 2d 650, 675 (S.D.N.Y. 2012)(holding that a plaintiff cannot show hostile work environment where "[p]laintiff never asserts that anyone ever made derogatory comments to her that ridiculed or insulted her because of her gender" and where plaintiff "could not point to a single instance where anyone said anything related to Plaintiff's sex.") Further, "[t]he mere fact that [plaintiff] is...female and that she did not always receive the respect and help she desired does not create the inference that the treatment was motivated by a discriminatory animus." *Id.* Additionally, plaintiff's hostile work environment claim must be dismissed as plaintiff failed to allege that the

treatment she endured was severe, pervasive or continuous enough to establish a hostile work environment. "Whether an environment is hostile or abusive can be determined only by looking at all of the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Forrest*, 3 N.Y.3d at 310-11. Plaintiff's allegations consist of episodic incidents and not continued harassment. In her complaint, plaintiff alleges separate incidents such as, *inter alia*, that (1) she was harassed by Mr. Cappella and other staff when she started in HHIU in 2007; (2) she was treated unprofessionally and humiliated by Mr. Cappella in front of a colleague in 2010; (3) Mr. Cappella undermined her clinical judgment in March 2011; (3) Dr. Ahmad yelled at her through "the latter part of 2011" and specifically on July 21, 2011; and (4) Dr. Ahmad was dismissive of plaintiff and undermined her in front of a patient in July 2012. However, not only do these incidents lack the severity required to sustain a claim of hostile work environment, but they are also episodic and isolated and spread out over a period of five years.

Additionally, defendants' motion for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's seventh cause of action alleging negligent hiring and supervision is granted on the ground that it fails to state a claim. "Generally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondeat superior and no claim may proceed against the employer for negligent hiring, retention, supervision or training." *Talavera v. Arbit*, 18 A.D.3d 738 (2d Dept 2005). "[A]n exception exists to this general principle where...the injured plaintiff seeks punitive damages from the employer based on alleged gross negligence in the hiring or retention of the employee."

Id. at 739. Here, plaintiff's seventh cause of action alleges that "[d]efendants failed to properly screen, interview, hire and supervise defendants Cappella and Dr. Ahmad who harassed and discriminated against plaintiff...." However, no cause of action for negligent hiring or supervision may lie against defendants as plaintiff makes no allegation that Mr. Cappella and Dr. Ahmad were not acting within the scope of their employment. Additionally, plaintiff does not seek punitive damages from defendants based on any alleged gross negligence in the hiring or supervision of Mr. Cappella and Dr. Ahmad. Thus, the seventh cause of action must be dismissed.

Defendants' motion for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's eighth cause of action alleging negligent infliction of emotional distress is granted on the ground that it fails to state a claim. "A cause of action for negligent infliction of emotional distress, which no longer requires physical injury as a necessary element, generally must be premised upon the breach of a duty owed to plaintiff which either unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety." *Sheila C. v. Povich*, 11 A.D.3d 120, 130 (1st Dept 2004). "Moreover, a cause of action for...negligent infliction of emotional distress must be supported by allegations of conduct by the defendants 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Id.* at 130-31, citing *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 303 (1983). "Such extreme and outrageous conduct must be clearly alleged in order for the complaint to survive a motion to dismiss." *Id.* at 131. However, plaintiff has not sufficiently alleged any conduct which would unreasonably endanger plaintiff's physical safety or which would cause plaintiff to fear for her

own safety. The instances of humiliation, harassment and disrespect alleged by plaintiff do not rise to the level of being so outrageous as to be considered atrocious or "utterly intolerable in a civilized community."

Finally, defendants' motion for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's ninth cause of action alleging breach of fiduciary duty is granted on the ground that it fails to state a claim. To sufficiently plead a cause of action for breach of fiduciary duty, a party must allege "(1) the existence of a fiduciary relationship, (2) misconduct by the [other party], and (3) damages directly caused by the [other party's] misconduct." *Smallwood v. Lupoli*, 107 A.D.3d 782, 784 (2d Dept 2013). Plaintiff's complaint alleges that "[d]efendants' discriminatory and harassing treatment...was negligent, reckless, extreme and outrageous, unreasonably endangering plaintiff's physical and emotional safety and caused plaintiff to fear for her own safety." The complaint further alleges that plaintiff complained about such conduct but that "defendants failed and/or refused to take any remedial action." However, the ninth cause of action fails to state a claim for breach of fiduciary duty as it fails to allege the existence of a fiduciary relationship between plaintiff and defendants.

Accordingly, defendants' motion for an Order pursuant to CPLR § 3211 dismissing the complaint is granted. The complaint is hereby dismissed in its entirety. This constitutes the decision and order of the court.

Dated: 10/17/13

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.