

<b>Hicks v City of New York</b>
2015 NY Slip Op 30200(U)
February 5, 2015
Supreme Court, New York County
Docket Number: 155025/14
Judge: Kathryn E. Freed
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY - - PART 5

DEBORAH HICKS,

Plaintiff,

- against -

**DECISION/ORDER**

Index No.: 155025/14  
Seq. Nos. 001 and 002

THE CITY OF NEW YORK, THE NEW YORK CITY  
DEPARTMENT OF EDUCATION, JOAN INDART-  
ETIENNE, and SUSAN SALKIN,

Defendants.

**KATHRYN E. FREED, J.S.C.:**

RECITATION, AS REQUIRED BY CPLR 2219 (A) OF THE PAPERS CONSIDERED IN THE REVIEW OF  
MOTION TO DISMISS AND CROSS MOTION TO AMEND (SEQ. NO. 002) AND MOTION FOR LEAVE TO  
SERVE A LATE NOTICE OF CLAIM (SEQ. NO. 001):

PAPERS	NUMBERED
ORDER TO SHOW CAUSE, AFFIRMATION IN SUPPORT, AFFIDAVIT, AND EXHIBITS A-D.....	.....1.....
AFFIRMATION IN OPPOSITION AND EXHIBIT I.....	.....2.....
NOTICE OF MOTION TO DISMISS, AFFIRMATION IN SUPPORT, AND EXHIBITS 1-6 .....	.....3, 3A.....
DEFENDANTS' MEMO OF LAW IN SUPPORT .....	.....4.....
NOTICE OF CROSS MOTION, AFFIRMATION IN OPPOSITION AND IN SUPPORT, PLAINTIFF'S AFFIDAVIT AND EXHIBITS A-C .....	.....5.....
DEFENDANTS' REPLY AFFIRMATION .....	.....6.....

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this action, plaintiff Deborah Hicks (Hicks), formerly employed by defendant New York  
City Department of Education (DOE), sues to recover damages for alleged fraud in connection with  
a report of a grievance hearing. Defendants move to dismiss the complaint (motion seq. no. 002),

pursuant to CPLR 3211 (a) (4), 3211 (a) (5) and 3211 (a) (7), based on a prior action pending between the same parties for the same cause of action, based on the statute of limitations, and for failure to state a cause of action. Plaintiff cross moves for leave to amend the complaint to add causes of action for prima facie tort and negligence. By separate motion (seq. no. 001), plaintiff moves for leave to serve a late notice of claim. The motions are consolidated herein for the purpose of their disposition.

#### **FACTUAL AND PROCEDURAL BACKGROUND:**

Plaintiff worked as a special education teacher with the DOE for approximately 30 years, from 1983 until her retirement in September 2011. Verified Complaint (Complaint), Ex. A to Hershman Affirmation in Support of Motion for Leave to Serve a Late Notice of Claim (Hershman Aff.), ¶ 26; Plaintiff Affidavit in Support of Motion for Leave to Serve a Late Notice of Claim (Pl. Aff.), also submitted as Ex. C to Hershman Affirmation in Opposition to Defendants' Motion and in Support of Plaintiff's Cross Motion (Hershman Aff. in Opp.), ¶¶ 1, 9. In 2011, plaintiff worked at the ReStart Academy, an alternative school program operated by the DOE. Pl. Aff., ¶ 2; Notice of Claim, dated May 23, 2014 (2014 Notice of Claim), Ex. C to Hershman Aff., ¶ 3, at 2. At all times relevant to this action, defendant Joanne Indart-Etienne (Indart-Etienne) was Principal, and defendant Susan Salkin was Assistant Principal, of the ReStart Academy. 2014 Notice of Claim, ¶ 3, at 1, 2. In April 2011, complaints were made that plaintiff had engaged in inappropriate interactions with some students, and she was transferred to another program until the end of the school year. Pl. Aff., ¶¶ 3-4; 2014 Notice of Claim, ¶ 3, at 2; *see* Letter, dated September 23, 2011 (September 23 letter), Ex. B to Complaint. Plaintiff received a satisfactory rating in June 2011 for

the 2010-2011 school year. Pl. Aff., ¶ 5.

An investigation into the charges against plaintiff was conducted in May 2011 by the office of the Special Commissioner of Investigation for the New York City School District (SCI), which issued a report finding that the charges against plaintiff were substantiated and recommending disciplinary action be taken. *See* SCI Letter, dated July 8, 2011, Ex. 2 to LaRose Affirmation in Support of Defendants' Motion to Dismiss (LaRose Aff.). As a consequence, in or around August of 2011, plaintiff was informed that her "satisfactory" rating for the 2010-2011 school year was changed to "unsatisfactory." Complaint, ¶ 27; Pl. Aff., ¶ 6. Plaintiff then filed a grievance "relative to said rating" through her union and, on September 20, 2011, plaintiff and her union representative met with Principal Indart-Etienne for a Step 1 grievance hearing. Complaint, ¶¶ 28-29; *see* 2014 Notice of Claim, ¶ 3, at 3-4. Plaintiff retired, effective September 28, 2011, and subsequently requested and was denied an Education Law § 3020-a hearing. Complaint, ¶ 30; Pl. Aff., ¶ 9, 10, 12. She then brought an Article 78 proceeding, seeking to nullify the charges against her and remove the designation that she resigned or retired with charges pending, or, alternatively, seeking a declaration that she was entitled to an Education Law § 3020-a hearing. Complaint, ¶ 13; Pl. Aff., ¶¶ 11, 13. By decision and order dated June 12, 2012, the court granted plaintiff the right to a hearing. Complaint, ¶ 31; Pl. Aff., ¶ 14; *see Matter of Hicks v Department of Educ. of City of N.Y.*, Sup Ct, NY County, June 12, 2012, Kern, J., Index No.100819/12. In November of 2012, after the court denied defendants' motion to reargue and for leave to appeal, the DOE withdrew the charges against plaintiff, eliminating the need for a § 3020-a hearing. Complaint, ¶¶ 32-34; Pl. Aff., ¶¶ 15-17. Sometime later, the designation "retired with charges pending" was removed, but the unsatisfactory rating (U rating) remained. *See* Verified Petition, dated July 11, 2013, Ex. 4 to

LaRose Aff., ¶ 18.

Plaintiff filed an appeal of her U rating, and a hearing on her appeal was held on March 12, 2013. Complaint, ¶¶ 35-36; Pl. Aff., 18-19. By letter dated May 29, 2013, plaintiff was informed by the office of the Chancellor that her appeal was denied and the U rating was upheld. *See* Letter, Ex. B to Hershman Aff. in Opp. That determination is the subject of an Article 78 proceeding, commenced in July of 2013 and now pending before this Court (Moulton, J.), which challenges the decision to sustain the U rating as arbitrary and capricious and based on fraudulent evidence presented at the March 12, 2013 hearing. *See* Verified Petition, dated July 11, 2013, Ex. 4 to LaRose Aff.

At the March 2013 appeals hearing, defendants introduced into evidence the September 23 letter, in which Indart-Etienne describes the grievance hearing held in her office on September 20, 2011, sets forth the allegations against plaintiff, states that plaintiff was given a copy of the investigative report and an opportunity to respond, recites statements purportedly made by plaintiff and her union representative at the hearing, concludes that plaintiff engaged in the alleged misconduct, and advises plaintiff that the “misconduct may lead to further disciplinary action, including an unsatisfactory rating, and . . . termination of [her] employment.” Complaint, ¶ 37; September 23 Letter, Ex. B to Complaint. Plaintiff claims that she did not receive this letter, although defendants produced a signed, undated receipt, and that she first saw the September 23 letter at the March, 2013 appeal hearing. Pl. Aff., ¶ 19. Plaintiff further alleges that the September 23, 2011 letter included “false, misleading and fictitious statements and events.” Complaint, ¶ 38. More specifically, although not alleged in the instant complaint, it appears, from the 2014 Notice of Claim, that plaintiff contends that the September 23 letter falsely described the September 20, 2011

meeting as a disciplinary hearing instead of a Step 1 grievance hearing; falsely attributed statements made by her at the hearing, when she claims she remained silent throughout it; falsely quoted what her union representative said at the hearing; falsely stated that she was given a copy of the investigative report, and an opportunity to respond to it, at the hearing, when instead she was given a copy of the report only at the end of the meeting. See 2014 Notice of Claim, Ex. C to Hershman Aff. Plaintiff objected to submission of the September 23 letter at the March 2013 appeal hearing, and plaintiff alleges that defendants knew the statements were false, that the statements were relied upon in legal proceedings, that defendants created the false statements to use against her in legal proceedings, and that defendants thereby committed fraud. Complaint, ¶¶ 39-43; Pl. Aff., ¶¶ 19, 20.

#### **LEGAL DISCUSSION:**

At the outset, defendants correctly argue that the City of New York (the City) is not a proper party to this action. The DOE remains a legal entity separate and distinct from the City, and the City cannot be held liable for torts allegedly committed by the DOE and its employees. *Perez v City of New York*, 41 AD3d 378, 379 (1<sup>st</sup> Dept 2007); see *Antonetti v City of New York*, 111 AD3d 558, 559 (1<sup>st</sup> Dept 2013); *McClain v City of New York*, 65 AD3d 1020, 1020 (2d Dept 2009) (no basis to hold City liable for “allegedly negligent and intentional acts and omissions” of employees of Board of Education); see also *Britt v City of New York*, 2013 WL 4206011, \*4, 2013 NY Misc LEXIS 3530, \*8 (Sup Ct, NY County 2013); *Gonzalez v. Esparza*, 2003 WL 21834970, \* 2, 2003 US Dist LEXIS 13711, \* 5 (SD NY 2003). The individual defendants named in the complaint are identified as principal and assistant principal, and, thus, are considered employees of the DOE, not the City. See *Mack v City of New York*, 2014 WL 6605426, \*3, 2014 NY Misc LEXIS, \*4 (Sup Ct, Queens

County 2014). In any event, plaintiff offers no opposition to this branch of defendants' motion, and the motion to dismiss the complaint as against the City is granted.

Defendants also argue that the complaint should be dismissed, pursuant to CPLR 3211 (a) (4), based on the Article 78 proceeding pending in this Court, and commenced prior to this action, which challenges the Chancellor's decision to uphold plaintiff's U rating; pursuant to CPLR 3211 (a) (5), because the claim should have been brought as an Article 78 proceeding, and is time-barred by the four-month statute of limitations under CPLR 217, or because the action otherwise is barred by the applicable statute of limitations and fails to comply with the Notice of Claim requirements set forth in Education Law § 3813; and, pursuant to CPLR 3211 (a) (7), because the complaint fails to state a cause of action for fraud.<sup>1</sup>

It is well settled that, on a CPLR 3211 motion to dismiss, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994); *see 511 W. 232<sup>nd</sup> Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 (2002). "In ruling on a motion to dismiss, the court is not authorized to assess the merits of the complaint or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action." *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 375-376 (1<sup>st</sup> Dept 2003); *see EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005). The court is not required, however,

---

<sup>1</sup>While plaintiff offers scant opposition to these branches of defendants' motion, and, notably, counsel for plaintiff, in his affirmation in opposition, fails to cite a single case to support his arguments (*see Hershman Aff. in Opp.*, ¶¶ 10-16), the court nonetheless proceeds to consider defendants' arguments.

to accept as true, or accord favorable inferences to, “bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence.” *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 (1<sup>st</sup> Dept 1999) (internal quotation marks and citation omitted), *affd* 94 NY2d 659 (2000); *see Adler v 20/20 Cos.*, 82 AD3d 915, 917-918 (2d Dept 2011); *Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495; 495 (1<sup>st</sup> Dept 2006). Further, while a court may consider a plaintiff’s opposing affidavit to remedy pleading defects (*see Leon*, 84 NY2d at 88; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]), the statements supporting a cause of action “must be sufficiently particular to give the court and parties notice of the transactions or occurrences to be proved and must support the material elements of the cause of action.” *Matter of Reden v Nassau County Civil Serv. Comm.*, 133 AD2d 694, 694 (2d Dept 1987). “[C]onclusory averments of wrongdoing are insufficient to sustain a complaint unless supported by allegations of ultimate facts.” *Vanscoy v Namic USA Corp.*, 234 AD2d 680, 681-682 (3d Dept 1996) (internal quotation marks and citation omitted); *see Scarfone v Village of Ossining*, 23 AD3d 540, 541 (2d Dept 2005).

Pursuant to CPLR 3211 (a) (4), a cause of action may be dismissed where “there is another action pending between the same parties for the same cause of action in a court of any state or the United States.” “In determining whether two causes of action are the same, [courts] consider ‘(1) [whether] both suits arise out of the same actionable wrong or series of wrongs[] and (2) as a practical matter, [whether] there [is] any good reason for two actions rather than one being brought in seeking the remedy.’” *Rinzler v Rinzler*, 97 AD3d 215, 217 (3d Dept 2012) (citation omitted); *see Red Barn Country, LLC v Trombley*, 120 AD3d 1537, 1538 (4<sup>th</sup> Dept 2014). While the statutory requirement that the prior action or proceeding be for the same cause of action is “an essential that seriously limits the availability of this defensive motion” (*Kent Dev. Co. v Liccione*, 37 NY2d 899,

901 [1975]), “[t]he mere fact that two lawsuits emanate from a common transaction or occurrence is not in and of itself enough to invoke CPLR 3211 (a) (4). If the wrongs alleged are separate and independent they may be prosecuted separately.” *Montgomery Ward & Co. v Othmer*, 127 AD2d 913, 914 (3d Dept 1987) (internal citations omitted). Even when the causes of action in both suits arise out of the same alleged wrongs, there may be “good reason for the separate existence of the earlier cause of action . . . [when] the nature of the relief sought is not the same or substantially the same.” *Kent Dev. Co.*, 37 NY2d at 901.

Here, although the claims in the action and proceeding are based on essentially the same facts, the nature of the relief sought is not substantially the same. In this action, plaintiff seeks compensatory and punitive damages on a fraud claim, and does not apparently seek relief with respect to the U rating. Thus, the complaint “could not be dismissed pursuant to CPLR 3211 (a) (4) as duplicative.” *Wharry v Lindenhurst Union Free Sch. Dist.*, 65 AD3d 1035, 1036 (2d Dept 2009); see *Goldman v A&E Club Props., LLC*, 89 AD3d 681, 683 (2d Dept 2011) (defendants have not demonstrated that, as a matter of law, the relief sought in the prior pending proceeding is “the same or substantially the same such that dismissal of this action was appropriate [under CPLR 3211 (a) (4)]”); see also *Courtemache v Enlarged City Sch. Dist. of the City of Middleton, N.Y.*, 686 F Supp 1025, 1030 (SD NY 1988) (a tort “action seeking monetary damages from a governmental entity is not properly brought under Article 78”).

Even if this action for damages otherwise is permitted, however, the complaint fails to allege facts sufficient to state a claim for fraud. See *Wharry*, 65 AD3d at 1036-1037 (finding that although action was not duplicative, it was not sustainable). To adequately plead a fraud claim, plaintiff must allege facts showing that “(1) defendant made a representation as to a material fact; (2) such

representation was false; (3) defendant[] intended to deceive plaintiff; (4) plaintiff believed and justifiably relied upon the statement and was induced by it to engage in a certain course of conduct; and (5) as a result of such reliance plaintiff sustained pecuniary loss.” *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 488 (2007) (internal quotation marks and citation omitted); see *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009); *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 (1996). Further, where a cause of action is based upon fraud, “the circumstances constituting the wrong shall be stated in detail.” CPLR 3016 (b); see *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 (2011); *Eurycleia Partners, LP*, 12 NY3d at 559. “[T]he pleadings must contain detailed allegations in support of every element.” *Small v Lorillard Tobacco Co.*, 252 AD2d 1, 15 (1<sup>st</sup> Dept 1998), *affd* 94 NY2d 43 (1999).

Plaintiff’s fraud claim rests on allegations that Indart-Etienne, in her letter dated September 23, 2011, misrepresented what happened and what was said during a grievance hearing held on September 20, 2011, and that the letter was submitted by defendants and used against plaintiff at the March 12, 2013 hearing on plaintiff’s appeal of her U rating. Complaint, ¶¶ 29, 36-38; Pl. Aff., ¶ 19; see also 2014 Notice of Claim, Ex. C to Hershman Aff., ¶ 3. Plaintiff does not dispute that a step 1 grievance hearing was held on September 20, 2011, attended by plaintiff, her union representative and Indart-Etienne; that plaintiff’s union representative spoke on her behalf at the hearing; and that plaintiff was given a copy of the investigative report describing the charges against her at the end of the meeting. Complaint, ¶ 29; Pl. Aff., ¶ 8; 2014 Notice of Claim, ¶ 3, at 2-3. Plaintiff alleges, however, that the September 23 letter falsely described the grievance hearing as a disciplinary hearing, falsely attributed statements to plaintiff and her union representative that they did not make, falsely stated that plaintiff received the SCI report and had an opportunity to respond to it during the

hearing, and otherwise falsely represented what occurred at the hearing. See Pl. Aff., ¶ 20; 2014 Notice of Claim, ¶ 3, at 2-3.

The complaint does not allege that the misrepresentations were made to plaintiff. See *Pope v Saget*, 29 AD3d 437, 442 (1<sup>st</sup> Dept 2006) (complaint fails where plaintiffs failed to show misrepresentations made to them, or how they relied on the misrepresentations). To the contrary, plaintiff alleges that she did not receive the letter, and saw it for the first time when it was introduced at the hearing of her appeal on March 12, 2013. Pl. Aff., ¶ 19. The complaint also does not allege that plaintiff was induced to change her position or otherwise relied on the alleged misrepresentations to her detriment. See *Waggoner v Caruso*, 68 AD3d 1, 6 (1<sup>st</sup> Dept 2009), *affd* 14 NY3d 874 (2010); *Walters v Pennon Assocs., Ltd.*, 188 AD2d 596, 596 (2d Dept 1992). Rather, plaintiff alleges that the false statements were created and relied on by defendants in “legal proceedings,” presumably referring to the March 12, 2013 hearing, and “in determinations relative to plaintiff.” Complaint, ¶¶ 40-42. Plaintiff does not explain how, given that she was litigating against defendants and objected at the hearing to submission of the letter (Pl. Aff., ¶ 19), she could have reasonably relied on the alleged misrepresentations. See *Bohn v 176 W. 87<sup>th</sup> St. Owners Corp.*, 106 AD3d 598, 599 (1<sup>st</sup> Dept 2013).

Plaintiff also fails to allege specific damages as required, that is, plaintiff has alleged no “pecuniary loss resulting from action or inaction in reliance on [the misrepresentations].” *Stutman v Chemical Bank*, 95 NY2d 24, 30 (2000); see *Lama*, 88 NY2d at 421; *Howard S. v Lillian S.*, 62 AD3d 187, 193 (1<sup>st</sup> Dept 2009) (“pecuniary loss is limited to the calculable expenditure flowing directly from defendant’s fraud”), *affd* 14 NY3d 431 (2010); *Rather v CBS*, 68 AD3d 49, 58 (1<sup>st</sup> Dept 2009) (plaintiff was required to plead that “he had something of value, was defrauded . . . into

relinquishing it for something of lesser value, and that the difference between the two constituted [his] pecuniary loss”); *see also Starr Found. v American Intl. Group, Inc.*, 76 AD3d 25, 28 (1<sup>st</sup> Dept 2010) (plaintiff must allege it gave up something in exchange for something else). To the extent that plaintiff claims that the DOE’s decision to uphold the U rating was based on the allegedly fraudulent information, and she was damaged by that decision, that claim is limited to Article 78 review. *See Kickertz v New York Univ.*, 110 AD3d 268, 272 (1<sup>st</sup> Dept 2013)(internal citations omitted). Plaintiff’s fraud claim accordingly will be dismissed.

In view of the above determination, the court need not reach the statute of limitations and notice of claim issues under Education Law § 3813, and plaintiff’s motion for leave to file a late notice of claim is denied as moot. The court notes, however, that neither side has correctly addressed the application of Education Law § 3813 (2) to this case, as discussed below.

Contrary to defendants’ contention that, because the City is not a proper party, the one year and ninety day statute of limitations found in General Municipal Law § 50-e is inapplicable here (*see* Defendants’ Memo of Law in Support of their Motion, at 8), Education Law § 3813 (2), rather than Education Law § 3813 (1), governs tort claims against the DOE. Education Law § 3813 (2) expressly provides that tort claims against the DOE, in contrast to other kinds of claims, “must comply with the notice requirements found in General Municipal Law § 50-e.” *Matter of Amorosi v South Colonie Ind. Cent. Sch. Dist.*, 9 NY3d 367, 370 (2007); *see Wesley-Dickson v Warwick Valley Cent. Sch. Dist.*, 973 F Supp 2d 386, 410 (SD NY 2013), *affd* 586 Fed Appx 739 (2d Cir 2014) (tort claims against a school district “must comply with the notice requirements in New York General Municipal Law § 50-e”); *Flaherty v Massapequa Pub. Schs.*, 752 F Supp 2d 286, 292 (ED NY 2010), *affd* 462 Fed Appx 38 (2d Cir 2012) ( Section 50-e explicitly applies to tort claims).

Section § 3813 (2) further provides that such tort claims “shall be commenced pursuant to the provisions of section fifty-i of the general municipal law,” which requires that actions “shall be commenced within one year and ninety days after the happening of the event upon which the claim is based.” General Municipal Law § 50-i (1) (c); *see Robinson v Board of Educ. of City Sch. Dist. of City of N.Y.*, 104 AD3d 666, 666 (2d Dept 2013); *Eberhard v Elmira City Sch. Dist.*, 6 AD3d 971, 972 (3d Dept 2004); *Peek v Williamsville Bd. of Educ.*, 221 AD2d 919, 920 (4th Dept. 1995); *Carlson v Geneva Sch. Dist.*, 679 F Supp 2d 355, 370 (WD NY 2010). Education Law § 3813 (2-b), in contrast, requires all non-tort claims against the DOE to be commenced within one year of the date the claim arose.<sup>2</sup> *See Matter of Amorosi*, 9 NY3d at 371; *Stembridge v New York City Dept. of Educ.*, 2014 WL 2933079, \*2, 2014 US Dist LEXIS 87930, \*5-6 (SD NY 2014) (“Claims against the DOE—other than those sounding in tort—must be brought within one year of the date on which they arose.”); *Carlson*, 679 F Supp 2d at 370.

On the other hand, plaintiff does not argue that the one-year statute of limitations is inapplicable (*see Hershman Aff. in Opp.*, ¶ 11), and instead contends that her claim arose within one year of the commencement of this action, that is, on May 29, 2013, the date of the decision denying plaintiff’s appeal (*Id.*, ¶¶ 4, 10-11), and not, as previously alleged, on March 12, 2013, when plaintiff discovered the alleged fraud. *See Hershman Aff. in Support of Plaintiff’s Motion for Leave to Serve a Late Notice of Claim*, ¶ 15; *Complaint*, ¶ 37; *Pl. Aff.*, ¶ 19; 2014 *Notice of Claim*, ¶ 3. Plaintiff’s counsel’s attempt to “retract” the March, 2013 accrual date based on a “mistake as to the underlying

---

<sup>2</sup>Education Law § 3813 (2-b) provides that “[e]xcept as provided in subdivision two of this section and, notwithstanding any other provision of law providing a longer period of time in which to commence an action or special proceeding, no action or special proceeding shall be commenced against any entity specified in subdivision one of this section more than one year after the cause of action arose.” (emphasis added).

facts” (Hershman Aff. in Opp., ¶16), and his argument that “[s]ince the actions of the false filing as alleged by the plaintiff deal directly with the appeal hearing of March 12, 2013, it was not until the decision of the Chancellor dated May 29, 2013 that the causes of action arose” (*Id.*, ¶ 10), are unsupported by any legal authority and are otherwise unavailing.

#### **CROSS MOTION FOR LEAVE TO AMEND:**

In her cross motion, plaintiff seeks leave to amend the complaint to add causes of action for prima facie tort and negligence, based on the allegations in the original complaint. See Proposed Amended Complaint, Ex. A to Hershman Aff. in Opp. For the reasons that follow, plaintiff’s cross motion is denied.

The decision whether to permit amendment of pleadings is committed to the discretion of the court. *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 (1983). Although, in general, leave to amend a pleading should be freely granted absent prejudice or surprise (*see* CPLR 3025 [b]; *Edenwald Contr. Co.*, 60 NY2d at 959; *McCaskey, Davies & Assocs. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 [1983]), in order “to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated.” *Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 355 (1<sup>st</sup> Dept 2005); *see Thompson v Cooper*, 24 AD3d 203, 205 (1<sup>st</sup> Dept 2005); *Davis & Davis, P.C. v Morson*, 286 AD2d 584, 585 (1<sup>st</sup> Dept 2001). When the proposed claims are “palpably insufficient or patently devoid of merit,” leave to amend should be denied. *Pomerance v McGrath*, \_\_ AD3d \_\_, 2015 WL 232396, \*1, 2015 NY App Div LEXIS 449, \*2 (1<sup>st</sup> Dept 2015) (internal quotation marks and citation omitted); *BCG Partners, Inc. v Refco Sec., LLC*, 96 AD3d 601, 603 (1<sup>st</sup> Dept 2012); *Vue Mgt., Inc. v Photo Assoc.*, 81 AD3d 569 (1<sup>st</sup> Dept

2011).

### **Prima Facie Tort**

“The requisite elements of a cause of action for prima facie tort are (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful.” *Freihofer v Hearst Corp.*, 65 NY2d 135, 142-143 (1985); *see Curiano v Suozzi*, 63 NY2d 113, 117 (1984); *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 332 (1983). “[T]here can be no recovery under this theory ‘unless malevolence is the sole motive for defendant’s otherwise lawful act or, in [other words], unless defendant acts from disinterested malevolence.’” *Posner v Lewis*, 18 NY3d 566, 570 n 1 (2012), quoting *Burns Jackson Miller Summit & Spitzer*, 59 NY2d at 333. “The act ‘must be a malicious one unmixed with any other and exclusively directed to injury and damage of another.’” *Wiggins & Kopko, LLP v Masson*, 116 AD3d 1130, 1131 (3d Dept 2014) (citation omitted); *see Lerwick v Kelsey*, 24 AD3d 931, 932 (3d Dept 2005). “A critical element of the cause of action is that plaintiff suffered specific and measurable loss, which requires an allegation of special damages.” *Freihofer*, 65 NY2d at 143 (internal citations omitted). “[S]uch damages must be alleged with sufficient particularity to identify actual losses and be related causally to the alleged tortious acts.” *Epifani v Johnson*, 65 AD3d 224, 233 (2d Dept 2009) (internal quotation marks and citations omitted).

“[P]rima facie tort was designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy, and not to provide a catch-all alternative for every cause of action which cannot stand on its legs.” *Kickertz v New York Univ.*,

110 AD3d 268, 277 (1<sup>st</sup> Dept 2013) (citation omitted); *see Freihofer*, 65 NY2d at 143; *Burns Jackson Miller Summit & Spitzer*, 59 NY2d at 333; *Belsky v Lowenthal*, 62 AD2d 319, 322, 323 (1<sup>st</sup> Dept 1978), *affd* 47 NY2d 820 (1979). “Where relief may be afforded under traditional tort concepts, prima facie tort may not be invoked as a basis to sustain a pleading which otherwise fails to state a cause of action in conventional tort.” *Freihofer*, 65 NY2d at 143 (internal citations omitted).

In this case, plaintiff’s proposed prima facie tort claim is premised on the same factual allegations underlying her fraud claim, that is, that Indart-Etienne made, and defendants submitted at plaintiff’s appeal hearing, a false report of statements and events related to the September, 2011 grievance hearing “with the intent to inflict harm on plaintiff.” Proposed Amended Complaint, Ex. A to Hershman Aff. in Opp., ¶ 53. The allegations are insufficient to show that defendants, or any of them, acted with disinterested malevolence, especially considering that defendants undisputedly had a right to investigate the complaints against plaintiff; and that the relevance of the letter -- which, among other things, truthfully included a statement that plaintiff denied the allegations against her -- to plaintiff’s appeal sufficiently justified its production at the hearing, where plaintiff had an opportunity to, and did, object to submission of the letter. *See Cusimano v United Health Servs.*, 91 AD3d 1149, 1153 (3d Dept 2012) (alleged false statements that plaintiff doctor was illegally storing drugs in her office insufficient to allege sole motivation was malevolence, where defendants had right to investigate complaint against plaintiff); *see also Bohn*, 106 AD3d at 599 (providing false letters to environmental control board regarding violations on building does not allege that defendants acted solely to injure plaintiff); *see generally Burns Jackson Miller Summit & Spitzer*, 59 NY2d at 333.

The proposed amended complaint also fails to allege specific and measurable damages, as required to support a prima facie tort claim. See *Freihofer*, 65 NY2d at 142-143; *Phillips v New York Daily News*, 111 AD3d 420, 421 (1<sup>st</sup> Dept 2013); *Wehringer v Helmsley-Spear, Inc.*, 91 AD2d 585, 586 (1<sup>st</sup> Dept 1982), *aff'd* 59 NY2d 688 (1983). The allegations that plaintiff “sustained detriment and loss, was rendered incapacitated from pursuing her employment and other pursuits, [and] incurred other losses and expenses . . . in a sum which exceeds the limits of all lower courts which would otherwise have jurisdiction over this action” (Proposed Amended Complaint, Ex. A to Hershman Aff. in Opp., ¶ 46), are not sufficiently specific or detailed. See *Phillips*, 111 AD3d at 421; *Vigoda v DCA Prods. Plus, Inc.*, 293 AD2d 265, 265 (1<sup>st</sup> Dept 2002) (allegations of “lost future income, conjectural in identity and speculative in amount” insufficient to support prima facie tort claim). The 2014 Notice of Claim (Ex. C to Hershman Aff.), which asserts that plaintiff’s damages include “stigmatic injury, emotional distress, . . . [and inability to] secure future employment,” and seeks \$5 million, similarly identifies only general categories and fails to allege special damages. See *Phillips*, 111 AD3d at 421 (“such round figures, with no attempt at itemization, must be deemed to be a representation of general damages” [internal quotation marks and citation omitted]); *Lopez v Fenn*, 90 AD3d 569, 573 (1<sup>st</sup> Dept 2011); *Epifani*, 65 AD3d at 233. Moreover, as it is based on the same factual allegations as her fraud claim, which has been dismissed, dismissal of the prima facie tort claim is proper on that basis as well. See *Woytisek v JP Morgan Chase & Co.*, 46 AD3d 331, 331 (1<sup>st</sup> Dept 2007); *Belsky*, 62 AD2d at 322. Although “there may be instances where the traditional tort cause of action will fail and plaintiff should be permitted to assert this alternative claim,” this is not such a case. *Freihofer*, 65 NY2d at 143 (internal quotation marks and citation omitted).

### Negligence

Plaintiff's proposed amended complaint also seeks to assert a negligence claim, alleging that "the foregoing actions and conduct of the defendants was [sic] negligently, carelessly and/or recklessly performed." Proposed Amended Complaint, Ex. A to Hershman Aff. in Opp., ¶ 60. The proposed amended complaint is ambiguous as to what acts were negligently performed, and it includes no allegations as to what duty was owed to plaintiff that was breached. Plaintiff's counsel's conclusory assertion that "the negligence cause of action incorporates the duty of the defendant with the actions herein in the event that the statements and misrepresentations made in the defendants [sic] September 23, 2011 letter were a result of negligence, not intentional actions" (Hershman Aff. in Opp., ¶10), does not serve to clarify the basis for such claim, and, in fact, makes little sense. Even giving plaintiff the benefit of every possible favorable inference, the proposed amended complaint fails to sufficiently allege the elements of a negligence claim or any facts which would give rise to such claim. See *Mitchell v New York Univ.*, 2014 WL 123255, 2014 NY Misc LEXIS 105, \*20-21 (Sup Ct, NY County 2014) (negligence claim dismissed where no duty to plaintiff expelled student shown; to extent student was challenging decision to expel him, relief sought was in the nature of an Article 78 proceeding).

Therefore, in light of the foregoing, it is hereby:

ORDERED that defendants' motion to dismiss the complaint is granted, and the Clerk is directed to enter judgment, with costs and disbursements as taxed by the Clerk; and it is further,

ORDERED that plaintiff's cross motion for leave to amend the complaint is denied; and it is further,

ORDERED that plaintiff's motion for leave to serve a late notice of claim is denied; and it is further,

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

Dated: February 5, 2015

ENTER:



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