SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER M. TISCH** **PART** **IAS MOTION 18EFM**

Justice

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RAHSAAN WIGGINS,

Plaintiff,

- v -

MOUNT SINAI HOSPITALS GROUP, INC., SAADI GHATAN, M.D., and NOEMI FIGUEROA,

Defendants.

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INDEX NO. 151209/2016

MOTION DATE 7/15/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43 ,44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59

were read on this motion to/for JUDGMENT - SUMMARY.

This action arises out of plaintiff Rahsaan Wiggins's claims that he was subject to discrimination and an alleged hostile work environment, based on his gender and race, in violation of both the New York State Human Rights Law (NYSHRL) and the New York City Human Rights Law (NYCHRL). Plaintiff also makes claims for defamation and intentional infliction of emotional distress. Defendants Mount Sinai Hospitals Group, Inc. (Mount Sinai Hospitals), Saadi Ghatan, M.D. (Ghatan) and Noemi Figueroa (Figueroa) (collectively, defendants) move, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff's complaint. For the reasons set forth below, defendants' motion is granted in its entirety.

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiff, an African American male, was formerly employed by Mount Sinai Hospitals as an administrative assistant. During all relevant times, plaintiff was assigned to work for Dr. Fedor Panov (Panov), assistant director of the neurosurgery department, and reported to work at

Mount Sinai West (MSW), a division of the Mount Sinai Health System, located at 1000 Tenth Avenue in the County, City and State of New York. He commenced his employment in September 2015 and was terminated on January 8, 2016, prior to completing his probationary period. The complaint indicates that, at the time, plaintiff was the "only male, African American administrative Assistant and/or secretary in the Neurosurgery Department of Mt. Sinai West." NYSCEF Doc. No. 1, Complaint, ¶ 10.

Plaintiff was initially hired by Jorge Gomez (Gomez), MSW's practice manager. Two months later, Figueroa was hired as the administrative director. Plaintiff claims that his work performance was exemplary and completely satisfactory to Gomez and Panov, among others. However, after Figueroa was appointed, he was subjected to discriminatory treatment, and ultimately terminated, on the basis of gender and race.

The relevant facts are as follows:

Figueroa's Alleged Gender Bias

Shortly after Figueroa was hired, she met with all the administrative assistants, including plaintiff. During plaintiff's meeting, Figueroa allegedly exhibited a "bias against Plaintiff's gender suitability for the position of administrative assistant." Complaint, ¶ 18. Plaintiff describes an initial "derogative" conversation where Figueroa allegedly stated, "you know, it's not oftentimes that I see men working in this type of environment, you must be happy working around a lot of women, you know, you can flirt with." NYSCEF Doc. No. 51, Plaintiff's tr at 28. Figueroa then "told Plaintiff that she could 'put him to good use,' and asked him to perform the task of assembling and installing a 'whiteboard' wallpaper on the wall of her office." Complaint, ¶ 16. After this meeting, plaintiff felt "concerned that it would be impossible to prove to [Figueroa] that he could perform the job of administrative assistant as well as a woman, and that

he was not more appropriately suited for manual labor." *Id.*, ¶ 17.

Panov's Laptop is Stolen

On December 3, 2015, while plaintiff was out of the office, Panov noticed that his laptop was missing. When plaintiff returned to the office, Panov asked plaintiff if he had seen his laptop. When plaintiff responded that he had not seen it, Panov began asking other employees if they had seen the computer. According to plaintiff, Ghatan, the Chair of Neurosurgery at MSW and at Mount Sinai Morningside, said to Panov, "oh, that's your problem right there – pointing in [plaintiff's] face- that's your problem right there, that's why your computer's stolen." Plaintiff's tr at 61. Plaintiff alleges that he was "shocked and humiliated" by Ghatan's false accusations. Complaint, ¶ 23.

When plaintiff returned to work the next day, the office staff was still gossiping about the incident and "whether Plaintiff was responsible for the missing laptop." *Id.*, ¶ 25. That same day, the video surveillance showed an unknown African American intruder, and "security personnel had cleared Plaintiff of any suspicious in connection with the theft." *Id.*, ¶ 26. Nonetheless, plaintiff believed that "irreparable damage had been done to his reputation and that the damage would continue to increase as rumors of his involvement in the theft continued to circulate around the office." *Id.*, ¶ 27.

According to plaintiff, he "overheard [Figueroa] telling others that Plaintiff was responsible for the theft because he had left the door open to Dr. Panov's office, the clear implication being that he had intentionally left the door open in order to aid and abet the theft of the laptop by the unknown African American suspect." *Id.*, ¶ 31. Over the next few weeks, plaintiff allegedly continued to hear rumors around the office that he had left Panov's door open to help facilitate the theft, "despite the fact that there was no evidence whatsoever to support

such a claim." *Id.*, ¶ 32.

Shortly after this incident, Figueroa began asking plaintiff to cover the front desk, "despite the fact that he needed to be in Dr. Panov's office to perform, his primary duties. Significantly, Figueroa blatantly told plaintiff that she wanted him at the front desk where 'she could keep an eye on him'." *Id.*, ¶ 33.

Figueroa met with plaintiff on January 8, 2016 to inform him that he was being terminated. After reviewing his performance, Figueroa advised him that she would not be "keeping him," and that she thought plaintiff was "overwhelmed." *Id.*, ¶ 39. Figueroa also allegedly stated that no one felt comfortable working with plaintiff and that she needed a team of people she could trust.

Shortly after he was terminated, plaintiff wrote a grievance letter to the human resources department at Mount Sinai Hospitals. In relevant part, plaintiff described how in his first interaction with Figueroa, she questioned why he would want to work as an administrative assistant and asked him for some assistance with putting up wallpaper in her office. He also explained how Ghatan allegedly accused him of stealing Panov's computer by stating to Panov, "that is your problem, him right there. He is your problem!" NYSCEF Doc. No. 53, grievance letter at 2. According to plaintiff, although Figueroa believed that plaintiff was overwhelmed and that no one felt comfortable working with him, she wanted to give him a chance to either resign with a good name or be terminated. "She stated that she tried to have me transferred to Eleanor Soto's position because see me [sic] as a better fit there as she is letting Eleanor go." *Id.* at 3. Plaintiff concluded by stating that he hoped to continue working at Mount Sinai Hospital as an administrative assistant. "I truly hope that neither my male gender, nor any false accusation made about me, would prevent me from a future career with Mount Sinai Hospital." *Id.* at 4.

After plaintiff was terminated, he commenced this case, alleging four causes of action. In the first cause of action, plaintiff claims that, in violation of the NYSHRL and the NYCHRL, he was subjected to discriminatory treatment on the basis of gender and race, and that he was ultimately discharged on the basis of this treatment. Specifically, defendants purportedly terminated plaintiff because they did not believe an African American male was suitable for the administrative assistant position, which is primarily staffed by females. Further, defendants allegedly terminated plaintiff because they believed that, as an African American male, plaintiff "must have been complicit" in the theft of Panov's laptop.

In the second cause of action, plaintiff alleges that defendants' false accusations and rumors related to the theft of Panov's laptop "altered the conditions of Plaintiff's employment and created a hostile and abusive working environment, in violation of the NYSHRL and the NYCHRL." Complaint, ¶ 48. The third cause of action, defamation, alleges that plaintiff suffered irreparable damage to his career and reputation as a result of the false statements and rumors spread by defendants in connection to the laptop incident. The fourth cause of action states that "[t]he repeated and persistent exposure of Plaintiff to the discrimination, false accusations and rumors, and abusive and hostile working environment, while he worked for Defendants, constituted an intentional infliction of emotional distress." *Id.*, ¶ 55.

Defendants' Motion

In defendants' motion for summary judgment, they maintain that plaintiff was terminated not due to his gender or race, but for failing his probationary period due to his poor performance. Further, there is no support in the record that he was subjected to discriminatory treatment based on gender or race. In support of their motion, defendants submit documentation, affidavits and testimony setting forth the circumstances surrounding plaintiff's short tenure with MSW and his

subsequent termination.

Plaintiff's Termination

As a new employee, plaintiff is required to serve a three-month probationary period. Defendants claim that it became apparent during this period that plaintiff was unable or unwilling to fulfill his job expectations and was not a good fit for the position. Figueroa testified that, in her position as administrative director at MSW, she was responsible for "running the practice and making sure all the moving parts are in place for the practice to be successful whether it's physicians or medical supplies, staff." NYSCEF Doc. No. 52, Figueroa tr at 12. Figueroa had "the power to hire and fire people in the department, non-physician staff." *Id.* at 38.

On December 14, 2015, towards the end of his probationary period, Panov and Figueroa concluded that, due to his poor performance, plaintiff should be terminated. In his three-month evaluation, Panov had stated, in relevant part, that despite seeing progress in some areas, he was "worried" that he was "seeing little progress in other areas." NYSCEF Doc. No. 43, Panov evaluation at 1. Panov recognized plaintiff's strengths, such as being punctual and doing a "great job" with billing. However, he continued that plaintiff's interaction on the phone "needs improvement, at times you seem overwhelmed," and that maintaining the schedules, "needs improvement . . . ." *Id.* Among other things, attention to detail, "needs improvement, this is paramount in my field, as small mistakes can lead to very serious consequences." *Id.* Panov met with plaintiff on December 15, 2015 to discuss his three-month evaluation. Plaintiff testified that Panov never met with him, nor did he ever see the contents of Panov's three-month evaluation. Plaintiff's tr at 81-82.

Defendants further allege that plaintiff exhibited a negative attitude and was unwilling to

assist coworkers. For example, plaintiff complained when he had to work the day after Thanksgiving. Figueora explained that, as the newest hires, both she and plaintiff, along with another employee who volunteered, would have to work. Nonetheless, plaintiff left without permission at noon, despite his scheduled departure time of 1:00 p.m. In addition, defendants state that, as the newest doctor to join the department, Panov's patient volume was low. Figueroa decided that, as plaintiff did not have as much work as others in the department, he should assist others. However, plaintiff replied that he does not "do teamwork."

On December 2, 2015, MSW's senior billing specialist advised plaintiff and Figueroa that she had not received any charges from Panov for the past two weeks. After plaintiff submitted information to her, she sent plaintiff an email asking him to review and correct the inaccurate summary sheet he had submitted. *See* NYSCEF Doc. No. 27. Exhibits 9, 10.

During the course of his probationary period, plaintiff used his work email address on several occasions to communicate with wedding vendors. For instance, on January 6, 2016, plaintiff mistakenly sent Figueroa an email with a draft of his wedding invitation. During his testimony, plaintiff conceded that he had used his work email address to communicate with wedding vendors.

Figueroa testified that she consulted with Ann McNicholas (McNicholas), Panov, Gomez and with Lucy Adjur prior to extending plaintiff's probationary period for one month past the upcoming holidays. Plaintiff received an email advising him of this extension.

In January, Figueroa concluded that plaintiff should be terminated "following a series of behavioral deficiencies, performance deficiencies and in general refusal to work as a team." Figueroa tr at 41. She did not think that he was qualified to hold the position of administrative assistant, but told plaintiff that she would assist him in finding other positions with the Mount

Sinai network. She consulted with Panov, Gomez and McNicholas prior to terminating plaintiff. Ghatan stated that he was not involved in the decision to terminate plaintiff.

Panov "agreed that [plaintiff] should be terminated because we had not seen progress from him after we extended his probationary period. He was still refusing to work with other employees in the Department and we had also discovered that he was planning his wedding during work hours." NYSCEF Doc. 42, Panov aff, ¶ 6.

Figueroa stated that she kept a worksheet for each member of her staff to keep track of their work performance throughout the year. She submitted plaintiff's worksheet, which noted the following, in pertinent part:

> "November 29, 2015 Assigned to assist Karen with filing and agreed to assist, then did not attempt or complete the assignment. Poor Teamwork: Frustrated with being asked to help the other admin staff, Rahsaan come to my office and declared, 'I don't do teamwork.' I asked him to clarify, and he said that he would only help if and when he could. He was here to support his doctor, not to help others.
>
> ***
>
> 'December 4, 2015 Rahsaan then complained that Dr. Ghatan made a comment (a claim that Dr. Ghatan pointed at Rahsaan and said 'that's your problem') when Panov informed him of the theft. The comment was oddly worded and out of character for Dr. Ghatan, so I explained to Rahsaan that this was strange and sometimes people word things inelegantly when they're stressed but I did not believe there was any malintent. Also, informed him that Ghatan had a very busy practice that day and there is no way he could take time out to address an issue like this while he's in the midst of seeing patients. Therefore, the comment was probably directed at the issue and not at the person.
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> ***
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> 'Rahsaan's performance unacceptable. He displayed a high degree of confusion about the systems December 10, 2015 and a lack of resourcefulness as he allowed his access to be deactivated without any attempt at resolution.
>
> ***
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> 'Probation Extension: Discussed Rahsaan's performance with Panov and concluded that due to clear performance December 14, 2015 deficiencies, this would not be a great fit. Agreed on a plan to extend probation to get the employee through the holidays and decline probation thereafter. Rahsaan met with Panov to discuss performance issues . . .."
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> ***
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> 'January 8, 2016 Terminated: During a busy day in the practice, the practice supervisor asked Rahsaan to assist in the front and he declined, claiming to be too busy. However, he had zero patients scheduled, therefore nothing to do. Subsequently, he 'accidentally'

sent me a copy of his wedding invitation that he had been working on that day. I called Labor Relations and informed them that he would be terminated immediately."

NYSCEC Doc. No. 30, Wiggins Summary at 1-3.

Gender Bias

During the relevant time period, there were six or seven administrative assistants working in the neurosurgery department. Figueroa held introductory sessions with each administrative assistant when she joined MSW. Figueroa testified that, at the time, there were no other male African American administrative assistants, but there were other African Americans on staff, including male African American physicians and female African American administrative assistants. After plaintiff was terminated, Figueroa hired another temporary male administrative assistant. Figueroa testified that she "did not think it was unusual that [plaintiff] as an African American male was working as an administrative assistant," and that she had previously worked at other hospitals that employed "numerous African American male administrative staff." Figueroa tr at 31. Figueroa did not socialize with plaintiff outside of the office. She said she knew he was getting married because he had "asked me for time off for a wedding." *Id.* at 33. They did not discuss their personal lives beyond "[c]onversationally we may have you know share a little bit about me, share a little bit about you as general mutual conversation." *Id.* at 37.

At one point during work, Figueroa recalled plaintiff helping her hang up a whiteboard. She testified that "it was not part of a meeting. Mr. Wiggins he came into my doorway and I was trying to hang a sticker, a whiteboard sticker on my wall and he appeared at my doorway and I said oh good, can you take this side and put it up and we stuck the sticker and he left . . . ." *Id.* at 28. Figueroa did not ask him to go to her office and "recall[ed] being surprised and relieved that someone had come and I could ask them for help." *Id.* at 29.

Figueroa submitted an affidavit stating the following, in relevant part:

> "At my deposition; I was not asked any questions regarding a number of statements made about me by Mr. Wiggins during his deposition. If asked, I would have given the following responses: a. I never told Mr. Wiggins that I did not often see men working in this type of environment. b. I never told Mr. Wiggins that he must be happy working around a lot of women that he could flirt with."

NYSCEF Doc. No. 29, Figueroa aff, ¶ 3.

Laptop Incident

Figueroa testified that she was not on site when Panov's laptop was stolen. Gomez texted her to return to the office because "[s]omeone stole Dr. Panov's laptop. You need to come back right away . . . ." Figueroa's tr at 45. She spoke to plaintiff and stated the following, in relevant part, "I am sorry that this happened. Nobody is blaming you. Don't worry about it. We will figure it out. I am sure the laptop is insured, but don't stress out about this." *Id.* at 46. She never thought plaintiff stole the plaintiff nor did she hear rumors from staff that plaintiff had been involved in the theft.

Panov "never thought that [plaintiff] was the thief nor did [he] hear [Ghatan] accuse [plaintiff] of being the thief." NYSCEF Doc. No. 38, Panov aff, ¶ 3.

Ghatan stated, in response to Panov "telling me that his laptop had been stolen, I did not point to [plaintiff], Dr. Panov's Administrative Assistant, and/or say that [plaintiff] was the 'problem'." NYSCEF Doc. No. 31, Ghatan aff, ¶ 4. Ghatan never thought that plaintiff had been involved in the theft of the laptop and never accused plaintiff of the theft. Further, "at his deposition, [plaintiff] said (for the first time) that I called him the N-word after Dr. Panov informed me that his laptop had been stolen. I never called [plaintiff] (or anyone else) the N-word." *Id.*, ¶ 7.

January 9, 2016 complaint

Ann McNicholas, director of labor relations at MSW and Mount Sinai Morningside, "investigated the allegations" in plaintiff's letter and interviewed Figueroa as part of the investigation. NYSCEF Doc. 32, McNicholas aff, ¶ 6. McNicholas "concluded that [plaintiff] had been terminated due to his poor performance during his probationary period and not because he was a man or because anyone thought that he was involved in the laptop theft." *Id.*, ¶ 10.

Fabricated Evidence

Defendants state that three documents submitted by plaintiff have been forged.

January 26, 2016 letter

During discovery, plaintiff produced a letter he allegedly received from Panov, where Panov wrote that he did not have "any say" in plaintiff's termination. NYSCEF Doc. No. 40 at 1. The letter also stated the following, in relevant part: "I apologize for the statement Dr. Ghatan made in the waiting area. Dr. Ghatan making the statement that you where [sic] the problem, and pointing you out as the thief was totally incorrect. Never once did I think it was you." *Id.*

Panov confirmed that he "did not write [this letter] nor are its contents accurate." NYSCEF Doc. No. 38, Panov aff, ¶ 6. Among other things, Panov noted that the letter contains several spelling and grammatical errors and a signature that is different from his signature. Panov concluded:

> "As described above, I did not hear Dr. Ghatan accuse Mr. Wiggins of stealing my laptop. In addition: (i) Noemi Figueroa did not tell me that Mr. Wiggins was terminated 'due to her own personal reasons'; (ii) Mr. Wiggins was terminated as a result of his job performance issues; and (iii) I approved the decision to terminate Mr. Wiggins."

Id.

February 22, 2016 Recommendation Letter

After plaintiff was terminated, he provided this letter to the labor relations department as part of his internal application process. McNicholas stated that the hospital received two reference letters from Panov, one dated January 26, 2016 and the other dated February 22, 2016. The letter dated February 22, 2016 stated the following, in relevant part:

> "[Plaintiff] has work [sic] in my office in Mount Sinai Hospital for several years from January 2013 to present as my Administrative Assistant aiding in both clinical and administrative pursuits of the Neurosurgical Department. . . . [Plaintiff] take [sic] great initiative and is always their [sic] when needed volunteering, helping with difficult tasks and any special assignment with the Department of Neurosurgery. . . . His overall performance has always been more then [sic] satisfactory and exceeded expectations."

NYSCEF Doc. No. 41 at 1.

This letter "looked suspicious" to McNicholas because it incorrectly stated that plaintiff had worked for defendants from 2013 until 2016. McNicholas aff, ¶ 15. After reviewing the letter dated February 22, 2016, Panov had advised McNicholas that he did not write the letter and that the phone number on the letterhead was not his phone number.

Panov confirmed that he did not write the reference letter dated February 22, 2016 and he also stated that its contents were inaccurate. Panov aff, ¶ 11.

June 17, 2016 email

During discovery, plaintiff produced an email dated June 17, 2016 from Deborah Thomas (Thomas), a temporary employee who had been working at MSW at the same time as plaintiff. The email, sent from the address debthomas@chpnet.org stated the following, in pertinent part:

> "It is so sad to hear that you were terminated over what Dr. Ghatan said to you. He had no right accusing you of the theft and pointing you out in front of all those patients, and to hear you where [sic] let go from the Hospital is very sad. I wish you all the best and I hope you find something better as I know you will. It is so sad that they would let you go like that after all your hard work. The way Dr. Ghatan pointed you out was a [sic] just a disgusting display of racism and prejudice. The way these Doctors talk to people is so in appropriate [sic] at times it is a shame. . . . I am so sorry I can't help you with your court cast [sic] as I just can't afford to lose my job, but if you need a referral don't hesitate to

call."

NYSCEF Doc. No. 45 at 1.

Thomas stated that she was a temporary employee assigned to work at MSW from July 2015 to December 18, 2015. She assisted Panov "with getting his practice set up and running" and "trained" plaintiff. NYSCEF Doc. No. 44, Thomas aff, ¶ ¶ 2, 3. Thomas stated that she "neither wrote nor sent that email to [plaintiff]. Moreover, that email is dated seven months after my assignment with neurosurgery concluded, at which point I was no longer in contact with [plaintiff]." *Id.*, ¶ 6.[1] Thomas stated that Panov's computer was stolen towards the end of her assignment. Thomas "did not hear anyone accuse [plaintiff] of the theft, nor did I hear anyone in the office gossiping about him having been the thief." *Id.*, ¶ 4.

Causes of Action and Plaintiff's Opposition

In sum, defendants argue that, based on the affidavits, testimony and documentary evidence presented above, they are entitled to summary judgment dismissing plaintiff's complaint. They claim to have provided ample documentation that plaintiff was terminated for the legitimate, nondiscriminatory reason of poor performance and that there is no evidence that race or gender played any role in this determination.

According to defendants, other than plaintiff's self-serving allegations, there are no witnesses or documents to support plaintiff's belief that he was accused of stealing the computer or that employees believed he had stolen it. On the other hand, plaintiff purportedly forged two letters in support of his argument that he was discriminated based on race. Even, assuming arguendo, Ghatan had accused plaintiff of stealing the computer and plaintiff's co-workers had

[1] Defendants note that MSW email addresses used to be @chpnet.org. As a result, Thomas could not have sent this email because she no longer worked at MSW on the date the email was allegedly sent.

been gossiping, there is no indication that the remarks were made due to plaintiff's race.

Defendants also argue that, even if the remarks were made based on plaintiff's race, they would be nothing more than stray remarks that have no nexus to the challenged employment decision. Here, neither Ghatan nor plaintiff's coworkers were responsible for the decision to terminate plaintiff.

Defendants argue that plaintiff has also failed to raise a triable issue of fact as to his gender discrimination claims. To begin, Figueroa testified that she did not make any gender-based comments to plaintiff nor did she think it was unusual for men to be employed as administrative assistants. Moreover, Figueroa hired another male administrative assistant shortly after plaintiff was terminated.

According to plaintiff, he has established that his termination occurred under circumstances giving rise to an inference of discrimination under the NYSHRL and that, under the NYCHRL, his termination was motivated in part, by discrimination. Plaintiff states that the allegations of poor performance are belied by Panov's positive recommendation. For instance, in the reference letter dated January 26, 2016 Panov stated that plaintiff "proved to be dependable and a quick learner. His personal interaction with the patients was commendable." NYSCEF Doc. No. 36 at 1.

Plaintiff also argues that he can establish pretext because the decision to terminate plaintiff was made around the same time Ghatan made the racially charged accusation. Plaintiff also states that McNicholas failed to speak to plaintiff after he submitted his January 9, 2016 complaint. He believes that it is "significant" that McNicholas concluded the investigation after only speaking with Figueroa, the target of the complaint, and not with him. In addition, with respect to the subsequent hire of another male administrative assistant, plaintiff alleges that "it

can be reasonably assumed that Figueroa hired another male administrative assistant trainee in the hopes that such male employee would be amenable and compliant in her sexual advances than Plaintiff was." NYSCEF Doc. No. 55, plaintiff's memorandum of law at 18.

However, it was during his testimony that plaintiff alleged for the first time that Figueroa made sexual advances towards him. For instance, on one occasion Figueroa "had on a short skirt, which she hiked up and crossed her legs" and while plaintiff was hanging up stuff, Figueroa's "bosoms grazed upon my back . . . ." Plaintiff's tr at 35. He further claims that she would close her office door, initiate personal conversations with him and that she asked him out to dinner. Plaintiff also alleges that Figueroa refused to take him off of probation because he rebuffed her advances.

In his testimony, for the first time, plaintiff alleged that, after Ghatan pointed his finger at plaintiff and accused him of stealing the computer, Ghatan "walks off saying something, something, this nigger." *Id.* at 61. He further testified that, on the date of the theft, Figueroa stated to plaintiff, "something along the magnitude of well, I don't know where your employment will be from this point on, but we'll see how it goes." *Id.* at 71. He testified that he did not overhear Figueroa talking to anyone else about the laptop theft. *Id.* at 71.[2] Plaintiff testified that he overheard some of the secretaries "talking amongst themselves . . . people having conversations around me pertaining to, you know, of, he is accused of stealing a laptop, they want to keep an eye on him . . . ." *Id.* at 69-70.

In response to defendants' motion, plaintiff still asserts that Panov did write these two letters and that Thomas did send him the email. Plaintiff states that "[i]t is extremely distressing to me that Dr. Panov now denies having written the other two recommendation letters for me . . .

[2] Although in his complaint plaintiff alleges that he overheard Figueroa telling others that he had been responsible for the theft because he had left the door open to Panov's office, he did not state this in his testimony.

." NYSCEF Doc. No. 54, Plaintiff's aff, ¶ 18. Further, "[i]t is also upsetting that Deborah Thomas would deny the genuineness of the emails exchange . . . ." *Id.*, ¶ 19.

Hostile Work Environment

Defendants reiterate the lack of evidence with respect to Ghatan and others' purported conduct in connection to the laptop incident. Nonetheless, even if Ghatan accused plaintiff of stealing the laptop and other employees were gossiping, plaintiff's allegations are insufficient to create a hostile work environment. Furthermore, plaintiff only speculates that the alleged accusation and gossip were linked to plaintiff's gender or race, which is insufficient to defeat summary judgment.

In opposition, plaintiff argues that he was subjected to a hostile work environment because of Ghatan's accusation that plaintiff stole Panov's laptop. "The laptop incident changed Plaintiff's conditions of employment since he was viewed with suspicion within the entire Department, and in particular by defendant Figueroa, who assigned him thereafter to frequently man the front desk so that she could 'keep an eye on him'." Plaintiff's memorandum of law at 17. According to plaintiff, employees improperly suspected him of leaving "the door open in order to facilitate the theft by another young black man." *Id.*

Plaintiff alleges, for the first time in opposition to defendants' motion, that Figueroa's purported comments alleged in connection to the gender discrimination claim also support a hostile work environment claim. According to plaintiff, the comments suggesting that he was a "young black man holding what she saw a women's job," were "discriminatory and disturbing." *Id.* at 18.

Defamation

According to defendants, Ghatan never made any statements or insinuated that plaintiff was involved in the laptop theft. However, even if he had done so, his statements would be

subject to the common interest qualified privilege. "Ghatan, as Chair of the Department, had an interest in resolving issues of workplace theft and Panov, whose laptop was stolen, shared the interest in resolving the laptop theft issues. Thus, Ghatan's alleged statement regarding Wiggins and the laptop theft is subject to the qualified privilege." *Id.* at 28. Defendants alternatively argue that Ghatan's alleged statement would constitute a statement of opinion, and not fact, and cannot be actionable as defamation.

Plaintiff maintains that Ghatan's statement that plaintiff was the problem, followed by a racial epithet, is defamatory. He argues that Ghatan's statement was a false accusation relating to plaintiff's conduct as an employee and constitutes defamation per se.

Intentional Infliction of Emotional Distress

Defendants dispute that any of the alleged conduct occurred. However, even if plaintiff's allegations were true, the conduct is purportedly insufficiently outrageous and extreme to support this claim.

According to plaintiff, in addition to the conduct he was purportedly subjected to as part of the laptop incident, he felt belittled and shocked after hearing Figueroa question his job choice and also allegedly suggest that he would be flirting with female co-workers.

DISCUSSION

I. Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman,* 39 AD3d 303, 306 (1st Dept 2007). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of producing evidentiary proof in admissible form sufficient to require a trial of material questions of fact." *People v Grasso*, 50 AD3d 535, 545 (1st Dept

2008) (internal quotation marks and citation omitted). In considering a summary judgment motion, evidence should be "viewed in the light most favorable to the opponent of the motion." *Id.* at 544. "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." *Ruiz v Griffin*, 71 AD3d 1112, 1115 (2d Dept 2010) (internal quotation marks and citation omitted).

II. Claims Made During Plaintiff's Deposition That Were Not Included In The Complaint

At the outset, during his deposition, plaintiff asserted several new allegations that he now incorporates into his memorandum of law in opposition to defendants' motion. As noted above, among other things, he claims, for the first time, that Figueroa sexually harassed him. In his memorandum of law in opposition to defendants' motion, plaintiff also asserts, for the first time, that Panov told plaintiff "you did it," with respect to the laptop theft. Plaintiff's memorandum of law at 17. For the reasons set forth below, the Court will not consider any of these new allegations.

To start, actions to recover damages for alleged discrimination under the NYSHRL and the NYCHRL are subject to a three-year statute of limitations. *See* CPLR 214 (2); Administrative Code of the City of New York § 8-502 (d). Plaintiff's last date of employment was on January 8, 2016. However, the new allegations were raised for the first time at plaintiff's deposition held on November 21, 2019, which was more than three years after the alleged incidents could have taken place. Plaintiff did not request leave to amend his complaint prior to January 9, 2019. Accordingly, these allegations are outside the statute of limitations and cannot be considered.

The claims are not considered for the additional reason that plaintiff did not include this new theory of discrimination or these allegations in his complaint. Although courts may make

an exception, there is no reason why plaintiff failed to include these allegations in both his internal grievance and the instant complaint. *See e.g. Ostrov v Rozbruch*, 91 AD3d 147, 154 (1st Dept 2012) (internal quotation marks and citations omitted) ("A court should not consider the merits of a new theory of recovery, raised for the first time in opposition to a motion for summary judgment, that was not pleaded in the complaint"); *see also Langan v St. Vincent's Hosp. of N.Y.*, 64 AD3d 632, 633 (2d Dept 2009) ("plaintiff's inexcusable delay in presenting the alternative cause of action four years after the action was commenced warranted the Supreme Court's rejection of this new theory of liability").

III. Discrimination Claims under the NYSHRL and the NYCHRL

Pursuant to the NYSHRL and the NYCHRL, it is an unlawful discriminatory practice for an employer to refuse to hire or employ, or to fire or to discriminate against an individual in the terms, conditions or privileges of employment because of the individual's gender or race. *See* Executive Law § 296 (1) (a); Administrative Code § 8-107 (1) (a).

Under the NYSHRL, the court applies the burden shifting analysis developed in *McDonnell Douglas Corp. v Green* (411 US 792 [1973]), where the plaintiff has the initial burden to establish a prima facie case of discrimination. *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 (2004). Plaintiff must set forth that "the plaintiff is a member of a protected class, was qualified for the position, and was terminated or suffered some other adverse employment action, and that the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination." *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 965 (1st Dept 2009).

If the plaintiff is able to set forth a prima facie case of discrimination, then the burden shifts to the defendants to rebut the presumption by demonstrating that the plaintiff was discharged for a nondiscriminatory reason. *Id.* at 965. If the employer meets this burden, the

plaintiff is still entitled to "prove that the legitimate reasons proffered by defendant were merely a pretext for discrimination." *Id.* (internal quotation marks and citation omitted).

The provisions of the NYCHRL are construed more liberally than its state or federal counterparts. *Bennett v Time Warner Cable, Inc.*, 138 AD3d 598, 599 (1st Dept 2016). On a motion for summary judgment dismissing a claim for discrimination under the NYCHRL, courts have reaffirmed the applicability of the burden-shifting analysis as developed in *McDonnell Douglas Corp. v Green*, in addition to the mixed-motive analysis. *See Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 514 (1st Dept 2016) (internal quotation marks and citation omitted) ("A motion for summary judgment dismissing a City Human Rights Law claim can be granted only if the defendant demonstrates that it is entitled to summary judgment under both the *McDonnell Douglas* burden-shifting framework and the mixed-motive framework").

Under the mixed-motive analysis, "the employer's production of evidence of a legitimate reason for the challenged action shifts to the plaintiff the lesser burden of raising an issue as to whether the action was motivated at least in part by . . . discrimination." *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 127 (1st Dept 2012) (internal quotation marks and citations omitted).

Further, to establish a discrimination claim under the NYCHRL, plaintiff has to prove by a "preponderance of the evidence that [he] has been treated less well than other employees because of [his] gender [and race]." *Williams v New York City Housing Auth.*, 61 AD3d 62, 78 (1st Dept 2009). Under the NYCHRL, the focus is on "unequal treatment based on [a protected characteristic] . . . ." *Id.* at 79. "Thus, even assuming that a plaintiff could not prove that [he] was dismissed for a discriminatory reason, [he] could still recover for other differential treatment based on [his] gender." *Suri v Grey Global Group, Inc.*, 164 AD3d 108, 120 (1st Dept 2018) (internal citation omitted).

Here, plaintiff alleges that he has established that the termination occurred under circumstances giving rise to an inference of gender discrimination because Figueroa displayed a "bias against Plaintiff's gender suitability for the position of administrative assistant." Complaint, ¶ 18. In support of his contention, plaintiff claims that he was the only male administrative assistant working in the neurosurgery department at the time. Further, when he first met Figueroa, she allegedly told plaintiff she was "shocked to see him working around all the ladies," and that he must "must love working around women, because men were not normally hired for administrative assistant positions." *Id.*, ¶ 15. Plaintiff further claims that Figueroa made an improper request during working hours for plaintiff to assist her with decorating the walls of her office.

Plaintiff also alleges that he has established that the termination occurred under circumstances giving rise to an inference of race discrimination because the decision that plaintiff was not a good fit for the department was made at the same time Ghatan accused plaintiff of being involved in the theft. This laptop incident also spurred the purported rumor circulating around the office that plaintiff must have been involved in the theft because the suspect was also African American.

Given plaintiff's "de minimis burden," to establish his prima facie case, the court "assume[s] that these circumstances surrounding the challenged adverse actions giv[e] rise to an inference of discrimination." *Melman v Montefiore Med. Ctr.*, 98 AD3d at 114 (internal quotation marks and citations omitted). Nonetheless, as set forth below, defendants have met their burden of providing a legitimate business reason for plaintiff's termination, which was based on plaintiff's poor job performance, his refusal to assist others in the department and his spending an inordinate amount of time at work on personal matters, such as wedding planning.

Defendants have submitted admissible evidence, in the form of performance evaluations, affidavits, deposition testimony and other documentation in support of the "legitimate, independent and nondiscriminatory reasons" for terminating plaintiff's employment. *Bendeck v NYU Hosps. Ctr.*, 77 AD3d 552, 554 (1st Dept 2010). Accordingly, as evidence of "unsatisfactory work performance" is a nondiscriminatory motivation for defendants' actions, defendants have met their burden of providing a nondiscriminatory reason for the termination. *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 46 (1st Dept 2011).

In response, plaintiff fails to raise a triable issue of fact as to whether the reasons proffered by defendants were "merely a pretext for discrimination." *Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d at 514. Plaintiff's unsupported belief that his termination was motivated by gender or race is based on nothing more than speculation. It is well settled that "[c]onclusory allegations of discrimination [which] are insufficient to defeat a motion for summary judgment." *Dickerson v Health Mgt. Corp. of Am.*, 21 AD3d 326, 329 (1st Dept 2005).

According to plaintiff, defendants' stated reason for his termination is pretextual. Plaintiff indicates that he always assisted other employees and was a good fit for the department. He also claims that, prior to when Figueroa was hired in November 2015, he had been considered exemplary. However, plaintiff's claims are unsupported in the record. For instance, it is undisputed that plaintiff used his work email address for personal wedding planning and that he made mistakes at work. Also, the record indicates that on October 1, 2015, Panov emailed plaintiff, in relevant part, "two criticisms are spelling errors in the email and next time keep it shorter . . . ." NYSCEF Doc. No. 27, exhibit 6 at 1. Moreover, plaintiff's personal belief that he was a good fit for the probationary position does not raise an inference of pretext. It is well settled that "[t]he mere fact that [plaintiff] may disagree with his employer's actions or think that

his behavior was justified does not raise an inference of pretext." *Melman v Montefiore Med. Ctr.*, 98 AD3d at 121 (internal quotation marks and citations omitted).

Plaintiff also argues that defendants' suggestion for him to apply for another position with the hospital complex, coupled with Panov's positive reference letter, demonstrate a pretextual basis for his termination. However, even if Panov and Figueroa thought that plaintiff would be a better fit in a different position, that does not necessarily indicate that his performance was satisfactory in his current position. While plaintiff may have been displeased with the way defendants handled these employment decisions, he has provided no evidence that they were motivated on account of plaintiff's gender or race. *See e.g. Fruchtman v City of New York*, 129 AD3d 500, 501 (1st Dept 2015) ("While termination is indisputably an adverse action, plaintiff's conclusory claim that her termination was motivated by a gender-related bias is insufficient to establish discrimination").

In addition, McNicholas has attached the probationary timeframes by employee classification, which indicates that plaintiff was required to serve a three-month probation, with the possibility of a 30-day extension. *See* NYSCEF Doc. No. 33 at 1. This position required a probationary period, as a "trial period to make sure that the person is learning, a good fit, effective in their role and will work out long term." Figueroa tr at 40. Plaintiff has failed to demonstrate how defendants deviated from the company policy in implementing his probation. It is well settled that the court will "not sit as a super-personnel department that reexamines an entity's business decisions." *Baldwin v Cablevision Sys. Corp.*, 65 AD3d at 966 (internal quotation marks and citation omitted).

After plaintiff was terminated, he sent a grievance letter to Human Resources explaining the alleged circumstances surrounding his termination. Plaintiff wrote, among other things, "I

truly hope that neither my male gender, nor any false accusation made about me. would prevent me from a future career with Mount Sinai Hospital." Grievance letter at 4. As part of her investigation, McNicholas interviewed Figueroa but did not interview plaintiff. According to plaintiff, this is "significant," as it apparently demonstrates that the decision to terminate him was based on a discriminatory animus.

The record indicates that McNicholas conducted an investigation, which included reviewing Panov's three-month evaluation and interviewing Figueroa. McNicholas concluded that plaintiff was terminated for poor performance, and not "because he was a man or because anyone thought that he was involved in the laptop theft." McNicholas aff, ¶ 10. Nonetheless "[e]ven if defendants failed to investigate plaintiff's complaints, plaintiff offers no evidence showing that such a failure was due to discrimination, rather than for some other reason." *Cook v Emblem Health Servs. Co.*, LLC, 59 Misc3d 1209[A], 2018 NY Slip Op 50451(U), *22 (Sup Ct, NY County 2018), *affd* 167 AD3d 459 (1st Dept 2018).

With respect to gender discrimination, plaintiff states that "[d]efendants' discriminatory conduct was based on their belief that an African-American male was not suitable for the position of an administrative assistant, a position that was primarily staffed by females." Complaint, ¶ 44. However, there was no indication beyond plaintiff's personal belief to support this allegation. "A plaintiff's feelings and perceptions of being discriminated against are not evidence of discrimination." *Basso v Earthlink, Inc.*, 157 AD3d 428, 430 (1st Dept 2018) (internal quotation marks and citation omitted).

Figueroa denied making the comments and testified that she had previously worked at other hospitals that employed numerous African American male administrative staff. She further stated that, although she did ask plaintiff to help her hang up something in her office, the incident

was taken totally out of context. Nonetheless, even if Figueroa "made inappropriate gender-based comments, under the circumstances, they constitute at most stray remarks which, even if made by a decision maker, do not, without more, constitute evidence of discrimination." *Hudson v Merrill Lynch & Co., Inc.*, 38 AD3d at 517 (internal quotation marks and citations omitted).

Regarding the claim for race discrimination, Ghatan denies making the comments or gesture. Not one other employee, including Panov, who was part of the conversation, heard Ghatan accuse plaintiff of stealing the laptop. Thomas too, submitted an affidavit stating she did not hear Ghatan accuse plaintiff of stealing the computer, nor did she hear gossiping about plaintiff's possible involvement in the theft.

Regardless, there is no support for plaintiff's contention that employees believed, on the account of his race, plaintiff was somehow involved in the theft. "In any event, as [Ghatan and the other employees] had no role in the decision to terminate plaintiff, [their comments], in and of themselves, and even if deemed to be racially charged are insufficient to establish discriminatory intent." *Cook v Emblem Health Servs. Co.*, LLC, 59 Misc 1209[A], 2018 NY Slip Op 50451(U).

NYCHRL

Turning to the mixed-motive analysis required pursuant to the NYCHRL, none of plaintiff's allegations can establish that his termination was motivated, even in part, by discrimination. *See e.g. Matias v New York & Presbyt. Hosp.*, 137 AD3d 649, 650 (1st Dept 2016) ("The absence of any evidence [that defendants were motivated by] discriminatory animus is equally fatal to any claim of mixed motive [under the NYCHRL]"). Plaintiff alleges that defendants' behavior towards him was based on his gender and/or race. Although plaintiff claimed to be the only male administrative assistant in the neurosurgery department at the time

of his termination, there is no basis to conclude that plaintiff's gender was a factor in his termination or that female employees were treated more favorably. To establish discrimination, plaintiff must demonstrate that there was discriminatory animus based on a protected characteristic. *See e.g. Whitfield-Ortiz v Department of Educ. of City of N.Y.*, 116 AD3d 580, 581 (1st Dept 2014) (Plaintiff's NYCHRL claim fails because it does not "contain any factual allegations demonstrating that similarly situated individuals who did not share plaintiff's protected characteristics were treated more favorably than plaintiff").

Accordingly, defendants are granted summary judgment dismissing the claims made under the NYSHRL and the NYCHRL for gender and race discrimination.

NYSHRL Hostile Work Environment

Under the NYSHRL, a hostile work environment exists where the workplace is "permeated with discriminatory 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." *La Marca-Pagano v Dr. Steven Phillips, P.C.*, 129 AD3d 918, 919 (2d Dept 2015) (internal quotation marks and citations omitted). Generally, isolated remarks or occasional episodes of harassment will not support a finding of a hostile or abusive work environment; in order to be actionable, the offensive conduct must be pervasive. *Matter of Father Belle Community Ctr. v New York State Div. of Human Rights*, 221 AD2d 44, 51 (4th Dept 1996).

As noted, there is no support in the record that Ghatan "in front of other doctors, employees and patients, pointed his finger at Plaintiff and exclaimed: 'that is your problem-him right there- He is your problem!'" Complaint, ¶ 22. However, even if this did occur, Ghatan's isolated remark cannot support a viable claim for hostile work environment under the NYSHRL. *See e.g. Forrest*, 3 NY3d at 210; *Witchard v Montefiore Med. Ctr.*, 103 AD3d 596, 596 (1st Dept

2013) ("Defendant's statements that it would fire [a disabled employee] were not so pervasive as to establish a hostile work environment").

According to plaintiff, even after the security video exonerated him, Figueroa interrogated him about the theft. Figueroa allegedly then told others that plaintiff was responsible for the theft since he left Panov's door open, "the clear implication that he had intentionally left the door open in order to aid and abet the theft of the laptop by the unknown African-American suspect." Complaint, ¶ 31. Plaintiff claimed to continue to hear rumors that he left the door open on purpose, so that the suspect could steal the computer. Nonetheless, these allegations do not raise a triable issue of fact that defendants subjected him to an environment "permeated with discriminatory intimidation, ridicule, and insult" in violation of the NYSHRL. *La Marca-Pagano v Dr. Steven Phillips, P.C.,* 129 AD3d at 919 (internal quotation marks and citation omitted).

Plaintiff also claims, in opposition to defendants' motion, that Figueroa's alleged comment about plaintiff being the only male administrative assistant in the department made him feel degraded and belittled. Even assuming, arguendo, that Figueroa made that comment, while plaintiff may have been exposed to a "mere offensive utterance," a reasonable person cannot find that plaintiff was subject to a hostile work environment based upon it. *Brennan v Metropolitan Opera Ass., Inc.*, 284 AD2d 66, 72 (1st Dept 2001). Considering the totality of the circumstances, even in the light most favorable to plaintiff, plaintiff fails to raise a triable issue of fact with respect to his NYSHRL hostile work environment claim.

NYCHRL Hostile Work Environment

A hostile work environment exists in violation of the NYCHRL where an employee "has been treated less well than other employees because of [his] protected status." *Chin v New York*

City Hous. Auth., 106 AD3d 443, 445 (1st Dept 2013). Under the NYCHRL, "the conduct's severity and pervasiveness are relevant only to the issue of damages. To prevail on liability, the plaintiff need only show differential treatment – that [he] is treated 'less well' -- because of a discriminatory intent." *Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 110 (2d Cir 2013) (internal citation omitted). To establish a hostile work environment claim under the NYCHRL, "the primary issue for a trier of fact in harassment cases, as in other terms and conditions cases, is whether the plaintiff has proven by a preponderance of the evidence that [he] has been treated less well than other employees because of [his protected status]." *Williams v New York City Hous. Auth.*, 61 AD3d 62, 78 (1st Dept 2009). Despite the broader application of the NYCHRL, conduct that consists of "petty slights or trivial inconveniences . . . do[es] not suffice to support a hostile work environment claim." *Buchwald v Silverman Shin & Byrne PLLC*, 149 AD3d 560, 560 (1st Dept 2017) (internal quotation marks and citation omitted).

Plaintiff's claims that he was treated less well due to his gender or race are conclusory and cannot defeat summary judgment. As explained in connection with the other claims, there was no indication, beyond plaintiff's personal belief, that that Ghatan or Figueroa's comments or actions were directed towards plaintiff as a result of his race, or that employees in the office suspected plaintiff due to his race. *See e.g. TufAmerica, Inc. v Codigo Music LLC*, 162 F Supp 3d 295, 324 (SD NY 2016) ("[S]elf-serving deposition testimony standing alone is therefore not sufficient to create a triable issue of fact . . . ."). Moreover, any gender-biased comments allegedly made by Figueroa, do not rise to the level of an actionable hostile work environment as they "could only be reasonably interpreted by a trier of fact as representing no more than petty slights or trivial inconveniences." *Williams v New York City Hous. Auth.*, 61 AD3d at 80.

Accordingly, defendants are granted summary judgment with respect to plaintiff's hostile work environment claims under the NYSHRL and the NYCHRL.

IV. Ghatan and Figueroa

Plaintiff's complaint states that he is seeking damages against Mount Sinai Hospitals plus Ghatan and Figueroa as individuals. Plaintiff states that Figueroa had supervisory power over him and had the authority to hire and fire plaintiff. He does not indicate on what basis he seeks to hold Ghatan liable for the NYSHRL and the NYCHRL violations. Under the NYSHRL, individual liability attaches if the defendant is "an 'employer' (i.e., has an ownership interest or the power to do more than carry out personnel decisions made by others) or if the individual has aided and abetted in the discriminatory conduct." *Graaf v North Shore Univ. Hosp.*, 1 F Supp 2d 318, 324 (SD NY 1998). *See* Executive Law § 296 (1) and (6). Neither Figueroa nor Ghatan can be considered an employer under the NYSHRL. As a result of this decision, where, as here, the underlying claims are dismissed as against Mount Sinai Hospitals, there can be no liability imposed on the individual defendants for aiding and abetting these claims. *See e.g. Matter of Medical Express Ambulance Corp. v Kirkland*, 79 AD3d 886, 888 (2d Dept 2010) ("Martinez cannot be held liable for aiding and abetting a violation of Executive Law § 296 (1), since there was no cognizable legal basis for holding MEA liable thereunder"). Moreover, as Ghatan and Figueroa's conduct gave rise to the discrimination claims they "cannot be held liable under Executive Law § 296 (6) for aiding and abetting [their] own violation[s] of the Human Rights Law." *Id.*

Under the NYCHRL, pursuant to Administrative Code § 8-107 (1) (a), individual employees, such as Figueroa, may be held liable when they "act with or on behalf of the employer in hiring, firing, paying, or in administering the 'terms, conditions or privileges of

employment.'" *Priore v New York Yankees*, 307 AD2d 67, 74 (1st Dept 2003). Administrative Code § 8-107 (6) provides that an individual employee may be held liable for aiding and abetting discriminatory conduct under the NYCHRL. As Mount Sinai Hospitals and Figueroa are not liable for employment discrimination as plaintiff's employer/supervisor, no liability can attach to any individual co-employees as aiders and abettors under the NYCHRL. *See e.g. Abe v Cohen*, 115 AD3d 491, 492 (1st Dept 2014) ("[Defendant] cannot be held liable for aiding and abetting an act which itself is not actionable").

Accordingly, the NYSHRL and the NYCHRL claims are also dismissed as against the individual defendants.

V. Defamation

"The elements [of defamation] are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se." *Dillon v City of New York*, 261 AD2d 34, 38 (1st Dept 1999). Plaintiff maintains that Ghatan's statement that plaintiff was a "problem," was defamatory, as it implied that plaintiff was involved in the laptop theft. The complaint alleges that plaintiff suffered irreparable damage to his reputation and career as a result of defendants' false statements and rumors surrounding the theft of Panov's laptop.

Plaintiff's assertions are completely uncorroborated. In any event, he fails to raise a triable issue of fact with respect to his defamation claim as "[l]oose, figurative or hyperbolic statements, even if deprecating the plaintiff, are not actionable." *Id.*

VI. Intentional Infliction of Emotional Distress

"[A] cause of action for either intentional or 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." *Sheila C. v Povich*, 11 AD3d 120, 130-131 (1st Dept 2004) (internal quotation marks and citations omitted). Even if plaintiff's allegations are all considered to be true, he has failed to provide any facts that Ghatan or anyone else's conduct was so extreme so as to substantiate a claim for intentional infliction of emotional distress. *See e.g. Herlihy v Metropolitan Museum of Art*, 214 AD2d 250, 262-263 (1st Dept 1995) (internal quotation marks and citations omitted) ("While the use of racial or ethnic epithets has been found to be deplorable . . . courts have been reluctant to allow recovery for their use under the banner of intentional infliction of emotional distress absent a deliberate and malicious campaign of harassment or intimidation").

CONCLUSION

Accordingly, it is ORDERED that Mount Sinai Hospitals Group, Inc., Saadi Ghatan, M.D. and Noemi Figueroa's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon submission of an appropriate bill of costs. This constitutes the decision and order of the Court.

12/22/2020
DATE

ALEXANDER M. TISCH, J.S.C.

CHECK ONE:		CASE DISPOSED		NON-FINAL DISPOSITION			
	x	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE