

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

1401

CA 13-00960

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, AND VALENTINO, JJ.

---

DEBORAH TOMUSHUNAS, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

DESIGNCRETE OF AMERICA, LLC AND ROBERT G. BYRNES, INDIVIDUALLY AND IN HIS CAPACITY AS OWNER AND PRESIDENT OF DESIGNCRETE OF AMERICA, LLC, DEFENDANTS-RESPONDENTS.

---

O'HARA, O'CONNELL & CIOTOLI, FAYETTEVILLE (STEPHEN CIOTOLI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KIRWAN LAW FIRM, P.C., EAST SYRACUSE (TERRY J. KIRWAN, JR., OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

---

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered September 7, 2012. The order, inter alia, granted the motion of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action against her former employer and its principal, alleging causes of action for assault, intentional infliction of emotional distress and prima facie tort. Supreme Court properly granted defendants' motion seeking summary judgment dismissing the complaint on the ground that the action is barred as the result of plaintiff's receipt of workers' compensation benefits. As plaintiff concedes, before commencing this action, she received \$40,000 in workers' compensation benefits for missing work due to illnesses and injuries resulting from the same misconduct by her employer as alleged in the complaint. "[B]y accepting an award of workers' compensation benefits, plaintiff forfeited the right to maintain an action at law on the theory of intentional tort" (*Mylroie v GAF Corp.*, 55 NY2d 893, 894; see *Cunningham v State of New York*, 60 NY2d 248, 251-252; *Martin v Casagrande*, 159 AD2d 26, 29-30, lv dismissed 76 NY2d 1018). Contrary to plaintiff's contention, it is of no consequence that the award of benefits resulted from the settlement of her claim (see generally *Hynes v Start El.*, 2 AD3d 178, 181).

Entered: January 3, 2014

Frances E. Cafarell  
Clerk of the Court